IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)
Sir Geoffrey Vos MR, Bean LJ, Sir Keith Lindblom
[2023] EWCA Civ 14

B E T W E E N :

R (on the application of
FRIENDS OF THE EARTH LIMITED)

Appellant

- and -

(1) THE SECRETARY OF STATE FOR INTERNATIONAL TRADE / UK EXPORT FINANCE (UKEF)
(2) CHANCELLOR OF THE EXCHEQUER

Respondents

INFORMATION ABOUT THE DECISION BEING APPEALED AND PROPOSED GROUNDS OF APPEAL

CA/§* refers to paragraph * of the Judgment of the Court of Appeal ([2023] EWCA Civ 14)
DC/§* refers to paragraph * of the Judgment of the Divisional Court ([2022] EWHC 568 (Admin))

A. SUMMARY

1. This proposed appeal concerns the decision of the Respondents ("**UKEF**" and "**the Chancellor**" respectively) to provide USD 1.15 billion in export finance to Total E&P Mozambique Area 1 Limited ("**Total**"), via its financing vehicle, MOZ LNG1 Financing Company Limited, for the development of a LNG Project in Cabo Delgado province in Northern Mozambique ("**the Project**" and "**the Decision**"). Total aims to extract 43 million tonnes per annum from the offshore gas fields with 95% of the gas produced by the Mozambique project being intended for export onto the global market. UKEF's finance is said to amount to 7% of the total financing for the Project.

2. A material consideration in the Decision was that the financing was compatible with the UK's obligations under the Paris Agreement on Climate Change ("**the PA**"), including its obligation under Article 2(1)(c) to "*mak*[e] *finance flows consistent with a pathway towards low greenhouse gas emissions*".

3. The lower Courts took different views on the legality of the Decision. In the Divisional Court, Thornton J held that in failing to quantify the greenhouse gas ("**GHG**") emissions that would be produced by the LNG from the Project ("Scope 3 emissions"), UKEF had not discharged its duty of inquiry; without such a quantification, it could not rationally determine the climate impacts of the Project. Further, she held that UKEF had conflated two different concepts: displaced emissions and absolute emissions, the latter being of essential importance in any climate assessment where new emissions needed to be

considered by reference to the remaining total global budget available. Thornton J also concluded that any assessment of displaced emissions should be addressed separately and based on evidence not unsubstantiated assumption. Those failures were such that UKEF did not have a reasonable (evidenced) basis for its conclusions on climate impact, nor for its conclusion that financing the Project was consistent with the UK's obligations under the PA, including under Article 2(1)(c). Stuart-Smith LJ, however, held that the PA was inherently contradictory and including that Article 2(1)(c) was inoperable because the needs of development were irreconcilable with the needs of climate (DC/§§231, 239). When the judgment was handed down, the parties agreed that the application should be dismissed, rather than re-heard by a differently constituted court, and permission to appeal was granted by the Divisional Court.

4. The Court of Appeal dismissed the appeal on different grounds, principally on the basis of a construction of the PA that had not been proffered by either member of the Divisional Court, nor advanced by the Respondents. Nonetheless, it is not clear from the judgment precisely what the Court of Appeal considered that the PA requires.

5. The Appellant seeks permission to appeal on the following grounds, each of which raise an arguable point of law of general public importance:

   5.1. The Court of Appeal was wrong to conclude that the Respondents could rationally assess the climate impacts of the Project without quantifying the emissions that would be produced by the LNG and/or on the basis of assumptions as to displaced/replaced emissions that had no basis, evidential or otherwise **(Ground 1)**;

   5.2. The Court of Appeal erred in law in its conclusions that financing was "tenably" compatible with the UK's obligations under the PA, including but not confined to its finding that the finance was aligned with the low emissions pathway in Article 2(1)(c) (**Ground 2**). In particular:

      (1) The Court of Appeal erred in finding that the PA gave rise to no obligations on Contracting States, including under Article 2 read alone, or with Articles 3, 4, 9, 11, 13 (**Ground 2A)**;

      (2) The Court of Appeal was wrong to find that the Decision to grant finance for the Project was reached on a tenable, let alone correct, interpretation of the law (**Ground 2B)**;

   5.3. The Court of Appeal erred in law in finding that the relevant standard of review is 'tenability' rather than an assessment of the correctness of the Respondents' view as to the compatibility of the Decision with the UK's obligations under the PA (**Ground 3**).

B. NARRATIVE OF FACTS

6. The Project comprises the development of offshore deepwater gas production facilities, located 50km from the coast of Northern Mozambique and connected to an onshore gas receiving and liquefaction facility. It is to be operated by Total E&P Mozambique Area 1 Limitada and funded via MOZ LNG1 Financing Company Limited. The Decision represents one of the largest financing packages ever offered by UKEF to a foreign fossil fuel project.

7. The complex factual background to the Decision is set out in over 130 paragraphs in the judgments in the Divisional Court, which were not contested by the Respondents on appeal and were adopted by the Court of Appeal (CA/§5). The essential facts are as follows.

8. In June 2019, the House of Commons Environmental Audit Committee ("**EAC"**) reported on the scale and impact of UKEF's support for overseas fossil fuel projects. It concluded that calculating Scope 3 emissions was essential for an understanding of the emissions impact of a proposed project. It recommended that UKEF use the Greenhouse Gas Protocol as an appropriate methodology (CA/§8).

9. In July 2019 the UK Government issued its Green Finance Strategy saying that it would ensure that any financial support for fossil fuel projects was in line with the PA (CA/§9).

10. The gas market consultants, Wood Mackenzie, were asked by Total on behalf of the lenders, to assess the emissions impact of the project (but never the actual emissions). In March 2020, Wood Mackenzie produced a report, '*Mozambique LNG – Carbon Emission Benchmarking*', which concluded that the emissions impact from the Project could not be modelled with any certainty, albeit that it saw some scope for the gas produced to replace coal and oil which could lower carbon emissions (CA/§10). Wood Mackenzie's report did not express a consistent view on global emissions impact (DC/§329). Disclosure through the proceedings revealed that there was very significant concern within UKEF about what could be made of Wood Mackenzie's analysis (DC/§§290-292).

11. Despite those concerns, UKEF in its climate change report ("**CCR**") went further than Wood McKenzie had considered possible in reaching a view on whether the Mozambique LNG would replace other more, or less, polluting fuels (DC/§§309-311).

12. The CCR did not include a calculation of the absolute emissions from the Project (Scope 3). It expressed the view that "[a] *high-level qualitative assessment indicates that the potential Scope 3 emissions from the use of the Project's exported LNG will be very high and will significantly exceed Scope 1 and Scope 2 emissions from the Project facilities, as well as exceeding 25,000 tonnes* CO_{2e} *per year.*" When, however, the Scope 3 emissions for the Project were eventually calculated at the

insistence of the Prime Minister after the approval for the Project had already been given, it transpired that the projected Scope 3 emissions were 1000 times greater than the 25,000 tonnes p.a. referred to in the Report (DC/§302).

13. On 1 June 2020 Mr Louis Taylor, Chief Executive of UKEF, briefed the Secretary of State for International Trade recommending support for the Project. He suggested that the Secretary of State read the CCR, noting that "*UKEF has a requirement to consider Climate Change risks as part of its consideration of support for the Project*" (CA/§12).

14. On 10 June 2020 the Secretary of State for International Trade consented to UKEF financing the Project. On 12 June 2020 the Chancellor of the Exchequer, who was also provided with the CCR, gave his consent.

15. However, the Secretary of State for Business, Energy and Industrial Strategy, Foreign Secretary and the Secretary of State for International Development all opposed the Project on environmental grounds, including in relation to the UK's obligations under the PA (CA/§13).

16. On 18 June 2020, Mr Taylor briefed the Prime Minister. On 26 June 2020, the Prime Minister's private secretary indicated that the Prime Minister was content for UKEF's decision to support the project to proceed. The Prime Minister's office asked, however, for advice on how much carbon capture, utilisation and storage would cost to offset the emissions that would be generated (CA/§§14-15).

17. Pursuant to the Prime Minister's request officials estimated that Scope 3 emissions would amount to 805.75 Mt (megatonnes) of CO_2 over the life of the Project (CA/§16). The figure is significant: the Project will use up almost 0.1-0.2% of the world's remaining carbon budget (DC/§324). The estimate was produced after the consent of the Secretary of State of 10 June 2020 and of the Chancellor of 12 June 2020 and approximately 5 hours before the UKEF CEO exercised his delegated power to issue final approval (DC/§322). It played no role in the decision under challenge, as officials did not share it with relevant decision-making Ministers.

18. Mr Taylor approved the underwriting minute for the Project on 30 June 2020 and cleared the necessary legal documents on 1 July 2020 in the exercise of his delegated power under s.1 of the Export and Investment Guarantees Act 1991 (CA/§16).

19. Following the Decision, decisions were made to cease UK financing for new fossil fuel projects, including natural gas projects on the basis that such financing was not consistent with the UK's obligations under the PA. The day after the Decision, on 1 July 2020, the Commonwealth Development Corporation ("**CDC**") (now British International Investment), (the shares of which are wholly owned by the UK Government), announced that it would no longer invest in fossil fuel projects, since they

were classified (on the basis of a World Resources Institute report dated 1 December 2018) as being "*misaligned with the Paris Agreement*".[1] This included standalone upstream gas exploration and production (CA/§17).

20. Similarly, on 12 December 2020, the Prime Minister announced to the Climate Ambition Summit that the UK would end all direct government support for the fossil fuel energy sector overseas, including natural gas projects, with very limited exceptions. That was said to be a significant change in policy to be implemented before COP26 (the 26th UNFCCC Conference of the Parties or "**COP**"), to be held in Glasgow in November 2021 (DC/§18). That policy was reflected in '*Guidance: Aligning UK international support for the clean energy transition*' of March 2021, which provided that the UK Government would "*no longer provide new direct financial or promotional support for the fossil fuel energy sector overseas*" in any circumstances where the fuel was for the global market. (CA/§19).

21. A chronology is appended to this Form as Annex A.

C. LEGAL FRAMEWORK

(i) Export and Investment Guarantees Act 1991

22. The statutory basis for the Decision is s.1 of the Export and Investment Guarantees Act 1991. Section 1(1) provides that the Secretary of State may make arrangements which he or she considers conducive to supporting or developing supplies or potential supplies by persons carrying on business in the UK of goods, services or intangible assets to persons carrying on business outside the UK. By s.1(4) the arrangements that may be made are arrangements for providing financial facilities or assistance for, or for the benefit of, persons carrying on business; and the facilities or assistance may be provided in any form, including guarantees, insurance, grants or loans. By s.4(2) the powers of the Secretary of State under s.1 are exercisable only with the consent of the Treasury.

23. Section 13 provides that the functions of the Secretary of State shall be exercised and performed through what is now UKEF. As part of its decision-making process, UKEF assesses the statutory basis for support, the export case, the credit risk and environmental, social and human rights impact considerations.

(ii) The UNFCC and the Paris Agreement

24. The PA, adopted by UNFCCC COP21 in 2015, is the third treaty in the UN climate regime. It was initiated by COP17 (2011) in response to the "*significant gap between the aggregate effect of Parties' mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate*

[1] https://www.wri.org/research/making-finance-consistent-climate-goals. The World Resources Institute is a global research organisation that works with governments, businesses, multilateral institutions and civil society groups.

emission pathways consistent with having a likely chance of holding the increase in global average temperature below 2°C or 1.5°C above pre-industrial levels": Decision 1 CP.17(11).

25. It builds on a complex body of decisions, declarations and treaties which together make up the UN climate regime. The founding Treaty is the UNFCC adopted in 1992, the ultimate objective of which is to stabilise GHG concentrations "*at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system*": UNFCCC, Art 2.

26. The UK signed the PA on 22 April 2016. The recitals to the PA recognise that climate change represents an "*urgent and potentially irreversible threat to human societies and the planet*": see *R (Friends of the Earth) v Secretary of State for Transport* [2021] 2 All ER 967 at §70. Article 2 states:

> "*1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:*
>
> *(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;*
>
> *(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and*
>
> *(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.*
>
> *2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."*

27. Article 3 then provides:

> *"As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement." (emphasis added)*

28. Article 4 of the PA further provides:

> *1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.*

2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances." ...

13. Parties shall account for their nationally determined contributions. In accounting for anthropogenic emissions and removals corresponding to their nationally determined contributions, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement."(emphasis added)

(iii) Carbon budgeting to achieve the temperature goal

29. Carbon budgets are based on the proven relationship between cumulative GHG emissions and the increase in average temperature. The level of GHG emissions reductions required to meet a temperature target are estimated by producing a carbon budget which must be met in order to limit global warming. In *Netherlands v Stitching Urgenda* (no. 19/00135 20 December 2019 ECLI: NL:HR 2019: 200) at §2.1(7),[2] the Netherlands Supreme Court described the concept as follows:

> "*It is clear that the world has very little leeway left when it comes to the emissions of greenhouse gases. The total worldwide leeway that now remains for emitting greenhouse gases is referred to as the 'carbon budget'*."

30. In October 2018, in a Report requested by the UNFCCC COP in its Decision adopting the PA, the Intergovernmental Panel on Climate Change ("**IPCC**") estimated the remaining carbon budget for the world to be 420 gigatonnes of CO_2, for a 66% probability of limiting global warming to 1.5°C, or 580 gigatonnes of CO_2 for a 50% probability of limiting warming to 1.5°C:[3]

> "*Limiting global warming requires limiting the total cumulative global anthropogenic emissions of CO_2 since the preindustrial period, that is, staying within a total carbon budget (high confidence). By the end of 2017, anthropogenic CO_2 emissions since the pre-industrial period are estimated to have reduced the total carbon budget for 1.5°C by approximately 2200 ± 320 Gt CO_2 (medium confidence). The associated remaining budget is being depleted by current emissions of 42 ± 3 Gt CO_2 per year (high confidence).*."

31. The IPCC also indicated that in order to achieve the 1.5°C target, global net emissions of CO_2 will need to fall by about 45% from 2010 levels by 2030 reaching zero by 2050 (*Friends of the Earth* at §90). (cited at DC/ §§251).

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2 See also the discussion in the Australian case of *Gloucester Resources Limited v Minister of Planning* [2019] NSWLEC 7 at §§441-445.

3 IPCC, *Global warming of 1.5°C: Summary for policymakers* (2018), Section C1.3.

32. In November 2019, the UN Environment Programme ("**UNEP**") Production Gap Report was published. The title of the Report refers to the discrepancy between countries' planned fossil fuel production levels and the global levels necessary to limit warming to 1.5°C or 2°C.[4] The Report noted the implications of the 2018 IPCC Report for future fossil fuel production, stating that "*Governments are planning to produce about 50% more fossil fuels by 2030 than would be consistent with a 2°C pathway and 120% more than would be consistent with a 1.5°C pathway*" (p.4). CO_2 emissions from fossil fuels would need to decline rapidly by around 6% per year to remain on a 1.5°C-compatible pathway, and by roughly 2% per year to remain on a 2°C-compatible one (p.8). It warned that "[b]*arring dramatic, unexpected advances in carbon capture and storage (CCS) technology, these declines mean that most of the world's proven fossil fuel reserves must be left unburned.*" (*Id.*)

D. PROCEEDINGS BELOW

(i) Divisional Court

33. The case was heard by the Divisional Court between 7 and 9 December 2021. Judgment was handed down on 15 March 2022. As set out above, the members of the Divisional Court reached different views in relation to the lawfulness of the Decision.

34. Stuart-Smith LJ considered that in determining whether the finance was compatible with the PA the appropriate standard of review was tenability (DC/§§106-124). He refused to "*give a definitive interpretation of the provisions of the Paris Agreement … or their legal effect*" and rejected the submission that in order to determine "alignment with the low emissions pathway" in Article 2(1)(c) it was at least necessary for the decision maker to quantify the emissions that would result from the use of LNG produced by the Project (DC/§§234). Stuart-Smith LJ concluded that the PA should be approached "*on the basis that it* [did] *not give rise to hard-edged free-standing obligations*" but was "*a composite package of aims and aspirations*" that were "*in tension or frankly irreconcilable*" (DC/§231).

35. Thornton J agreed that the tenability standard applied (DC/§§262-270) and that the court must accord considerable deference to UKEF's decision-making (DC/§330). However, she disagreed with Stuart-Smith LJ's view of the PA. Thornton J. considered that it imposed a due diligence obligation upon the UK to demonstrate compliance with the temperature goal in Article 2, holding that "*in order for UKEF to demonstrate compliance with Article 2(1)(c), it had to demonstrate that funding the project* [was] *consistent with a pathway towards limiting global warming to well below 2°C and pursuing efforts to*

[4] UNEP, 'The Production Gap. The discrepancy between countries' planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C' (2019).

1.5°C", although the broad wording of the provision afforded UKEF discretion as to how it demonstrated compliance (DC/§268).

36. Thornton J further held that in assessing climate change risks "*UKEF failed to discharge its duty of inquiry in relation to the calculation of Scope 3 emissions*" and that "[i]*ts judgment that a high level qualitative review of the impact was sufficient was unreasonable*" (DC/§331). Her reasons were as follows:

> "*332. UKEF set out to produce a climate impact assessment that would "fully acknowledge", "fully consider" and "evidence" the climate change risks presented by the project so that they could be "coherently presented to the ultimate decision makers, alongside the other project considerations".*
>
> *333. The climate assessment does not, however, include a calculation of the Scope 3 emissions, which illustrate that the Project will use up 0.1- 0.2% of the world's remaining carbon budget. The House of Commons Environmental Audit Committee had advised in July 2019 that Scope 3 emissions are essential for calculating the full emissions impact of a project. There is a well-established methodology for doing so (the Greenhouse Gas Protocol) which the House of Commons Environmental Audit Committee had endorsed. UKEF was given clear advice by its own experts that the failure to quantify the Scope 3 emissions undermined the credibility of the climate assessment. The Chair of the statutory expert committee advising UKEF (EGAC) warned that the information on Scope 3 emissions was insufficient. UKEF's specialist external climate advisor, Dr Caldecott, described the failure to calculate the emissions as a "big gap in the analysis". Within Government, the Director General of Energy Transformation and Clean Growth at the Department for Business, Energy and Industrial Growth* [sic] *advised that the absence of a Scope 3 estimate "undermines the credibility of the Climate Change Report". The Chair of EGAC advised UKEF that there were other specialists who could model the climate change impacts of the project but it was decided there was not enough time to engage consultants to do the work and UKEF made no further enquiries before Ministers were asked to take a decision on funding. A rough estimate was produced by UKEF and Department for Business, Energy and Industrial Strategy within 24 hours, after the relevant Ministers had made their decisions. Ministers were not told about the calculation (805 million tonnes CO 2 over the lifetime of the Project) and were not therefore aware of the scale of impact (0.1- 0.2% of the world's remaining carbon budget). Accordingly, in the circumstances of this case, UKEF failed to make reasonable and legally adequate enquiries in relation to a key consideration in the decision making (climate risks). The lack of information deprived Ministers of a legally adequate understanding of the scale of the emissions impact from the Project.*
>
> *334. Other flaws in the assessment include the conflation of Scope 3 and avoided emissions; the expression of inconsistent views about the global emissions impact and an unclear evidence base in relation to the view expressed that the Project can be expected to lead to a net reduction in emissions.*"

37. She held that the Decision was also irrational because "[t]*he failure to quantify the Scope 3 emissions, and the other flaws in the Climate Report mean that there was no rational basis by which to demonstrate that funding for the Project is consistent with Article 2(1)(c) of the Paris Agreement on Climate Change and a pathway to low greenhouse gas emissions*" (DC/§335).

(ii) Court of Appeal

38. The appeal was heard between 6 and 8 December 2022. The appeal was dismissed in a judgment delivered by Sir Geoffrey Vos MR and handed down on 13 January 2023.

39. The Court held that "[i]*n broad terms, we agree with the respondents and the Divisional Court as to the tenability point and with the respondents as to the rationality and Tameside challenges. We do not, however, agree completely with either member of the Divisional Court as to the correct approach to the Paris Agreement*." (CA/§37) It reached the view that the "*specific obligations on state parties to the Paris Agreement are primarily to be found in articles 4, 7, 9, 10, 11 and 13, as article 3 indicates, and that the provisions of article 2, as article 3 also makes clear, represents the purposes of the Paris Agreement*." (CA/§38). It did not interpret or apply the effect of those provisions.

40. The Court of Appeal held that tenability was the appropriate standard of review and that it was tenable for UKEF to reach the view that funding the Project was compatible with the UK's obligations under the PA. The Court did not try and set out the Respondents' view of what the PA entailed, nor determine whether that view was tenable. It also dismissed the *Tameside* challenge on the basis that "[i]*t was known at the time that the project would go ahead with or without finance from* UKEF" and "[t]*he absolute level of Scope 3 emissions did not answer the nuanced question of whether approval of the financing would or would not align with the UK's obligations under the Paris Agreement*." It stated that, in any event, the "*obligations*" were only "*some of the purposes of the Paris Agreement*" (CA/§41).

E. PROPOSED GROUNDS OF APPEAL

(i) Ground 1: Failure to discharge the duty of inquiry

41. The Court of Appeal was wrong to conclude that the Respondents could rationally assess the climate impacts of the Project without a quantitative assessment of Scope 3 emissions and/or on the basis of an assumption as to displaced emissions for which there was no basis, including no evidential basis.

42. The Divisional Court reached different views on whether the Respondents discharged their duty of inquiry. Thornton J made the following factual findings, which were not challenged on appeal:

    42.1. UKEF set out to quantify the Scope 3 emissions of the Project. The CCR posed the question, "*what are the estimated scope 3 emissions of the project?*" UKEF acknowledged that the indirect, downstream GHG emissions were a consideration relevant to its decision-making (DC/§282).

    42.2. UKEF's CCR did not indicate the climate benchmarks against which the Project would be assessed or provide any detail on the methodology. There was limited analysis of the requirements of the PA in the CCR (DC/§§283-284).

42.3. UKEF's specialist climate advisor, Dr Caldecott, repeatedly expressed concerns about the absence of a framework or benchmarks for the assessment (DC/§§285-288).

42.4. The lenders requested Total procure Wood Mackenzie, an energy consultancy, to assess the GHG emissions. However, the scope of works requested of Wood Mackenzie, which Total approved, provided that the objective was for ECAs to be able to "*to inform their Boards and stakeholders as to the potential reduction in CO2 emissions associated with the use of LNG from MZLNG*." Wood Mackenzie advised that Scope 3 displacement calculations would be "*inaccurate and therefore likely to be misleading.*" UKEF did not point Wood Mackenzie to the observations of the EAC in relation to the use of the Greenhouse Gas Protocol to calculate emissions (DC/§290).

42.5. Wood Mackenzie's report concluded that it could not model the emissions impact of the LNG produced by the Project with any certainty. The report said it saw some scope for the gas produced to replace coal and oil which could lower carbon emissions (DC/§292), but also found that the gas might also displace lower emitting energy sources such as renewables and nuclear (DC/§311). In its CCR, UKEF posited three possible scenarios premises on whether the LNG would result in a net reduction or increase in global GHG emissions, depending on whether the gas would replace and/or displace more polluting hydrocarbons. UKEF opted for its so-called 'mid-case scenario' under which the gas would displace some more polluting sources despite Wood Mackenzie having concluded that it was not possible on the evidence to reach any such conclusion and reached a 'view' on that basis (DC/§§291-293).

42.6. Disclosure revealed that UKEF's expert advisers had in fact informed UKEF that a failure to quantify the Scope 3 emissions undermined the credibility of the climate assessment and that UKEF had wrongly conflated displacement with actual emissions. Despite that, UKEF decided not to take further steps to calculate the emissions (DC/§§294-302).

42.7. UKEF and BEIS carried out a rough quantification of the Scope 3 emissions following the Prime Minister's request, which concluded that emissions would be at least 805.75 million tonnes CO_2 over 25 years (DC/§321). The CCR stated only that Scope 3 emissions would "*likely exceed 25,000 tonnes*", when in fact they were not 'likely' but certain to exceed that amount and indeed likely to exceed it by at least 1000 times (DC/§302).

42.8. Ministers were not told about the calculation (805 million tonnes CO_2 over the lifetime of the Project) and were not therefore aware of the scale of impact of the Project (0.1- 0.2% of the world's remaining carbon budget). The calculation was not put to the decision-making Ministers and formed no part of their decisions (DC/§§322-325, 333).

43. Accordingly, Thornton J concluded that UKEF had failed to discharge its duty of inquiry. Its view that a "*high-level qualitative assessment*" of the climate impact was sufficient, was unreasonable (DC/§§331-333). Her analysis was correct; it is not possible to assess emissions impacts, including but not confined to any analysis of potential displacement, without determining the absolute emissions that will be produced by the LNG, as the EAC had made clear. That is particularly so when considering the UK's obligations under the PA. This is because, in setting a specific temperature goal in Article 2(1)(a) PA, the parties agreed that there was an absolute limited quantity of GHG that could be emitted into the global atmosphere ("GHG budget"), beyond which the temperature limit would be exceeded. That, read with the obligation to attain net zero (Article 4(1)), establishes the low emissions pathways referred to in Article 2(1)(c) and set out by the IPCC in its 2018 Report. It is in that legal and factual context that the duty of inquiry in this case falls to be considered. For the Court of Appeal to hold that no "*mathematical*" analysis was required in assessing the risks of the project (CA/§60), involved a failure to understand and apply the central object and purpose of the PA. As Thornton J held, without a quantified/mathematical analysis no rational decision as to alignment with a low emissions pathway, that is, by reference to a carbon budget, can be carried out.

44. The Court of Appeal did not consider these wider points. Rather, it held that Thornton J's analysis was flawed because she had stated (at DC/§335) that the failure to quantify Scope 3 emissions and the other flaws in the CCR (including as to the assumption of displacement) meant "*that there was no rational basis by which to demonstrate that funding for* [the Project was] *consistent with*" Article 2(1)(c). In its view, that conclusion was wrong because Article 2(1)(c) does not include binding obligations (CA/§49). It erred in its assessment of Thornton J's analysis:

    44.1. UKEF had <u>already decided</u> to quantify Scope 3 emissions – and erred in concluding and stating subsequently that such quantification was not possible. UKEF's own internal advisers considered it an essential element of any climate assessment, as had the EAC. That is correct since climate impacts cannot be assessed in any meaningful way without reference to climate budgets. The issue of whether Article 2(1)(c) of the PA gives rise to binding obligations is irrelevant, since the decision-maker had <u>chosen</u> to assess the climate impacts of the Project, and for those purposes, to quantify Scope 3 emissions. Accordingly, the Court of Appeal proceeded on a false basis in rejecting Thornton J's reasoning because of her allegedly "*flaw*[ed]" interpretation of the PA.

    44.2. The Court of Appeal did not properly consider whether a qualitative assessment was sufficient to discharge the *Tameside* duty of inquiry. It merely stated that "[t]*he Scope 3 emissions were always fully understood to be significantly larger than the Scope 1 and 2 emissions, even if no*

precise quantification was available until the Prime Minister raised the matter" and that quantification was not necessary (CA/§§41, 62-63). That was wrong:

(1) There was an established and straightforward methodology for calculating Scope 3 emissions (the Greenhouse Gas Protocol), which the EAC regarded as essential and the Interested Parties before the lower Courts accepted as standard practice. A high-level assessment of Scope 3 emissions was plainly not sufficient for the fair and reasonable presentation of the climate risks of the Project or to enable those risks to be properly considered by decision-making Ministers.

(2) The order of magnitude of the Scope 3 emissions was necessary to assess climate impacts. The absolute level of those emissions is also necessary to determine whether financing the Project could be consistent with a pathway towards low GHG emissions (in particular, whether those Scope 3 emissions could be accommodated within international and national carbon budgets) and the UK's obligations under the PA.

(3) The Court of Appeal's statement that the "[t]*he absolute level of Scope 3 emissions did not answer the nuanced question of whether approval of the financing would or would not align with the UK's obligations under the Paris Agreement*" (CA/§41) is a *non-sequitur*. The question of compatibility with the PA cannot be answered without quantification of the Scope 3 emissions. UKEF itself recognised this. The fact that it is a necessary element in the analysis but not the only element in the analysis does not transform it into an unnecessary element in the analysis.

(4) No rational analysis of the alignment of finance with the pathway can be assessed without the quantification of Scope 3 emissions and/or on the basis of an unsubstantiated assumption as to the displacement of emissions.

45. The UK's obligations under Articles 3 and 4 are also relevant to determining whether financing the Project was compatible with the UK's obligations under the PA. It cannot be rational for a developed country to undermine its best effort mitigation measures by financing significant additional global emissions, and those emissions must be accounted for. The UK has now recognised this in its NDC by providing that the UK will not finance fossil fuel projects for the global market, presumably on the basis that it would undermine Article 2(1)(c) and the temperature goal in Article 2(1)(a).

46. The Court of Appeal further erred in considering that it was relevant to the discharge of the duty that the "*the project was going ahead whether or not UKEF contributed to its financing*" since "[t]*he decision was … not one that could have reduced or avoided Scope 3 emissions*" (CA/§61). Whether correct or not, that was irrelevant to the question of whether there was sufficient factual information

available to enable UKEF to reach the view that the Project was compatible with the UK's obligations under the PA, which was what the Ministers who took the Decision were advised. In circumstances where the UK had the Presidency of the UNFCCC/PA COP and three Ministers were against UKEF's financing of the Project it was particularly important that the correct factual and legal position was understood and Ministers given the correct advice. The Respondents have not claimed and there was no witness evidence before the lower Courts that, even had the Project been found not to be compatible with the UK's obligations under the PA, the Decision would have been the same.

(ii) Ground 2: Error of law as to the compatibility of the Decision with the UK's obligations under the PA, including that the financing was in alignment with the low emissions pathway in Article 2(1)(c).

Ground 2A: The Court of Appeal erred in law in concluding that the Respondents did not proceed on the basis of an error of law because the PA, and in particular Article 2(1)(c) did not give rise to any obligations on Contracting States

47. Each member of the Divisional Court, and the Court of Appeal, reached a different view on the nature and scope of the obligations in the PA (CA/§37). As noted by the Respondents below, "*there was* [before the Court of Appeal] *no jurisprudence as to the precise legal meaning of the Paris Agreement.*" The Court of Appeal erred in reaching the conclusion that Article 2, the central tenet of the PA, gave rise to no obligations on Contracting States, including no obligations of conduct (CA/§55(vi)). Such an interpretation undermines the object and purpose of the UNFCCC and PA.

48. As Thornton J found below, the PA gives rise to legal obligations. Indeed, no other conclusion would be consistent with the principle of effective interpretation (*effet utile*) of treaty obligations. Article 2(1)(c) required UKEF to demonstrate that "*funding the Project was consistent with a pathway towards limiting global warming to well below 2°C and pursuing efforts to 1.5°C. The broad wording of Article 2(1)(c) affords UKEF discretion in how it goes about demonstrating compliance*." (DC/§268) In accordance with the accepted taxonomy of international obligations, Article 2(1)(c) of the PA is an obligation of conduct rather than an obligation of result. The UK is not required to achieve the result of the temperature goal in Article 2(1)(a) (since this depends on a global effort), but it must provide a rational and transparent justification as to how its decisions on the financing of fossil fuel projects are consistent with a pathway towards the temperature goal. It is an obligation of due diligence in the process of making a decision that impacts upon the achievement of the temperature goal. The obligations under the PA (Articles 4, 7, 9, 10, 11 and 13) are relevant to the obligation in Article 2(1)(c). But that does not detract from the binding obligation of conduct in Article 2(1)(c) itself.

49. The Court of Appeal was wrong to conclude that Article 2 included no obligation of conduct. The direct correlation between GHG emissions and an increase in temperature means that the reference in Article 2(1)(c) to "*low greenhouse gas emissions*" must be understood by reference to the temperature

goal in Article 2(1)(a) and the time period in Article 4(1), as read with the 2018 IPCC Report. Thus, the provision of finance must be consistent with a pathway towards holding global warming to well below 2°C above pre-industrial levels and pursuing efforts to limit warming to 1.5°C (DC/§265).

50. This was Thornton J's view, as well as the approach taken by other international bodies. The UNFCCC Standing Committee on Finance, which serves the PA, stated that compliance with Article 2(1)(c) requires a consideration of all finance flows, and not only climate finance under Article 9. The Standing Committee stated:[5]

> "*Climate finance continues to account for just a small proportion of overall finance flows ...; the level of climate finance is considerably below what one would expect given the investment opportunities and needs that have been identified. However, although climate finance flows must obviously be scaled up, it is also important to ensure the consistency of finance flows as a whole (and of capital stock) pursuant to Article 2, paragraph 1(c), of the Paris Agreement. This does not mean that all finance flows have to achieve explicitly beneficial climate outcomes, but that they must reduce the likelihood of negative climate outcomes.*"

51. The OECD also stated that "*measuring progress towards Article 2.1c requires looking at the consistency of all finance flows with climate objectives, including finance for activities that undermine or do not impact climate objectives*."[6]

52. UKEF set out to assess the financing of the Project against the UK's obligations under the PA. Several questions in the CCR asked whether the Project was compatible with the PA, including the question "*is it compatible with the Paris Agreement i.e. to reduce emissions well below 2ºC with effort to limit to 1.5ºC*" (Q14). Another question was "*how does the Project impact on the …the Paris Agreement …*" (Qn 11), to which the answer given is that "*Investment in renewable energy" "would offer a more environmentally sustainable pathway … to meet the needs of the Paris Agreement*." UKEF's submission to the Prime Minister referred to "*a specific climate change report, considering support of the Project in the context of the UK's … Paris Agreement commitments*." A narrative explanation of why UKEF considered that the Decision was consistent with the PA was set out in Respondents' SGR, repeated in the DGR (see DC/§152). It included the assertion that "*UKEF concluded that providing export finance in connection with the Project … would be consistent with a pathway towards low GHG emissions and climate-resilient development*."

53. It is plainly wrong, and indeed not the Government's current position (nor publicly stated position at the time), that the PA does not require reductions in emissions, or is neutral on that central question. Such an interpretation contravenes the temperature goal set out in Article 2(1)(a) which the CA

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5 UNFCC, 'Summary and recommendations by the Standing Committee on Finance on the 2018 Biennial Assessment and Overview of Climate Finance Flows, §49.(emphasis added)

6 Jachnik, R., M. Mirabile and A. Dobrinevski, 'Tracking finance flows towards assessing their consistency with climate objectives' (*OECD Environment Working Papers No. 149*, OECD Publishing 2019), p.11.

accepted was a clear objective of the PA (CA/§45). The effect of the Court of Appeal's reasoning is therefore to denude the obligation in Article 2(1)(c) of any meaning. That obligation, along with the temperature goal in Article 2(1)(a), is a central tenet of the PA.

54. Further, it ignores the overall finding by UKEF that the financing was compatible with the UK's obligations under the PA. The Court of Appeal failed to address the obligations in Articles 3 and 4(2), (3), (8), (11), (13) and (14) of the PA on the UK to undertake and communicate ambitious efforts, reflecting its "*highest possible ambition*" with a "*view to achieving the purpose*" of the Agreement set out in Article 2, and to comply with a duty of transparency and effective accounting in that regard, as provided in Article 13. The UK rightly recognises that it is responsible under the PA for emissions attributable to it as a result of its financing of Projects abroad and aims to reach net zero in relation to such finance. The UK has, moreover amended its NDC so it is committing not to finance fossil fuel projects for the global market.

Ground 2B: The Court of Appeal was wrong to conclude that the Respondents had reached the Decision on a tenable, let alone correct, understanding of the law

55. The Court of Appeal was wrong to hold that the Respondents had not reached the Decision on the basis of an error of law or otherwise acted irrationally in concluding that the Decision was compatible with the UK's obligations under the PA.

56. As Thornton J concluded, the Respondents' decision to finance the Project on the basis that it was compatible with the UK's PA obligations, including that the financing was aligned with the low emissions pathway in Article 2(1)(c) was not tenable. It was not based on necessary relevant evidence, there having been no quantification of Scope 3 emissions; it had involved a mistaken conflation of Scope 3 and potential avoided emissions; it was based on inconsistent (non-evidence based) views about the global emissions impact and a lack of evidence for the assertion that the Project could be expected to lead to a net reduction in emissions (displacement) (DC/§§306-316). There was no rational basis for reaching the conclusion that the Project was compatible with the UK's obligations under the PA, let alone to demonstrate that funding was consistent with Article 2(1)(c). The Respondents failed to discharge their due diligence obligation: their obligation of conduct.

57. Further, at the Divisional Court hearing, the Respondents' submitted for the first time that the Project would in fact lead to a net increase in global emissions, such that, by definition, the financing of the Project could not be in alignment with the low emissions pathway, which requires a rapid decrease in global emissions (see §§30-31 above). The Court of Appeal failed to deal with this argument and the lack of clarity in the CCR, as fully explained by Thornton J.

58. UKEF would not now approve the financing for the Project in view of the policy changes in 2019 and 2020. That policy not to fund any fossil fuel project was introduced on the basis that financing for the opening up of new fossil fuel projects for supply to the global market was inconsistent with a pathway towards limiting global warming to well below 2°C and pursuing efforts to 1.5°C and has been incorporated in the UK's NDC. The Respondents provided no evidence to explain why the UK's obligations under the PA on 30 June 2020 can have been different to those on 1 July 2020. In truth, they cannot.

59. The Court of Appeal was wrong to state that the Decision must be rational because there was as an "*uncertainty*" as to whether the Project would contribute to the fossil fuel transition, which was an issue on which "*the precise outcome could not be predicted*" (CA/§55(i)). The Respondents had themselves claimed before the Court that the Project would result in an increase in global emissions. There was no basis for the Court of Appeal to gainsay that view. Indeed, the fact that the opening up of new fossil fuel developments will increase global emissions of GHGs – contrary to the requirements of Article 2(1)(c) – is the very reason why the UK Government has now ended financing for fossil fuel projects for the global market and set out that commitment in its NDC.

60. Further, as noted by Thornton J, the CCR expressed inconsistent views on the global emissions impact, stating that it could be expected to lead to a "*net reduction in global emissions*", whilst also stating that it could lead to a decrease in future GHG emissions but only to the extent that LNG from the Project replaced and/or displaced more polluting fuels. As Thornton J correctly noted, those positions are materially different because there is a direct correlation between <u>all</u> emissions and temperature rise (DC/§329).

(iii) Ground 3: Correct standard of review

61. The Court of Appeal erred in concluding that it was only required to assess whether the Respondents' view that funding the Project was compatible with the UK's obligations under the PA was 'tenable' rather than 'correct'. There is no dispute as to justiciability, which the Respondents have always accepted. Where a question of law is justiciable, the Court must discharge its responsibility and determine that question of law. For it to do otherwise, is to abrogate its responsibility and to create dangerous uncertainty, which does not benefit the decision-maker, the Government more widely or the public. On the contrary, it would enable different Ministers to make different claims that a decision is compatible with an international obligation of the UK without any possibility of determination as to its correctness. In this case, where three Ministers were against the UK financing the Project, and where two Ministers were required to consent to it, inconsistent views as to compatibility would create an irresolvable conflict were 'tenability' to be the relevant standard.

62. This was also at a time when the UK held the COP Presidency and when adherence to PA obligations was no doubt considered important. In that context, a claim by civil servants as to compatibility of the Decision with the PA will have been important both to the Ministers making the Decision and to those objecting to it. Ministers and the public are entitled to know whether they have been correctly advised as to the law. If Ministers have not been correctly advised, they are entitled to be given the opportunity to make their decision again on the basis of a correct understanding of the law.

63. The Court of Appeal accepted the Respondents' submission that it was inconsistent with the constitutional principle of dualism for the court to adopt a correctness standard (CA/§§26, 40(vii)). That is wrong. Dualism is irrelevant to the question before the Court, which concerns error of law. The Respondents took the Decision on the basis of advice that the funding was compatible with the PA (CA/§22),and have accepted that whether they were correct to do so was a justiciable question (CA/§40(ii)).

64. Where a decision-maker voluntarily takes account of unincorporated treaty obligations in exercising executive discretion, that self-direction or advice may be reviewed by the courts: see, e.g., *R v Secretary of State for the Home Department, ex p Launder* [1997] 1 WLR 839 at 867F and *R v DPP, ex p Kebilene* [2000] 2 AC 326 at 367D-368A, 375F-376A. Here UKEF policy provided that it was obliged to take account of the PA in deciding whether to provide the financing and it did so. The interpretation of a treaty obligation is a question of law and there is only one permissible approach which is to apply the rules in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("**VCLT**"). Those rules, like any principles of interpretation, are designed to yield a single right answer.

65. The alleged "*lack of clear guidance as to how unincorporated treaties like the Paris Agreement should be construed as a matter of domestic law*" (CA/§50(iii)) is only relevant to whether the question is justiciable. If a question is justiciable, the court must determine it (*Benkharbouche v SSFCA* [2019] AC 777, §35).

66. A standard of tenability is unworkable. A court cannot take a view on whether the decision-maker's approach is tenable unless it has a benchmark to assess the plausibility of the interpretation advanced by the decision-maker. In order to have a benchmark, a court must come to its own view about the correct interpretation of the treaty provision in question by applying the standard rules of interpretation in the VCLT. The tenability of an interpretation of a treaty obligation cannot be assessed in a void.

67. If the decision-maker's interpretation is consistent with the court's own interpretation, it will be characterised not only as tenable but also as 'correct'. If not, it will be characterised as 'incorrect', either explicitly or by implication, even if it is nonetheless found to be 'tenable'. Accordingly, so long as some threshold of judicial control is contemplated, even on the tenability standard, the court will

inevitably pass judgment on whether or not the decision-maker has acted consistently with the UK's obligations under an unincorporated treaty. That is precisely what the tenability standard is supposed to avoid.

68. To say that a Minister "*must … be able to say, without successful challenge, that it thinks on balance and in good faith that a particular decision is compliant, even if it later changes its policy or is shown to have been wrong in the view that it took*" (CA/§50(v)) is tantamount to no judicial review at all, which is contrary to the *obiter* statements in support of the tenability standard in *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756, §§66-68, which contemplated at least some degree of judicial oversight based upon the plausibility of the interpretation adopted by the executive decision-maker.

69. The motivating idea behind the tenability standard is to afford a heightened level of deference to executive decision-makers. But this runs into insurmountable problems in relation to questions of law. The reasoning behind the Government's conclusion that its decision was compatible with the PA was legally privileged and not disclosed (this is likely to be a common occurrence in these cases). The heightened level of deference is, therefore, not afforded to the actual executive decision-maker operating under the ubiquitous time and resource constraints, but to whatever legal position the Government has later adopted in litigation – albeit that in this case even that was wholly unclear. There is no principled basis for according particular deference to a legal position adopted by one of the parties in litigation. Indeed, in this case, the Court of Appeal, albeit that it disagreed with Stuart-Smith LJ's view that the PA and in particular, Article 2(1)(c) was incoherent, adopted a view of the PA that was <u>not</u> advanced by the Respondents and <u>not</u> endorsed by either judge of the Divisional Court. Its conclusion, in effect, was that if the Government were to have taken the same view of the PA as the Court of Appeal, then its decision would be tenable, and therefore it is tenable. But the Court of Appeal did not set out its view of what the PA means either. As explained above, to reach a view on whether a decision-maker is right as to the law, one must understand its view of the law.

70. The tenability standard also assumes that it is desirable for the courts not to second guess the executive's *bona fide* interpretation of unincorporated treaty obligations (even if they do not know what it was). But this ignores the fact that the Government may be assisted by the courts' rulings on questions of treaty interpretation (something that the judiciary is better equipped to provide) and benefit from the opportunity to revisit its decision once the courts have clarified the scope of the UK's obligations under a particular treaty. The tenability standard also raises the prospect of different Government departments reaching different, potentially inconsistent views of the same treaty obligations, but without the courts being able to resolve any such conflict. This is not a farfetched

prospect, given the facts of this case, where Ministers disagreed on PA compatibility. It would also entail citizens not being able to obtain redress in such circumstances.

71. The rule of law demands that when a Minister claims that his or her decision is compatible with the UK's international obligations – a legal conclusion – then such a claim must be susceptible to being tested in the courts as a question of law to which there can only be one correct answer. The proposition that such a claim is impervious to correction in judicial review so long as it is made in good faith and/or is tenable (even if later found to be incorrect, as found by the Court of Appeal) will undermine the public's confidence in government if it becomes entrenched as a principle of public law.

72. Finally, the decision-makers were not advised that there might be different views as to whether financing the Project would be compatible with the UK's obligations under the PA or that UKEF thought, on balance and in good faith, that the decision was likely to be compliant but that it could not be sure. The decision-makers were advised that the Decision was compatible with the UK's obligations under the PA. Whilst a margin of discretion will apply to how it reached that conclusion, particularly in relation to obligations of conduct, the relevant standard can nonetheless only be one of correctness.

F. CONCLUSION

73. For the reasons above, this application raises arguable points of law of general public importance which ought to be considered by the Supreme Court at this time, and the Court is respectfully invited to grant permission to appeal.

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20 February 2023