IN THE COURT OF APPEAL **CA-2022-000759**
ON APPEAL FROM THE DIVISIONAL COURT
Stuart Smith LJ and Thornton J.
[2022] EWHC 568 (Admin)

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

-and-

(1) TOTAL E&P MOZAMBIQUE AREA 1 LIMITADA
(2) MOZ LNG1 FINANCING COMPANY LIMITED

Interested Parties

SKELETON ARGUMENT FOR THE APPELLANT

Note: Bundle Refs (indicated by footnote place markers) will be inserted when the Appeal Hearing Bundle is filed.

1. This is an appeal against a rejection of the Appellant's challenge to a Decision of the Respondents (the "**Decision**") to provide USD 1.15 billion in export finance and support in relation to a liquified natural gas ("**LNG**") project in Mozambique (the "**Project**"), which the Appellant submits was unlawful as being:

    a. based on an error of law or fact, namely that the Project and its financing was compatible with the United Kingdom's commitments under the Paris Climate Change Agreement ("**the PA**") and/or assisted Mozambique to achieve its commitments under the PA (Ground 1(a)) and/or

    b. reached without regard to essential relevant considerations, including in respect of (but not confined to) the view that funding the Project aligned with the UK and Mozambique's obligations under the Paris Agreement (Ground 1(b)).

2. Thornton J. considered the grounds together and found that they both succeeded. Had she been sitting alone the Decision would have been quashed. However, Stuart-Smith LJ. rejected both grounds of claim. The alternative to the case being reheard before a differently

constituted Divisional Court – a possibility that was raised with the parties prior to the Judgment - was for the case to be dismissed and for the Appellant to be given permission to appeal. To avoid the waste of time and expenditure that a further hearing would have involved, the Court decided (and the parties agreed) to the case being approached in this novel way.

3. The facts and issues are fully set out in §§1-93 of the Judgment of Stuart-Smith LJ. and §§248-270 of the Judgment of Thornton J.

4. There are three grounds of appeal:

   a. Ground 1: Failure to take into account essential relevant considerations, namely, to quantify the indirect downstream greenhouse gas emissions from the processing and use of the LNG generated by the Project (Scope 3 emissions) and/or to consider a high-level qualitative review sufficient.

   b. Ground 2: The Respondents were required to adopt a view of the PA that was more than merely "tenable".

   c. Ground 3: The Respondents conclusion that the provision of financing was compatible with Article 2(1)(c) of the PA or the PA as a whole was erroneous, being based on no rational foundation, including the new claim made at the hearing that it would result in a net increase in global emissions.

5. Grounds 1 and 3 are effectively Grounds 1(b) and 1(a) respectively of the Claim as set out in paragraph 0 above, save that Ground 1 is narrowed in relation to certain factual matters, on which permission to appeal was refused. In relation to both Grounds 1 and 3 the Appellant seeks to uphold the Decision of Thornton J.,[1] and submits that Stuart Smith LJ erred in law.

6. Ground 2 concerns the standard the Court should apply in deciding whether the Respondents properly directed themselves as to the meaning of the PA when reaching the Decision. The Respondents have filed a Respondents' notice by which they seek to overturn the judgments of Green LJ and Whipple J in *Heathrow Airport Ltd v HM Treasury & anr* [2021] STC 1203, in which the Court held that the rule of law prevented a bright line distinction being drawn

[1] Save in the limited and irrelevant for the purposes of Thornton J.'s conclusions, question of whether the standard of review for determining an error of international law was "tenability".

between how a Court should treat a misdirection of domestic law and a misdirection of international law.

Ground 3 Appeal/Ground 1(a) Claim: No rational basis for concluding that the decision to provide funding was compatible with Article 2(1)(c) of the PA such that the Respondents proceeded on the basis of an error of law**.**

(i) The Decision-maker concluded that financing the Project was compatible with the UK's obligations under the PA

7. The case is not concerned with whether, or the extent to which, the Respondents should have considered the PA in reaching their Decision. Rather, it is concerned with whether, having concluded that both the Project and its financing were compatible with the UK's obligations under the PA, and having taken the Decision on that basis, the Decision was lawful: [DGD §75[2], §102.2[3]]. The Respondents do not dispute justiciability, it being well established that an error of law (including international law) is susceptible to judicial review: *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839, 866-867[4] and *R v Director of Public Prosecutions,* Ex *p Kebilene* [2000] 2 AC 326, 341-342, 367, 375-376[5].

8. There is no dispute that the Respondents intended to exercise their power to grant funding under s. 1(1) of the Act in line with the UK's international obligations: PAP response §33-36 []; DGD §17-19 [][7] [8]. This approach accorded with the UKEF ESHR Policy of December 2018 [][9], which at §3 provides: "*we will comply with all international agreements which apply to ECAs [and] not operate beyond international agreements which apply to ECAs*" [][10]. Thus, UKEF committed: "*to be satisfied that projects comply with applicable local and relevant international laws and align with relevant ESHR standards before support is provided*." (emphasis added) [**ibid**]. See further ASFG §17-25, §29-60 [][11].

9. There is also no dispute that the conclusion of PA compatibility was a key consideration in the Decision, even if not a pre-condition [Louis Thomas Statement ("**LT WS, Exhibits in**

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[8] It is uncontentious that Parliament is assumed to intend that statutory powers afforded to the executive be exercised in a way that is compatible with the UK's international law obligations, absent an express abrogation by Parliament: *Assange v Swedish Prosecution Authority* [2012] 2 WLR 1275 at 10 per Lord Phillips , 98 per Lord Browne, 112 per Lord Kerr 122 per Lord Dyson.

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Format: LT/Exhibit Number") §85, §88 **[]**[12]; Maxwell Griffin Statement ("**MG WS, Exhibits in Format: MG/Exhibit Number**") §60-61, §64 **[]**[13]; indeed consideration of Climate Change risk, including compatibility with the PA, was a requirement of the decision making: [LT/4/§14 **[]**[14] and §37 **[]**[15]; Further Disclosure ("**FD/Item Number**") FD/32/§3 **[]**[16]]. See further: judgment §§246 and 281. As found by Thornton J., the Respondents considered the PA in order to determine whether the Project and/or the UK financing of it was consistent with the UK's obligations under the PA (§152 citing §75.8-9 of the DGD, and see § 153(ii) and §244(ii) and §268 judgment.

10. In so far as Stuart-Smith LJ proceeded otherwise at Judgment §§236-243, he was incorrect. See further Annex A.

(ii) The Paris Agreement and the UN Climate Change Convention

11. The 1992 UN Framework Convention on Climate Change ("UNFCCC") has as its ultimate objective the stabilisation of GHG concentrations "*at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system*": Art 2. It requires industrialised countries (Annex 1 countries) to take the lead in cutting GHG emissions on the basis that they are largely responsible for climate change: Arts 3(1) and 4(2). Further, it provides that developed countries are required to finance and provide technology transfer to assist developing countries to mitigate and adapt to climate change: Arts 4(3)-(5).

12. The PA was adopted under the UNFCCC by the 21st Conference of the Parties under Decision 1/CP.21 of 12 December 2015 ("**the Adoption Decision**"). As explained in the Preamble to that Decision (§§15-16), the PA was necessitated by the increased urgency posed by climate change. In that regard, the Parties recognised: (1) the need for international cooperation in order to accelerate the reduction of global GHG emissions given the significant emissions gap (recital (5))); (2) that deep reductions in global GHG emissions are required (recital (5)); (3) the urgency of the potentially irreversible threat posed by climate change (recital (4)). They expressed serious concern as to the urgent need to address the significant gap between the aggregate effect of their mitigation pledges and aggregate emission pathways consistent with the PA temperature goals (recital (9)). These elements are anchored in detailed scientific

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analysis published by the Intergovernmental Panel on Climate Change ("IPCC") and UN Environment Programme ("UNEP") and reflect the urgent need to close the emissions gap to meet the temperature goals and thereby significantly reduce the risks and impacts of climate change.

13. Art 2 PA defines its object and purposes as follows:

> 1. This Agreement, in enhancing the implementation of the Convention [the UNFCCC] 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;
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> (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.
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> 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." (emphasis added)

14. Pursuant to Art 4(5) of the PA, support must be provided to developing country Parties for the implementation of mitigation requirements set out in Art 4, in accordance with Arts 9, 10 and 11 of the PA to allow for higher ambition in their actions. This includes the mobilisation of climate finance to assist particularly developing countries that are vulnerable to the impacts of climate change: Art 9(3)-(4) of the PA. Parties must take individual and collective action in relation to mitigation and adaptation on the basis of 'best available science' (BAS) (A's 4(1), 7(5) and 14(1) PA). BAS is relevant to the interpretation of the PA's more general language, for example in relation to peaking of emissions "as soon as possible" under A4(1). Further provisions of the PA are set out in the judgment at §§17-24.

15. In the PA Adoption Decision, the Parties requested the IPCC to provide a special report ("**SR1.5**") on the impacts of global warming of 1.5 °C above pre-industrial levels and related global GHG emission pathways.

(iii) Science informing the climate change regime

16. In 2018, the IPCC concluded in SR1.5 that there is a high risk of very significantly worse outcomes if temperature increases exceed 1.5°C and that even a global temperature increase of 1.5°C will cause extreme harms, entailing particular risk for vulnerable communities, including in Africa: IPCC SR15 Report Fig SPM.2). Further, that limiting global warming to 1.5°C above pre-industrial levels will significantly reduce the risks of challenging impacts of climate change, that to achieve this target will require "deep emissions reductions" and "rapid, far-reaching and unprecedented changes to all aspects of society", requiring global net emissions of CO2 to fall by about 45% from 2010 levels by 2030 reaching zero by 2050.

17. The level of GHG emissions reductions required to meet a temperature target are estimated to produce a remaining global carbon budget, which must not be exceeded if global warming is to be limited (Judgment, §§252-253). This remaining available 'global carbon budget' is based upon the proven and well-established direct correlative relationship between the cumulative anthropogenic emissions of GHGs (the concentration of GHGs in the atmosphere) and the increase in average global temperature: (§249 judgment).

18. The IPCC SR1.5 (2018) concluded that that, as at 1 January 2018, for a 66% chance of not exceeding 1.5°C, a carbon budget of 420 GtCO2 remained and for a 50% chance, 580 GtTCO2 (IPCC SR15 Report SPM C.1.3). It looked at emissions pathways and budgets by reference to timescales and found that to stay within a carbon budget of 420 GtCO2 carbon neutrality had to be reached within 20 years.

19. In November 2019 UNEP issued its first Production Gap Report (PGR) and concluded that "*the world is on track to produce far more coal, oil and gas than is consistent with limiting warming to 1.5°C or 2°C, creating a "production gap" that makes climate goals much harder to reach.*" UNEP noted the implications of the IPCC SR1.5 in the following terms.

> … continued expansion of fossil fuel production - and the widening of the global production gap - is underpinned by a combination of ambitious national plans, government subsidies to producers, and other forms of public finance…. 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.2 REF]

20. Oil and gas are also on track to exceed carbon budgets, as countries continue to invest in fossil fuel infrastructure that "locks in" oil and gas use. The effects of this lock-in widen the production gap over time, until countries are producing 43% (36 million barrels per day) more

oil and 47% (1,800 billion cubic meters) more gas by 2040 than would be consistent with a 2°C pathway…[p.4]. CO2 emissions from fossil fuels will need to decline rapidly, by approximately 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... Barring 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..." [p.8] UNEP 2021 PGR found that "*[a] significant course correction, including profound changes in technology deployment, policy adoption, and financing, is needed if the world is to get on track with an equitable, low-carbon recovery that is consistent with the Paris Agreement goals*." (p.33) In that regard, it specifically referred to the Defendants' financing of "*a multibillion-dollar gas project in Mozambique, just months before the UK exclusion policy was formally approved (TotalEnergies, 2020)*" (p.33)

(iv) Defining compatibility with the UK's obligations under the PA Article 2(1)(c), 3, 4(5), 9

21. In determining the meaning and effect of the terms of the PA, the Court must interpret the provisions in good faith and in accordance with their ordinary meaning to be given to their terms in their context and in the light of the Agreement's object and purpose: Article 31 Vienna Convention on the Law of Treaties ("**VCLT"**); see Thornton J §262 and Stuart-Smith LJ §119(iii). Recourse may also be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or where there is ambiguity: Article 32 VCLT. See *Al-Malki and another v Reyes (Secretary of State for Foreign and Commonwealth Affairs and another intervening)* [2019] AC 735 per Lord Sumption §10-12; *Fothergill v Monarch Airlines Ltd* [1981] AC 251 ILR 74; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 HL 508C-F per Lord Clyde; 495B-C per Lord Hope.

22. The Appellant submits that Thornton J.'s interpretation of the requirements of the relevant provisions of the PA, in particular Article 2(1)(c) PA read with Article 3(1), 4(5) and 9(1)-(4), of the PA as set out in §§262-268 of her judgment is correct:

    a. '*Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development*' (Article 2(1)(c)) is one of three core aims in Article 2, which sits alongside a 'temperature goal'; to hold the increase in the global average temperature to 'well below 2°C above pre-industrial levels and to pursue efforts to limit the increase to 1.5 °C'. The third goal is to increase the ability of countries to adapt to climate change ('the adaptation goal').

b. In the present context, the finance goal is relevant to the UK's obligations under the Agreement, not those of Mozambique. In practical terms, the application of the principle may lead, as in the present case, to environmental standards that impose differing obligations on states. (Sands et al Principles of International Environmental Law (2018 4th Ed CUP) excerpts page 244 – 249).

c. The direct correlation between emissions of greenhouse gas emissions and 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). Flows of finance are therefore a core element in meeting the temperature goal. Thus, the provision of finance must be consistent with a pathway towards holding global warming to well below 2°C above preindustrial levels and pursuing efforts to limit warming to 1.5°C.

d. Making finance flows consistent with a "pathway towards" low greenhouse gas emissions does not mean that all finance flows have to achieve explicitly beneficial climate outcomes, providing the pathway to the temperature goal is evident. The Standing Committee on Finance which serves the Paris Agreement expressed matters as follows in its 2018 assessment of finance flows in the context of Article 2:

> "…although climate finance flows must obviously be scaled up, it is also important to ensure the consistency of finance flows as a whole …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."

e. There was no dispute between the parties that, on its ordinary meaning the finance goal in Article 2(1)(c) applies to all finance flows, not just to climate finance. Although not a defined term in the Paris Agreement, climate finance is directed specifically at the provision of financial resources from developed countries, such as the UK, to assist developing countries, such as Mozambique, to mitigate against, and adapt to, the effects of climate change. In particular, it is to enable them to 1) reach peak national emissions as soon as possible and thereafter reduce towards net zero emissions in the second half of this century and 2) to adapt to the effects of climate change (Articles 4(5) 7(13) and 9(1)). It was common ground between the parties that the export finance under scrutiny in this claim is not climate finance.

f. Accordingly, applying the above interpretation of the PA to the present case: in order for UKEF to demonstrate compliance with Article 2(1)(c), it had to demonstrate that funding

the project is 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.

23. The Appellant submits that the approach adopted by Stuart-Smith LJ. to the meaning and effect of the PA was impermissible and wrong: see §§225-231 judgment. At §231 and §239 the Judge held that the PA:

> "does not give rise to hard-edged free-standing obligations but should be seen as a composite package of aims and aspirations that may be – and in this case are – in tension or frankly irreconcilable.
>
> …a hard-edged approach to the obligations of both Mozambique and the United Kingdom…is inconsistent with a proper understanding of the Paris Agreement. The Agreement contains numerous aims or aspirations that may prove to be in tension or frankly irreconcilable on the facts of a given case, this case being a paradigm example."

24. Specifically, he considered that Article 2(1)(c) was not capable of generating legal obligations because of its "*opaque language*" and that "*by common consent, the Parties' current commitments are inadequate to prevent the increase in the global average temperature to 2°C, let alone 1.5°C*": §227. In that regard, he dismissed as incoherent the explanation of a PA body: the PA Standing Committee on Finance ("**SCF**")[17] that finance flows do not have to have beneficial climate outcomes "*but that they must reduce the likelihood of negative climate outcomes*", saying: "[q]*uite how that is meant to be applied to a case such as the present, where Mozambique's ability to make its way to a carbon-free economy and climate resilient development is dependent upon the income stream from the Project, is unclear*." (ibid)

25. Whilst the Judge accepted "*for the purposes of argument*" that "*a finance flow that increases aggregate global emissions* [which he found to be the case here]*, is not when viewed in isolation, consistent with a pathway to low greenhouse gas emissions, at least in the short term*," he rejected the argument that such a finance flow would be out of alignment with the PA on the basis that one had to look (a) beyond the short term; (b) at the emissions impact of not financing the project on the country where the project is and (c) at other aspects of the PA: §228.

26. Thus, the Judge accepted that it was permissible under the PA for Parties to make flows of finance that were <u>inconsistent</u> with the temperature goal in Article 2(1)(a), that is, were for projects that would result in a net increase in global emissions, despite the clear language of

[17] UNFCCC Decision 1/CP.21, paragraph 63 **[]**

Article 2(1)(c), the explanation of the SCF and the overall object and purpose of the PA and the UNFCCC: §229. On that basis, he held that UKEF's decision that the financing of the Project was in alignment with the UK's obligations under the PA could not be criticised because it "*involved recognition of those conflicting aims and aspirations and an evaluative balancing exercise in order to come to a conclusion*": §§231 and the 233.

27. Such an interpretation is erroneous for the following reasons:

a. First, Treaties give rise to obligations on state parties that are legally binding and must be discharged by them. The whole point of making a binding agreement is that each of the parties should be able to rely on performance of the treaty by the other party or parties; *pacta sunt servanda*: Article 26 VCLT. Thus, in a treaty States commit to certain behaviour; it is axiomatic that a party to a treaty has committed to what has been agreed in the treaty. Thus, the treaty is the source of law or legally binding obligations. Here the source of legally binding obligations lies in the overarching UNFCCC and the other agreements including the PA, adopted pursuant to it.

b. Secondly, the meaning of those obligations must be ascertained by reference to the interpretative rules set out in Articles 31 and 32 of the VCLT. That interpretation must be coherent to give effect to the object and purpose of the treaty, including the overarching treaty. Thus, it cannot be that the treaty itself is incoherent and not capable of giving rise to legal obligations; the parties that have committed to those legal obligations must know what they are and where necessary, the courts must interpret the treaty to give effect to the relevant rights and obligations, that is, render those rights and obligations effective (the principle of effectiveness).

c. Thirdly, national judgments as to the meaning and effect of treaty obligations form part of the sources of international law under Article 38 of the Statute of the International Court of Justice.

d. It follows that here, in determining whether the Respondents were correct in concluding that the Decision met the UK's international obligations under the PA, the Court must ascertain the scope and nature of the relevant treaty obligations. It must do so by reference to the fact that it was adopted under the UNFCCC to provide a <u>strengthened</u> response to the threat of climate change, including through closing the emissions gap,

for which Article 2(1) provides an essential core obligation. The judgment of the Court on this issue is a source of international law under Article 38 of the Statute of the ICJ.

(v) The Respondents' understanding of the legal position

28. Thornton J. concluded that the Respondents had properly understood the requirements of the PA in the way set out in paragraph 22 above: Thornton J. §269-270. She further noted that that correct understanding is shared across Government, as well as by other bodies, including as regards the financing of fossil fuels. It has, moreover, led to the Government to bring an end Governmental to the financing of fossil fuel developments, on the basis that such financing is not in alignment with Government obligations under the PA, which was equally the case when the Decision was taken.

29. In July 2019 the Government stated in its Green Finance Strategy that it would be "*[e]nsuring any investment support for fossil fuels affecting emissions is in line with the Paris Agreement temperature goals and transition plans [and] [e]nsuring that relevant programmes do not undermine the ambition in countries' Nationally Determined Contributions (NDC) and adaptation plans*."[18] It stated that it would be: "*taking action to ensure the UK Government leads by example through aligning the UK's Official Development Assistance spending with the Paris Agreement… In practical terms this will include… ensuring any investment support for fossil fuels affecting emissions is in line with the Paris Agreement temperature goals and transition plans…*" (Judgment, §35).

30. As the UK stated in its December 2020 submission pursuant to Article 9(5) PA: "[under Article 2(1)(c)]…*all parties committed to collectively align finance flows with low greenhouse gas and climate resilient development.*" Further, "*[w]ithout the fundamental shift in the financial system as a whole, the climate goals of the Paris Agreement cannot be met*."[19] (emphasis added)

31. UKEF recognises that *[m]aking financial flows consistent with a net zero and resilient economy is a crucial goal of the 2015 Paris Agreement*" and has expressed the ambition to "[*e]mbed the UK and UKEF as a key influencer in multilateral negotiations amongst export credit agencies, and encourage our peers to join us in making financial flows consistent with the Paris Agreement*." [20]

[18] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820284/190716_BEIS_Green_Finance_Strategy_Accessible_Final.pdf p. 31
[19] https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202012111841---UK%20Biennial%20Finance%20Communication%202020%20-%20publication%20version%20(1).pdf submitted pursuant to Dec. 12 CMA 1: https://unfccc.int/Art.9.5-biennial-communications
[20] See https://www.gov.uk/government/publications/uk-export-finance-climate-change-strategy-2021-to-2024 pp. 5 and 8.

32. The day after the Decision, the CDC (the UK development bank) for the very purpose of aligning its financing with its obligations under the PA, adopted a climate change strategy that excludes new investment in the vast majority of fossil fuel subsectors.[21] Even earlier, on 8 November 2019, the finance ministers of the EU issued a statement urging the European Investment Bank ("**EIB**") to end financing for fossil-fuel energy projects so as to align with the PA.[22] The Private Infrastructure Development Group ("**PIDG**"), funded by the governments of the UK, the Netherlands, Switzerland, Australia, Sweden, Germany and the International Finance Corporation ("**IFC**") ended such financing for the same reason.[23]

33. On 12 December 2020, the Prime Minister announced that in order to align with the PA the UK would no longer provide <u>any</u> new direct financial or promotional support for the fossil fuel energy sector overseas, other than in limited circumstances, as soon as possible, and would align its support to enable clean energy exports.[24] The policy was adopted on 31 March 2021 and applied "*to any new Official Development Assistance (ODA), investment, financial and trade promotion activity overseas, including support provided by UK Export Finance*".[25] It provided for alignment with the PA".[26] The policy <u>specifically prohibits</u>: "[*s]upport for gas production, distribution and power generation <u>into the global market</u>*"[27]: and prohibits*: "[u]nabated gas production and gas distribution infrastructure <u>to the global market</u>. …feedstock infrastructure needs to be directly tied to use of gas in a domestic power plant… not tied to LNG terminals for export*."[28] (emphasis added)

34. UKEF accepts responsibility for the emissions produced by Projects that it invests in (including the emissions from products: scope 3 emissions) and in September 2021 committed to make its portfolio of investments net zero by 2050, including Scope 3 emissions.[29]

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[21] https://www.theguardian.com/environment/2020/jul/02/uk-governments-development-bank-to-end-fossil-fuel-financing ; https://assets.cdcgroup.com/wp-content/uploads/2020/07/01170324/CDC_Climate_Change_Strategy_spreads.pdf
[22] https://www.consilium.europa.eu/media/41303/st13871-en19.pdf
[23] https://www.pidg.org/wp-content/uploads/2020/07/Spotlight-Taking-action-on-climate-change.pdf
[24] https://www.gov.uk/government/news/pm-announces-the-uk-will-end-support-for-fossil-fuel-sector-overseas
[25]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975753/Guidance_-_Aligning_UK_international_support_for_the_clean_energy_transition_-_March_2021_.pdf p.4
[26] Ibid. pp. 6-7.
[27] Ibid. p. 7
[28] Ibid, p.8
[29] UK Export Finance Climate Change Strategy 2021 to 2024, Strategic Pillar 2.

(vi) The conclusion that the financing of the Project was compatible with the PA was an error of law, no such compatibility having been established and it now being said that the Project will result in a net increase in global emissions.

35. As stated above, for UKEF to demonstrate compliance with Article 2(1)(c), the Respondents had to demonstrate that funding the project is 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: Thornton J. §328 and §271. Even applying that margin of discretion, the Respondents failed to demonstrate such compliance. Indeed, to the contrary, at the hearing it was revealed that in fact the Respondents considered that the Project would result in an increase in global emissions (and as Stuart-Smith LJ found). Accordingly, its conclusion of compatibility was an error of law or otherwise irrational.

36. **First**, and crucially, the Respondents did not quantify the emissions impact of the LNG that will be produced by the Project (Scope 3 emissions) at all, let alone by reference to any benchmark, representative of a low emissions pathway. There is no dispute that the Project will be a highly significant generator of GHG emissions. The initial development is expected to produce 16 trillion cubic feet of gas (TcF) and 93 million barrels of condensate over a 30-year development and production period. 95% of the LNG produced will be exported around the world, with 5% to be used in Mozambique. It was common ground that the GHG emissions from the combustion of the gas in the countries of import will dwarf the emissions generated in Mozambique. The major climate impact of the Project will be the indirect, downstream, international GHG emissions arising from the Project, that is Scope 3 emissions. Accordingly, it was crucial that those emissions be quantified in order to determine their impact on the attainment of the PA temperature goals.

37. This is considered fully in relation to Ground 1 of the Appeal at §§48-5763 below.

38. **Secondly**, in so far as the Respondents stated at the hearing that the Project will in fact result in a net increase in global emissions, and Stuart-Smith LJ found to that effect:(§§177, 204-205) financing of the Project cannot, by definition, be consistent with a low emissions pathway. In that regard, the Respondents have still not clarified their position on this. For the purposes of determining whether the decision-makers proceeded on the basis of an error of law (or fact), however, - the issue before this Court - it may not matter:

a. If the finding of consistency with the UK's obligations under the PA was premised on the Project having the net effect of increasing global emissions,[30] its financing is plainly not consistent with the temperature goals in Article 2(1)(a) and thus not compatible with the UK's obligations, including under Article 2(1)(c);

b. If consistency with the UK's obligations under the PA was premised on the Project having the net effect of reducing global emissions, the Respondents cannot and could not demonstrate that on the evidence, including because they failed to quantify Scope 3 emissions and proceeded on an erroneous, unsubstantiated and arbitrary analysis of "displacement" of GHG emissions through the substitution of LNG for other fossil fuels (coal and oil). Indeed, the fact that no attempt had been made to quantify the net increases was noted by Stuart-Smith LJ: Judgment, §204.

39. In either case, the conclusion that the financing of the Project was compatible with the UK's obligations under the PA, on which basis the Decision was made, was erroneous either because it was wrong or because it was not founded on evidence or a rational analysis.

40. **Thirdly**, in so far as the Project's emissions were considered against a low emissions pathway at all, (and none of the methodologies available were used): [Greg Muttitt §6 **[]**[31]], it was done by reference to a 2°C increase when the relevant temperature objective is towards 1.5°C see Wood Mackenzie Report ("**WM Report**") at [MG/12/p.3 **[]**[32]]. As such, it was itself based on an error of law. [33] Stuart-Smith at Judgment §§176-213 refers to the CCR but ignores the fact that the CCR was based on WM.

41. Finally, in so far the Respondents say that they cannot in any event be held responsible for the emissions because the Project would take place anyway and they are only providing finance and not responsible for the emissions: [DGD §101.2 [CB1/2/90]], this does not help them:

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[30] It should be noted however, that this was at no point made clear to the Respondent decision-makers in any Ministerial briefing or elsewhere, which would be another basis for quashing the Decision since they were not informed of an essential material fact and/or were incorrectly led to believe that the Project would have a net effect of reducing global emissions.

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[33] This appears to have been explicitly approved of by the second Defendant: [MG/23/E-mail from Joe Shephard UKEF 19.3.20 at 11.18 **[]**] and in part at least, based on US Exim's approach: [MG/23/E-mail 18.3.20 **[]**]. Accordingly, the finding that the Project was consistent with the PA low emissions pathway was based on an analysis (albeit an erroneous analysis for the reasons set out by Greg Muttitt in his statement and further in Ground 1B below) that the Project was consistent with a pathway to 2°C.

a. It was not the basis on which the decision was taken, which was that financing the Project was compatible with the UK's obligations under the PA, including Article 2(1)(c) and the UK's obligations to developing countries. The Respondents' claim would render Article 2(1)(c) meaningless.

b. The Prime Minister specifically asked for quantification of Scope 3 after consenting to the Project in order to determine the cost of the UK paying for carbon capture and storage in relation to the emissions, recognising that the PA has meaning and effect in the context of financing

c. It begs the question as to (a) why the Respondents purported to determine that the Project was compatible with the UK and Mozambique's obligations under the PA, (b) why the OECD Common Approaches requires compliance, (c) why other UK funds, such as ODA and CDC, all consider the emissions of projects they fund in order to ascertain the climate change consequences and (d) why they are all, now <u>including</u> UKEF, aligning their funding with a net zero pathway, which involves the ending of finance for fossil fuels; and (f) why they are divesting their portfolios so as to achieve a net zero portfolio by 2050. The point is plainly a bad one.

<u>Ground 1 Appeal/Ground 1(B) Claim: failure to take into account relevant considerations</u>

42. Both aspects of unreasonableness apply here: the decision cannot be justified and there is a demonstrable flaw in the reasoning that led to it (*R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 §98); *R (FoE) v Secretary of State for Transport* ([2021] 2 All ER 967; §142. The former is dealt with in Ground 3 above; there was no justifiable basis for the Respondents concluding that financing the Project was compatible with the UK's obligations under the PA and that determination was an error of law. The latter is set out below; whilst the Respondents sought to determine the climate impacts of the Project, they failed to failed to take the reasonable (indeed necessary) steps to obtain the relevant information to determine those impacts : *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 at 696, [1977] AC 1014 at 1065 per Lord Diplock. In that regard, the Appellant submits that even affording the decision maker a wide margin of discretion, the consequence of the Appellants' failings was a Decision that was arbitrary: *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 40 at §434. See also judgment of Thornton J. in this case §277.

43. The parties agree that the relevant principles are those set out in *R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice and others* [2015] 3 All ER 261, §100: (1) The decision-maker must take such steps to inform himself as are reasonable; (2) It is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken; (3) The court should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision; (4) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable [decision-maker] possessed of that material could suppose that the inquiries they had made were sufficient; (5) The principle that the decision-maker must call his own attention to considerations relevant to his decision may in practice require him to consult outside bodies with a particular knowledge springs from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion; (6) The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it.

44. Applying those principles, including a thorough analysis of the material before the decision-maker, Thornton J. correctly concluded that the Respondents' conclusions were irrational, as not being founded on any proper evidence base. She noted that UKEF had properly and unsurprisingly, set out to determine the climate change impacts of the Project, including attempting to quantify Scope 3 emissions (§282 judgment) but had then gone on to reach conclusions as to the emissions impact of the Project, including compatibility with the PA, without any quantification and without any use of benchmarks, which in all the circumstances, including failure to seek the information from their consultant WM, was irrational: §§283-284; 290-291. This was particularly so in light of the internal criticism of the climate assessment: §288, 294-302.

45. In so holding, the Judge applied a similar approach to that is previously adopted by numerous courts that have considered environmental assessments of fossil fuel projects, albeit in the context of licensing and leasing: see for example *Gloucester Resources Limited v Minister of Planning* [2019] NSWLEC 7 and the recent judgment in *Friends of the Earth v Debra A Haaland and others*, Case 1:21-cv-02317-RC judgment 27 January 2022. In the latter case the District Court of Columbia considered an environmental assessment that had excluded of Scope 3 emissions from the calculation and proceeded on the assumption of that higher emitting

foreign production would be substituted by the lower emitting US production: p.23-24, as is the case here. Despite a substantial deference,[34] it found that those failures rendered the conclusions reached "*capricious and arbtrary*": pp. 27 and 40.

46. In purporting to determine the climate change impact of the Project (including but not confined to consistency with the UK and Mozambique's obligations under the PA [MG WS §45, §48 **[]**[35]]), the Respondents:

    a. Failed to quantify or obtain a quantification of Scope 3 emissions: Thornton J. §§283-288;

    b. Failed to carry out any assessment against any benchmark and/or any analysis against a 1.5°C low emissions pathway, failing to consider budgets or baselines at all let alone by reference to the IPCC SR15 Report or the UNEP emissions and productions gap reports, as they should have done: Thornton J. §§289-305[36]

    c. Wrongly, conflated avoided emissions with absolute emissions: Thornton K. §§306-317.

47. Further, WM could not be relied on for the CCR. It looked at an outdated 2°C pathway by reference to a scope of work drawn up by Total, which was not intended to assess PA compatibility at all but rather was commissioned for the purposes of providing lenders with an argument that higher emissions would be displaced by the LNG produced[37]: MG WS §37-9 **[]**[38]; GM WS §6-35 **[]**[39]**.** Despite being aware of its inadequacy, the CCR purported not only to rely on it but to go further than it WM was willing to go, in concluding in the CCR that the LNG from the Project would result in reduced global emissions: GM WS §42-44 **[]**[40]**;** LT/07/p.8, 29 **[]**[41]**.**

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[34] P. 24-26. Further, under the APA, a reviewing court may set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law…. Agency action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.": p. 10 However, "When an agency is evaluating scientific data within its technical expertise, an extreme degree of deference to the agency is warranted…. Rather, NEPA's "rule of reason" dictates that an agency's assessment is sufficient unless its "deficiencies are significant enough to undermine informed public comment and informed decision making." p. 11

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[36] GM WS §4(c), §13-15 and §59-62 **[]**].

[37] The Respondents say in their DGD §19 fn5 **[]** that the Wood MacKenzie Report was commissioned by the lenders. However, their CCR states that it was commissioned by Total: [LT/07 p.27 **[]**.

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(i) Failed to quantify scope 3 emissions: §§289-305 Thornton J.

48. The Scope 3 emissions from the Project will dwarf its Scope 1 and 2 emissions. Despite acknowledging this and setting out initially to quantify them, the Respondents did not do so (erroneously understanding from their consultant, Wood McKenzie ("**WM**") that the exercise was not possible) and misdirected themselves when seeking to reach their conclusions on climate impact without knowing even an estimate of the quantity of emissions that would be produced. For obvious reasons, quantification is the "*first necessary stop in any serious climate analysis of a project*": GM WS §4(a), §45 **[]**[42]. As has been held in numerous courts across the world, including in Commonwealth jurisdictions, a proper assessment of all GHG emissions must be carried out to reach a conclusion on the impact on global emissions: *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, §486-513.

49. As noted by Thornton J. at 285-287 the inadequacy of the CCR was pointed out by UKEF's advisers, including those on the EGAC. Ben Caldicott who internally advised UKEF that the lack of Scope 3 quantification was "*a big gap in the analysis*": [FDB/21/E-mail 07 May 2020 **[]**[43]], which Helen Meekings, accepted as a "*fair point*" [FDB/21/E-mail 07 May 2020 15.30 **[]**[44]]. She noted that the CCR: "*doesn't set out an assessment [of] the climate impact of the project in the traditional sense of an environmental impact assessment – what would be the base-line for example. But the impact would essentially be the result of all the GHG emissions expected from the project, hence Ben's point about Scope 3…*" being "*a big gap in the analysis*." The Director General, Energy Transformation and Clean Growth at BEIS (BEIS), Julian Critchlow described it as "*undermin[ing] the credibility of the CCR*" [FDB/11/E-mail of 29 June 2020 17.20 **[]**[45]].

50. UKEF was fully aware that climate consultancies could have carried out a proper quantification and analysis; [MG/17/§6 **[]**[46]]. To that extent, the statement in the DGD and in the CCR that "*the remaining uncertainty could not be resolved with further analysis or due diligence*": [DGD §75.2 **[]**[47]] [LT/07/p.8, p.31 **[]**[48]] was untrue. As Thornton J. notes, UKEF did not inform WM of the observations of the House of Commons Environmental Audit Committee in relation to the use of the GHG Protocol to calculate the emissions and, despite reservations about WM's analysis, nonetheless chose to use it: §§290-292 judgment.

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51. Whilst recognising that Scope 3 emissions were relevant, as they plainly are, the Respondents concluded in their ESHR Report that there was too much uncertainty for them to be quantified [MG/11/p.24/§85 **[]**[49]] and in their CCR stated that the energy consultant WM commissioned by Total "*for the benefit of the lender group*"[50] to carry out an emissions impact had "*concluded that it was impossible to state with any certainty what [they] would be*" [LT/07/p.27] **[]**[51]. Further, they claim that there is no recognised methodology for their calculation: [DGD §84 **[]**[52]]. In the UKEF BG underwriting minute of 30 June 2020 it is further stated that '*To calculate the Project's Scope 3 emissions, details on where the Project's gas volumes will be used, when it will be used, how it will be combusted (including with what technology and the efficiency of that technology), and in what volumes, is required*.' [FDB/31/§68 **[]**[53]]. This is wrong.

52. There are well-established methods for calculating Scope 3 emissions, including the GHG Protocol and see *Gloucester* §489. Indeed, Total acknowledges this, itself being required to report Scope 3 emissions as part of its business [IPS DGD §44 **[]**[54]]. In that regard, therefore, Stuart-Smith LJ. said at §238(c) of his judgment that "*UKEF was entitled to accept the advice of WM that the variables affecting future use and generation of Scope 3 emissions would render any calculations too uncertain to be of value*." That was wrong in two respects. First, that had not been the advice of WM. Secondly, it was not correct in terms of total quantity of emissions; it related rather to displacement effects/avoided emissions: see Thornton J. §§306-317

53. The GHG methodology is mandated in the TCFD, which states that "*GHG emissions should be calculated in line with the GHG Protocol methodology to allow for aggregation and comparability across organizations and jurisdictions*."[55] Whilst the Respondents dismiss the TCFD (and indeed GHG Protocol) as not applicable [DGD §57-58 **[]**[56]] that is to miss the point; the question is whether it was <u>possible</u> to apply that methodology. It plainly was. Indeed, the UK has committed to apply the TCFD as soon as practicable after the close of the 2020/21 financial

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50 The Respondents state in fn 67 of their DGD **[]** that Wood McKenzie was independent and not a consultant to Total. The documents show that that is incorrect. Further, MG's statement makes it clear that at best it was a joint instruction by Total and the lenders: MG WS §37-40 **[]**

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55 https://www.tcfdhub.org/metrics-and-targets; Recommendations of the Task Force on Climate-related Financial Disclosures (https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf) p. 22, p.36 fn 55 **[]** referring to the GHG Protocol calculation tool: https://ghgprotocol.org/calculationg-tools-faq

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year.[57] Moreover, UKEF's submission made before the Court had been rejected by the Environmental Audit Committee more than a year before the Decision. In its Report of 10 June 2019 the EAC indeed, advised UKEF that quantification of Scope 3 emissions was not only essential to assess the climate change impacts of a Project but could also be done using the GHG Protocol:[58]

> "148. Scope 3 emissions are essential for calculating the full emissions impact of a product, asset or portfolio. Scope 3 emissions are particularly high for fossil fuel-related projects. UKEF claim that there is no universally accepted measure for Scope 3 emissions. However, Scope 3 emissions are already being used in many private sector companies using the GHG Protocol, and the Canadian Export Credit Agency has already expressed its ambition to work towards the G20 Taskforce on Climate-related Financial Disclosure (TCFD) standards (which would include Scope 3 emissions).
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> 149. UKEF should report the Scope 3 emissions of all projects, and in particular of all fossil fuel-related projects where Scope 3 emissions are particularly high. The GHG Protocol provides a methodology for calculating Scope 3 emissions, and the TCFD recommendations provide a readily-available source of guidance for this work. If Government considers that existing methodologies for modelling Scope 3 emissions are inadequate, it should support research to develop an agreed model, and should promote this model amongst its ECA peers." (emphasis added)

54. The Respondents ' claim that they did not need to quantify the emissions: [DGD §75.2, §80-91 **[]**[59]]; that it was enough for them to carry out "*a high level qualitative assessment of Scope 3 emissions*" [DGD §75.2 **[]**[60]]. Indeed, they go further and say that there is "*nothing which required them to undertake any specific analysis*", that they did not even have to consider Scope 3 emissions and that "*[i]t was sufficient that UKEF had regard to GHG emissions, including Scope 3 emissions to the extent it considered appropriate*" [DGD §81, §115.3 **[]**[61]]: "*no requirement…to quantify and consider cumulative emissions or Scope 3 emissions*" [DGD §53**[]**[62]]. Their position is

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[57] UKEF Annual Report 2019-20 p.98 [**[]**]: "In July 2019 it was announced in the UK Government's Green Finance Strategy that UKEF will be making financial disclosures in line with the Task Force on Climate-Related Financial Disclosure (TCFD) as soon as practicable following the close of the 2020-21 financial year. A project is underway to implement the TCFD recommendations through 2020, as well as further develop the integration of climate change considerations across all the products and services that UKEF provide in alignment with wider government policy and practice, including that provided as part of the UK's hosting of the UN Climate Change Conference of Parties (COP) 26 in 2021." https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895102/ukef-annual-report-and-accounts-2019-to-2020.pdf

[58] https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1804/180407.htm §149 [see **[]** for gov response citing recommendation]

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that "*on any view [it was] rational to consider scope 3 in qualitative terms*", justifying that approach on the basis that quantification would be "*misleading*" and considering that they "*were not obliged to undertake…a quantitative assessment against the remaining global, regional and national budgets*" [DGD §87-88 &91] **[]**[63] and [LT WS §90(b) **[]**[64]].

55. For obvious reasons that is wrong; it is impossible to ascertain the climate impacts of a Project without having an estimate of the quantities of GHG that will be emitted as a consequence: [GM WS §45-9 **[]**[65]] [GM WS §31-34 **[]**[66]]. A qualitative assessment without regard to quantities, budgets and time is wholly meaningless. It is not a proper rational assessment capable of reaching a rational conclusion – its result is arbitrary: see *Gloucester* §510-513.

56. Moreover, as Thornton J. notes at §282 of her judgment, UKEF understood that and did consider it necessary to quantify Scope 3 emissions (their CCR assessment-form even contains a section entitled "*what are the estimated scope 3 emissions of the project?*"[LT/07/p.27 **[]**[67]**).** The Respondents say, indeed, that they sought to get the information from WM but were told that it could not be provided: MG WS §37-42 **[]**[68] and CCR [LT/07/p.27 **[]**[69]]. They accept however, that they never asked WM to use the GHG Protocol, which the EAC had told UKEF to use, and they provide no explanation for that failure: [Part 18 Response §44 **[]**[70]).

57. The fact that Scope 3 emissions could have been estimated is shown by the fact that when on 30 June 2020, after the Decision had been taken, the PM demanded they be calculated in order to assess whether the UK could pay for Carbon Capture and Storage in respect of the part of the emissions financed by UKEF, a rough and ready calculation was done within 24 hours: see [LT WS §42-43, §103-4 **[]**[71]**;** [Part 18 §18 **[]**[72]**;** [MG/38/Email 30 June 2020 13:07, 11:07 **[]**[73]].

(ii) Failed to consider a quantified estimate of emissions by reference to any benchmark/budget: Thornton J. §§289-305.

58. Having failed to quantify the emissions impact of the Project, the Respondents also failed to consider the totality of the emissions against the remaining available carbon budgets having

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regard to the relevant timescales for their use, as set out by the IPCC and by UNEP in its Production and Emissions Gap Reports of 2019 **[]**[74]**,** which established that current global intended production of fossil fuels was more than double the amount (120% more) consistent with a 1.5° rise in temperature and 50% more than is consistent with 2°C: ([KA WS1 §41-46 **[]**[75]]; [KA WS2 §34-37 **[]**[76]]; [GM WS §65-66 **[]**[77]]). This finding was confirmed in 2020 and 2021.

59. The Respondents did not consider the climate impacts of the Project by reference to <u>any</u> budgets or timescales. There was no consideration at all of emissions pathways aligned with the Paris goal of 1.5°C: GM WS §4(c) **[]**[78]. **T**he Respondents carried out no benchmarked quantitative analysis at all, whether by reference to UNEP scientific modelling or otherwise. [ASFG §76.1, §77-82, §112.1-112.3 **[]**[79]].

60. Astonishingly, the Respondents state that '*there are no such published budgets for the Paris Agreement*' [DGD §90 **[]**[80]]. This is to ignore the IPCC reports, which are integrally connected to the PA, the UNEP reports and the nature of the PA goals themselves. It is to disregard, in its entirety, the scientific work done by the IPCC and UNEP [see GM WS §18, §64-66 **[]**[81]]. Carbon budgets by reference to remaining available emissions is the way that the IPCC and UNEP approach consideration of low emissions pathways and Paris alignment. Carbon budgets are the approach used by the Climate Change Act 2008, which incorporates the 2050 Net Zero target and is used to reduce our UK emissions in line with our NDC.

61. Thornton J. was correct to find that without an assessment of emissions by reference to a benchmark or budgets, it was not possible to reach a rational conclusion on the environmental impacts of the Project, including its compatibility with UK obligations under the PA : §§285-288 judgment. A finger in the air view that something might or might not happen (here that the LNG might displace coal, rather than renewables, somewhere) will plainly not be good enough. Contrary to the finding of Stuart LJ., the fact that the "*aims and goals of the Paris Agreement, as set out for example in Articles 2, 3 and 4*" are "*broadly cast*" [DGD §75.9 **[]**[82]] does not make them devoid of meaning.

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62. The Respondents claim that "*it is not simply about figures*" [DGD §86 **[]**[83]]. But the science makes it clear that reducing climate change (and meeting the PA goals) is all about emission figures. As explained by GM WS §4(c), §17, §37-9 **[]**[84], there is only one thing that matters in deciding whether the temperature goals are met and that is the cumulative global emissions of GHGs that enter the atmosphere. There is a direct relationship between those emissions and temperature increases, as explained and calculated in IPCC SR15 and the UNEP Reports: IPCC SR15 Report SPM C.1.3 SPM C.2; **[]**[85] "Consistency" or alignment with a PA compliant low emissions pathway relies on numerical analysis.

The CCR wrongly conflated emissions and displacement: Thornton J. §§306-317

63. A further error was the Respondents' confusion between the quantification of the absolute emissions that would be produced by the LNG from the Project and any potential for those emissions to be reduced by displacing higher emitting fossil fuels. Those are two separate analyses. The Respondents proceeded on the erroneous basis that they could not determine the first because they were not able to determine the second. As Thornton J. explains, that was a fundamental error that vitiated the Decision, rendering any conclusions on climate change impacts and compatibility with the PA irrational.

GROUND 2: TENABILITY

64. The Court concluded that the applicable standard of review for determining whether the Decision maker had properly understood the meaning of the relevant provisions of the PA was "tenable" §§120-124 per Stuart-Smith and §262 per Thornton J. Thornton J. held, however, that that the Respondents had asked themselves the correct legal question, (that is their interpretation of the PA obligations was correct rather than tenable) when attempting to determine the requirements of the PA: §270, holding that they had failed to answer it properly and had thus, reached a conclusion on compatibility with the PA that was wrong.

65. By contrast, as set out in §23 above, Stuart-Smith LJ. took the view that the PA could not be interpreted to establish ascertainable international legal obligations and simply concluded that overall that "*UKEF was entitled to form the view that the support for the Project that was in contemplation was in accordance with its obligations under the Paris Agreement as properly understood" and that "[t]hat view was at least tenable*": §240. Thus, Stuart-Smith LJ did not

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determine the legal question that the Decision-maker had sought to answer, in concluding that the financing was consistent with the temperature goals. Rather, he applied a general rationality analysis to the conclusion that financing the Project was compatible with the PA on the basis that the PA did not contain ascertainable legal obligations. Such a conclusion is not tenable; it fundamentally undermines legally binding treaty obligations and as such does not meet the interpretative requirements of Articles 31 and 32 of the VCLT.

66. The Appellant submits that in this case it the Court had to determine whether the Decision-maker proceeded on a correct understanding of the law. If the international law measure descends from the international plane and becomes embedded or assumes a foothold into domestic law then the Courts acquire the right and duty of supervision: *Heathrow Airport Limited v Her Majesty's* [2021] EWCA Civ 783 §138. Put another way, the UK Courts are "*bound to interpret and determine the question*": *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2019] A.C. 777 §35-36 per Lord Sumption **[]**[86]. That is so where the decision maker has taken the international law into account in its decision making and directly applied it at an operational level: *Heathrow Airport Limited v HM Treasury* §164 and 169-177 per Green LJ **[]**[87].

67. In so far as Stuart-Smith LJ says at § 110 of his judgment that this Decision falls into a category to which Lord Sumption considered the tenability test might apply, that is incorrect. Lord Sumption was referring at §35 to cases where the challenge was to the "*rationality of a public authority's view on a difficult question of international law*", such as in the *Corner House* case or the *ICO* case. He was not referring to cases such as this, where the challenge is to the correctness of the Decision-maker's determination of a question of international law, on which basis the Decision was made, that is *Launder/ Kebiline/Heathrow/Benkabouche* type cases.

68. In such a case, as in any public law case, if in the exercise of a power or discretion, the decision maker proceeds under a misapprehension of the law then the court has power to set aside the decision and remit the matter for the decision to be retaken applying the law correctly: *Heathrow Airport Limited* §135. The decision maker is given the opportunity take its decision again on a correct legal basis: *Heathrow* ibid §152-153 by reference to *Launder* and *Kebiline.* As Green LJ noted, there was no suggestion in *R (Corner House Research) v Director of the Serious*

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Fraud Office [2009] 1 AC 756 **[]**[88], the facts of which were very different, that either of those cases was wrongly decided §156-157 (and §66 *Corner House*, cited there).

69. The Respondents argue that, even if the Court takes the view that the Respondents were wrong in law, the Decision will nonetheless be lawful unless the Defendants' view of the law was 'untenable'.

70. That argument was made by the Government in *Heathrow Airport Ltd* and was rejected. Before this Court the Respondents seek to have *Heathrow* overturned. The Respondents' ambition should be rejected; such an approach undermines the rule of law, the principle of good administration and "*risks fostering legal uncertainty at the international level; damning with faint praise.", Heathrow Airport Ltd* §181-182. Lord Sumption in *Benkharbouche*, with whom the other Judges agreed, thought similarly: "[i]*f it is necessary to decide a point of international law in order to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer*." *Benkharbouche*, §35. "*If there is a rule [of international law], the court must identify it and determine*" its application (in that case, state immunity): ibid §36.

71. The Respondents intended to comply with the law in the provision of UK finance. If their decision was based on a mistake of law, it is in the public interest that it should be re-made on the basis of a correct understanding of the law.

72. The Respondents say however, that errors of international law are only exceptionally subject to the normal approach, namely where the relevant Treaty provides a means for its provisions to be litigated, that is, provides for the "*adversarial resolution of disputes*": DGD §31 **[]**[89]. Here, they say that the PA, by Articles 14 and 15 provides for the "*facilitation of implementation by a non-adversarial and non-punitive committee, and for "global stocktake" meetings at five-year intervals*" and as such, say that it would be "*wrong,…for the PA to be interpreted and applied in determining the lawfulness of the decision as if it were a domestic statute.*" DGD §29 **[]**[90]. The Appellant responds as follows:

    a. First, it is incorrect. Article 24 applies UNFCCC Article 14, which allows states to submit disputes to the International Court of Justice; and/or (b) Arbitration in accordance with procedures to be adopted by the COP.

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b. Secondly, nobody is suggesting that the PA should be interpreted as if it were a domestic statute. As an international treaty, it must be interpreted in accordance with Articles 31 and 32 VCLT. Both judges in fact agreed with this: Stuart Smith LJ § 119(3): Thornton §262.

c. Thirdly, in any event, there is no requirement for a Treaty to have an adversarial dispute resolution procedure for the domestic courts to be able to discharge their supervisory function of determining the correct meaning of the law and indeed, ironically, the Government made the opposite argument in *Heathrow Airport Limited* §175, claiming that the existence of a dispute resolution mechanism was a reason to "*stand back*".

d. Fourthly, domestic courts are perfectly able to carry out the interpretative techniques in Article 31 and 32 VCLT without international tribunal jurisprudence, which will often not exist <u>even when</u> a dispute resolution procedure exists in respect of a Treaty. Domestic courts across the world carry out that exercise day in day out. Indeed, their judgments are sources of international law under Article 38 of the Statute of the ICJ. and are necessary to elucidate State obligations.

e. Fifthly, our domestic courts have applied international law where no adversarial dispute resolution procedure applies, including customary international law: e.g. *Benkharbouche*; *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* - [2002] 2 WLR 1353 §28-29 per Lord Nicholls, §114-115 per Lord Steyn[91]; §138-140, 144-149 per Lord Hope **[]**[92]. In so doing, they have not applied a 'tenability approach': see above and further, *A and others v Secretary of State for the Home Department. X and another v Secretary of State for the Home Department* [2005] 2 AC 68 §68 per Lord Bingham **[]**[93]; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening)* [2005] 2 AC 1, §44–45, per Lord Steyn, and §98–100, per Baroness Hale of Richmond **[]**[94]**.**

[91] "Moreover, in the light of the letter of Sir Franklin Berman, the Legal Adviser of the Foreign and Commonwealth Office, of 7 November 1997, describing the United Kingdom's consistent position as to the binding effect of the Security Council Resolutions, it would have been contrary to the international obligations of the United Kingdom were its courts to adopt an approach contrary to its obligations under the United Nations Charter and under the relevant Security Council Resolutions. It follows that it would be contrary to domestic public policy to give effect to Resolution 369 in any way."

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f. As regards *Benkharbouche*, the Respondents stated at the permission hearing "*that [Benkharbouche] was a case where the court was willing to consider an identifiable rule of customary international law because there was an ascertainable answer to a point which it was necessary to consider to decide a justiciable issue*," [Transcript p. 41F **[]**[95]]. That is precisely the case here, save we are concerned with a treaty.

g. Sixthly, for the UK courts to accept a tenable but incorrect approach by the UK to its PA obligations would be highly detrimental. As Lord Nicholls noted in *Kuwait Airways Corpn* at §28 in the context of applying a UN Security Council resolution in order to deny the application of a foreign law: "*[a]s nations become ever more interdependent, the need to recognise and adhere to standards of conduct set by international law becomes ever more important*." That is overwhelmingly the case in the context of climate change, where state acts and omissions have transboundary consequences – and where national rulings on the PA will provide sources of international law for other states.

73. The approach advocated for by the Respondents does not even make sense from the perspective of the executive, within which there was significant dispute about whether or not this funding should be provided [LT/02 **[]**[96]; FDB/03 **[]**[97]; FDB/04 **[]**[98]]. The executive, including the actual decision-makers, as well as the public, whose money is being used, are entitled to know the correct interpretation of the law not just for this Decision but for future decisions. The judiciary cannot close their eyes to this critical public policy need: *Kuwait*, Lord Hope §145.

74. None of the *obiter* statements from *Corner House*, *R (ICO Satellite Limited) v Office of Communications* [2010] EWHC 2010; *R (Elliott-Smith) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 1633 (DGD §28 **[]**[99]), on which the Respondents rely, provide a basis for the Court not discharging its primary function of determining the law.

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CONCLUSION

75. For the reasons set out above, in the Detailed Grounds of Claim, in the skeleton before the Divisional Court and as explained by Thornton J. in her judgment, the Decision is vitiated by illegality and should be quashed.

JESSICA SIMOR QC
KATE COOK
Matrix Chambers

GAYATRI SARATHY
Blackstone Chambers

13 June 2022