Neutral Citation Number: [2023] EWCA Civ 14

Appeal No: CA-2022-000759
Claim No: CO/3206/2020

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE KING'S BENCH DIVISION
DIVISIONAL COURT
Stuart-Smith LJ and Thornton J

Royal Courts of Justice, Strand,
London WC2A 2LL

Date: 13/01/2023

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE BEAN
and
SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS

BETWEEN:

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

Claimant/Appellant

and

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

Defendants/Respondents

and

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

Interested Parties

Jessica Simor KC, Zachary Douglas KC, Kate Cook, and **Gayatri Sarathy** (instructed by **Leigh Day**) for the **Claimant/Appellant** (Friends of the Earth)

Sir James Eadie KC, Richard Honey KC, Hollie Higgins and **Conor Fegan** (instructed by **Government Legal Department**) for the **Defendants/Respondents** (the respondents)

Adam Heppinstall KC and **Freya Foster** (instructed by **Latham & Watkins**) for the **Interested Parties** (the interested parties)

Hearing dates: 6-8 December 2022

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.00am on Friday 13 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Sir Geoffrey Vos MR delivering the judgment of the court:

Introduction

1. The main issue in this appeal is whether the UK Government acted unlawfully in approving UKEF's $1.15 billion investment in a liquified natural gas project in Mozambique (the project). The Divisional Court (Stuart-Smith LJ and Thornton J) could not agree on the outcome, and the application by Friends of the Earth for judicial review of the Government's decision (the decision) was dismissed. Both judges gave substantive judgments, and none of the facts that they recited in their judgments has been contested before us. The argument has, however, assumed a rather different focus in this court.

2. We recognise at the outset that the 197 state parties to the Paris Agreement of 12 December 2015 (the Paris Agreement) said that climate change represented an urgent and potentially irreversible threat to human societies and the planet and "thus require[d] the widest possible cooperation by all countries, and their participation in an effective and appropriate international response, with a view to accelerating the reduction of global greenhouse gas emissions". Notwithstanding that stark statement of the position, this case concerns an application for judicial review of UK Government decision-making and is to be determined, as the parties agree, on the basis of accepted and familiar principles of public law. Nothing we say in this judgment should be construed as supporting or opposing any political view of the issues. Our task is only to establish whether the decision is vitiated by an error of law.

The essential facts

3. The Divisional Court set out the facts on which both sides relied at [1]-[93] and [248]-[270]. Reference should be made to those paragraphs. In this section, we set out only those matters that are essential to understanding our decision. We have recorded the most relevant terms of the Paris Agreement in the annex to this judgment. Reference should be made to the entirety of the Paris Agreement for a full understanding of its provisions.

4. Friends of the Earth is a not-for-profit organisation that undertakes campaigning and other work in furtherance of environmental protection objectives. UKEF is an export credit agency whose mission is to ensure that no viable UK export fails for lack of finance or insurance from the private sector.

5. The project comprises the development of offshore deep-water gas production facilities 50 kilometres from the coast of Northern Mozambique connected to an onshore gas receiving and liquefaction facility. It is to be operated by TotalEnergies E&P Mozambique Area 1 Limitada (Total) and funded via MOZ LNG1 Financing Company Limited. The decision is said to be one of the largest single financing packages ever offered by UKEF to a foreign fossil fuel project. It formed part of a larger package worth in the region of $14.4 billion provided by other countries' export credit agencies, including the USA ($3.75 billion), Japan ($5 billion), South Africa (up to $0.96 billion), Italy (up to $0.95 billion), the Netherlands ($0.75 billion) and Thailand ($0.15 billion) (the figures changed but are given as at mid-2019). Various commercial lenders, including the African Development Bank, and regional banks from Southern Africa

also supported the project. UKEF's support was conditional on Total procuring UK goods and services and is expected to create approximately 2,000 UK jobs.

6. We were told that Mozambique is one of the least developed and poorest countries in the world and is extremely vulnerable to climate change impacts.

7. We will now enumerate in chronological order the main events upon which the challenge to the decision was based.

8. In June 2019, the House of Commons Environmental Audit Committee reported on the scale and impact of UKEF's support for overseas fossil fuel projects including the project. It concluded that calculating Scope 3 emissions (all indirect emissions from the fossil fuels extracted by a project not included in Scope 1 (direct emissions) and Scope 2 (indirect emissions from the generation of purchased electricity)) was essential for an understanding of the full emissions impact of a project. It recommended that the Greenhouse Gas Protocol provided an appropriate methodology.

9. In July 2019, the UK Government issued its Green Finance Strategy saying that it would ensure that any investment support for fossil fuels affecting emissions was in line with the Paris Agreement. The respondents say that this passage was expressly limited to official development assistance (ODA), and did not relate to export finance provided by UKEF, which is not a form of ODA.

10. In March 2020, consultants Wood Mackenzie produced a report entitled *Mozambique LNG – Carbon Emission Benchmarking*, saying that they were unable to model the project's emissions impact with any degree of certainty, but that there was particular scope for the gas produced to displace coal in power generation in China, India and Indonesia to "potentially reduce emissions". Wood Mackenzie said that they could not provide a definitive assessment of the emission reduction associated with the project.

11. On 29 May 2020, UKEF's final climate change report on the project (the CCR) concluded after a detailed analysis that "[g]as from the [project] is … considered by the Government of Mozambique to be an important contributor to the energy transition of Mozambique in line with its NDC [nationally determined contribution] and its Paris Agreement commitments" and that "[t]his aligns with the UK Government's commitment to support developing countries to respond to the challenges and opportunities of climate change as part of its own Paris Agreement obligations". The CCR concluded that the project's Scope 3 emissions would significantly exceed its Scope 1 and Scope 2 emissions.

12. On 1 June 2020, Mr Louis Taylor, Chief Executive of UKEF (Mr Taylor), briefed the Secretary of State for International Trade (SSIT) recommending support for the project. He suggested that the SSIT read the CCR and said at [37] that "UKEF has a requirement to consider Climate Change risks as part of its consideration of support for the Project".

13. On 10 and 12 June 2020, the SSIT and the Chancellor of the Exchequer (CHX) provided their respective consents for the project. The Secretary of State for Business, Energy and Industrial Strategy and the Secretary of State for Foreign and Commonwealth Affairs opposed the project on environmental grounds.

14. On 18 June 2020, Mr Taylor briefed the Prime Minister saying that different Ministers and Departments held opposing views on the project, but that the requisite approvals from the CHX and the SSIT had been received, and that there were material legal risks to a decision either way. The briefing noted that gas was a transition fuel that was likely to displace higher polluting fossil fuels like coal and oil, and result in a net decrease in emissions in countries where that was the case. It was not possible to assess accurately the Scope 3 emissions. Friends of the Earth submitted that these latter points were wrong.

15. On 26 June 2020, the Prime Minister's private secretary indicated that the Prime Minister had reviewed the details of UKEF support for the project and was content for it to proceed. By a separate email, the Prime Minister's office asked the Department for International Development and the Department for Business, Energy and Industrial Strategy to provide advice on how a facility could be created for carbon capture, utilisation and storage to offset the emissions generated through the project.

16. On 30 June 2020, Mr Taylor was given a "very rough" estimate of 805.75 Mt (megatonnes) of carbon dioxide (CO_2) for the Scope 3 emissions over the life of the project. Mr Taylor approved the underwriting minute for the project on 30 June 2020 and cleared the necessary legal documents on 1 July 2020. He gave these approvals in the exercise of his delegated power under section 1 of the Export and Investment Guarantees Act 1991. In that way, the UK Government made the decision to invest in the project without commissioning any detailed quantitative analysis of the Scope 3 emissions.

17. On 1 July 2020, the Commonwealth Development Corporation (the CDC - now called British International Investment), whose shares are wholly owned by the UK Government, issued its climate change strategy document. The CDC said that: "[c]rucially, we will not make new investments … in fossil fuel sub-sectors that we have classified as misaligned with the Paris Agreement", including standalone upstream gas exploration and production. The respondents submitted that this related only to ODA, not UKEF, investments and demonstrated that different policies applied to different parts of Government.

18. On 12 December 2020, the Prime Minister announced to the Climate Ambition Summit that the UK would end 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 UN Climate Change Conference), which was to be held in Glasgow in November 2021.

19. In March 2021, the UK Government issued its *Guidance: Aligning UK international support for the clean energy transition*, which set out the detail of the new policy. The guidance said that the UK Government would "no longer provide new direct financial or promotional support for the fossil fuel energy sector overseas" other than in limited circumstances. It was expressed to apply to both ODA and UKEF support.

The main arguments of the parties

20. Friends of the Earth's grounds of appeal were that: (i) the respondents were required to adopt a view of the Paris Agreement that was more than merely tenable (the tenability issue), (ii) there was no rational basis on which the respondents could conclude that the

decision was compatible with the whole of the Paris Agreement and article 2(1)(c) in particular (the rationality challenge), and (iii) the respondents failed in their duty of enquiry under *Secretary of State for Education and Science v. Metropolitan Borough of Tameside* [1977] AC 1014 at 1065 (*Tameside*) to obtain a quantification of the project's Scope 3 emissions, and their view that the CCR was sufficient was irrational (the *Tameside* challenge). It may be noted at the outset that Friends of the Earth did not contend that the decision was irrational on the basis that it would, if it had been made some 6 months later, have contravened the Government's then climate change policy.

21. The first two issues, which were central to the appeal, resolved into the questions of (i) whether it was an error of law for the respondents to have concluded that the decision was aligned with the UK's obligations under the Paris Agreement, (ii) whether, once the respondents had decided to finance the project on the basis that such funding was in accordance with the UK's obligations under the Paris Agreement, it could ask the court to assess that question on the basis only of whether the respondents' view was or was not a tenable, rather than the correct, one, and (iii) whether this court should determine the proper construction of article 2(1)(c) and, if so, what that construction was.

22. Friends of the Earth contended that, on the true construction of the Paris Agreement, by the application of the rules of interpretation contained in the Vienna Convention on the Law of Treaties (1969) (VCLT), such funding was not in accordance with the UK's obligations. The respondents had accepted throughout that they had indeed concluded that their decision was aligned with the UK's obligations under the Paris Agreement, not merely that there was a tenable view that it was so aligned. Friends of the Earth pointed to [1] of the respondents' skeleton, which said:

> In taking [the decision], as part of its due diligence, UKEF decided to have regard to the extent to which that Decision would be consistent with the UK's international law obligations under the Paris Agreement ... UKEF judged that [the decision] was consistent with those obligations … UKEF concluded that, whilst the Project will have a significant climate change impact by increasing global [greenhouse gas emissions] emissions, [liquified natural gas] can act as a 'transition fuel' by displacing the use of more polluting fuels such as coal and oil and the Project will have transformational economic benefits for the Mozambican economy and has the "*potential to lift millions of Mozambicans out of poverty"*. UKEF rightly considered that the [Paris Agreement] imposes no prohibition on developed countries assisting developing countries in such circumstances.

23. Friends of the Earth submitted that the court was bound by the House of Lords' decisions in *R v. Secretary of State for the Home Department, Ex parte Launder* [1997] 1 WLR 839 at pages 866-8 (*Launder*), and *R v. Director of Public Prosecutions, Ex parte Kebilene* [2000] 2 AC 326 at pages 341-2, 367 and 375-6 (*Kebilene*). Lord Hope had explained at page 867 in *Launder* that:

> If the applicant is to have an effective remedy against a decision which is flawed because the decision-maker has misdirected himself on the Convention which he himself says he took into account, it must surely be right to examine the substance of the argument. The ordinary principles of judicial review permit this approach because it was to the rationality and legality of the decisions, and not to some independent remedy, that Mr. Vaughan directed his argument.

24. That view was supported, argued Friends of the Earth, by Lord Sumption in *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2019] AC 777 (*Benkharbouche*), who had said this at [35]:

> But I decline to treat these examples as pointing to a more general rule that the English courts should not determine points of customary international law but only the "tenability" of some particular view about them. If 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.

25. Since the respondents had accepted that the international law question of whether funding the project was consistent with the UK's obligations under the Paris Agreement was justiciable, Friends of the Earth submitted that the court could not re-introduce justiciability factors and the tenability approach by the back door.

26. In response, the respondents submitted that Friends of the Earth were confusing treaties that had been incorporated into English law with unincorporated treaties that had not. The approach of Friends of the Earth breached the fundamental principle of dualism. Dualism meant that only treaties that had a legislative foothold in domestic law gave rise to legally enforceable rights. Unincorporated treaties did not. (See *J H Rayner (Mincing Lane) Ltd v. Department of Trade and Industry* [1990] 2 AC 418 at pages 499-501 (often referred to as the *Tin Council* case), *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 at [55] (often referred to as *Miller (1)*), and *R (SC) v. Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 at [74]-[91] (*SC*)).

27. The respondents submitted that *Benkharbouche* did not apply to this case because it concerned article 6 of the European Convention of Human Rights (ECHR), which was a provision of international law that had been incorporated into domestic law through domestic legislation (the Human Rights Act 1998). They contended that *Launder* and *Kebilene* were explained by Lord Bingham (with whom Lords Hoffmann, Rodger and Brown agreed) in *R (Corner House Research) v. Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756 (*Corner House*) at [44]:

> … reliance was placed in particular on [*Launder*] and [*Kebilene*]. Both cases concerned decision-makers claiming to act consistently with the [ECHR] at a time when it had not been given effect in domestic law. The courts accepted the propriety of reviewing the compatibility with the [ECHR] of the decisions in question. But there was in the first case no issue between the parties about the interpretation of the relevant articles of the [ECHR], and in the second there was a body of [ECHR] jurisprudence on which the courts could draw in seeking to resolve the issue before it. Whether, in the event that there had been a live dispute on the meaning of an unincorporated provision on which there was no judicial authority, the courts would or should have undertaken the task of interpretation from scratch must be at least questionable. It would moreover be unfortunate if decision-makers were to be deterred from seeking to give effect to what they understand to be the international obligations of the United Kingdom by fear that their decisions might be held to be vitiated by an incorrect understanding.

28. Lord Brown at [65] in *Corner House* echoed what Lord Bingham had said at [44] and added that "[f]or a national court itself to assume the role of determining such a

question (with whatever damaging consequences that may have for the state in its own attempts to influence the emerging consensus) would be a remarkable thing, not to be countenanced save for compelling reasons".

29. The respondents argued that there was no jurisprudence as to the precise legal meaning of the Paris Agreement. Questions as to the interpretation of an unincorporated treaty were for the executive to determine. For those reasons, Lord Brown had been right in *Corner House* to suggest that, in such a case, the decision-makers could not be challenged if they adopted a tenable view as to a point of unincorporated international law. The respondents endorsed [66]-[68] of Lord Brown's speech in *Corner House* (with which Lord Rodger agreed), in which he had approved parts of an article entitled *International Law in Domestic Courts: The Developing Framework* 124 LQR 388 (July 2008) by Philip Sales QC and Joanne Clement (the Sales article). In particular, the Sales article said at pages 405-6 that:

> If the rule of law in *Launder* is treated as unlimited it will lead to very extensive direct application of treaties and international law in the domestic courts, thereby for practical purposes undermining the basic constitutional principle about non-enforceability of unincorporated treaties. One solution might be for the domestic courts, in recognition of the limits of their competence … either to decline to rule or to allow the executive a form of margin of appreciation on the legal question, and to examine only whether a tenable view has been adopted on the point of international law (rather than ruling on it themselves, as if it were a hard-edged point of domestic law) … Adoption of a 'tenable view' approach would be a way … to allow space to the executive to seek to press for legal interpretations on the international plane to favour the United Kingdom's national interest, while also providing a degree of judicial control to ensure that the positions adopted are not beyond what is reasonable.

30. The respondents commended Lord Brown's conclusion that, in that case, he had no doubt that the "tenable view" approach was the furthest the court should go in examining the point of international law. They pointed to Lord Reed's clear statement in *SC* at [84] to the effect that there was "no basis in the case law of the European court, as taken into account under the Human Rights Act, for any departure from the rule that our domestic courts cannot determine whether this country has violated its obligations under unincorporated international treaties".

31. The competing positions of the parties as to the meaning of the Paris Agreement centred on whether article 2(1)(c) imposed positive obligations on the parties. That article provided that the Paris Agreement aimed to "strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: … (c) making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development".

32. The interested parties focussed their submissions on the inequality between developed countries and the least developed countries, of which Mozambique was a prime example. They argued that the project would be economically transformative for Mozambique, and that Friends of the Earth's attack would deny those benefits to its population. Export finance from developed nations would help increase Mozambique's gross domestic product by a projected $67.1 billion. These resources would allow Mozambique to alleviate poverty, improve food security, invest in green energy and to

become climate change resilient. The Paris Agreement itself invoked the equitable principle that least developed countries should be permitted to address their high levels of poverty and low economic growth by exploiting their natural resources so that their emissions peaked later than those of the developed world. All that was in the context, argued the interested parties, that the impacts of climate change had overwhelmingly been caused by the developed nations.

The Divisional Court's decision

33. On the central questions that we have described above, Stuart-Smith LJ adopted the tenable view approach at [106]-[124]. He held at [230]-[231] that he would not "attempt … to give a definitive interpretation of the provisions of the Paris Agreement … or their legal effect", but that UKEF's view that the project was in overall alignment with Mozambique's stated climate policies was tenable. At [241], he held that UKEF had been entitled to form the view that its support for the project was in accordance with the UK's obligations under the Paris Agreement. Thornton J agreed with the tenability analysis at [262]-[270], but disagreed with Stuart-Smith LJ's construction of the Paris Agreement.

34. Stuart-Smith LJ concluded at [122] that the stated aims of the Paris Agreement were in tension "if not in frank opposition to one another". He held at [231] that the Paris Agreement 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". Thornton J's view of the meaning of the Paris Agreement was that it did give the UK hard-edged obligations. She said at [268] 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 1.5°C", although the broad wording of article 2(1)(c) afforded UKEF discretion as to how it demonstrated compliance.

35. Thornton J's central holding, however, was at [331] to the effect that UKEF had "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". Stuart-Smith LJ reached the opposite conclusion on the *Tameside* challenge at [214]-[224], especially [219].

36. After judgment had been reserved, the Divisional Court informed the parties that the two judges could not agree and offered them a re-hearing before a three-judge court. That offer was declined, and the parties agreed that the application should be dismissed, with the Divisional Court being requested instead to grant permission to appeal on the three grounds we have mentioned. Permission was granted accordingly.

Our conclusions in outline

37. Against that background, we have decided that this appeal must be dismissed. In 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.

38. It seems to us that, whilst the authorities to which we have already referred differ as to whether or not a domestic court ought to be reaching firm conclusions as to the proper construction of an unincorporated treaty, it is important first to understand the basic structure of the Paris Agreement. That is particularly important here where the two judges below reached clearly contrasting conclusions on the point. Our conclusion is 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, represent the purposes of the Paris Agreement. The specific obligations are to be undertaken with a view to achieving those stated purposes.

39. Once it is understood that article 2 reflects the purposes of the Paris Agreement, the other questions before the court fall into focus. The purposes in article 2 including "holding the increase in the global average temperature" and "making finance flows consistent with a pathway towards low greenhouse gas emissions" are to be achieved, for example, through the setting of nationally determined contributions (article 4), and through developed countries providing financial resources to assist developing countries (article 9). It is against that background that the questions we have set out at [20] and [21] above need to be resolved.

40. Our conclusions on the tenability issue and the rationality challenge are as follows:

    i) The Paris Agreement is pre-eminently an unincorporated international treaty that does not give rise to domestic legal obligations.

    ii) The question of whether funding the project was aligned with the UK's international obligations under the Paris Agreement is accepted to be justiciable.

    iii) The Paris Agreement was, however, only one of a range of factors to which the respondents decided to have regard in reaching the decision.

    iv) The question of whether it was an error of law for the respondents to have concluded that funding the project was aligned with the UK's obligations under the Paris Agreement must be judged by considering whether the decision-makers adopted a tenable view of that question.

    v) In other words, provided it was tenable for UKEF to reach the view that funding the project was aligned with the UK's obligations under the Paris Agreement, the court could not and should not hold that it had made an error of law.

    vi) UKEF's view was indeed a tenable one, bearing in mind the huge complexities explained in the CCR.

    vii) This conclusion may look as if it is reintroducing justiciability considerations through the back door, but it is actually an application of the constitutional law principle of dualism: the court cannot and should not second guess the executive's decision-making in the international law arena where there is no domestic legal precedent or guidance. The standard for judicial review may be, and is in this case, less intense where the issue is one that is not properly within the province of the domestic court (see, for example, Lord Mance at [53] in *Kennedy v. Charity Commission* [2014] UKSC 20, [2015] AC 455).

viii) These views are not affected by the fact that the respondents said they had formed a definitive view that their approval decision was compliant with the UK's obligations under the Paris Agreement, rather than simply saying there was a tenable view that it was compliant.

41. In relation to the *Tameside* challenge, we have concluded that it too cannot succeed. The 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. It is true that the estimate of Scope 3 emissions given to the SSIT was much smaller than the estimate later given to the Prime Minister, but it is not possible to say that it was irrational to take the funding decision without quantifying the Scope 3 emissions. It was known at the time that the project would go ahead with or without finance from UKEF. The 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. The obligations in question were, anyway, not absolute requirements to restrict the increase in global average temperatures, and to make finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development. These were some of the purposes of the Paris Agreement.

42. We will now proceed to deal with the issues in detail as follows (a) the Paris Agreement, (b) the tenability issue, (c) the rationality challenge, and (d) the *Tameside* challenge.

The Paris Agreement

43. As we said at [38]-[39], the structure of the Paris Agreement is important. Article 3 specifically provides that parties are to undertake ambitious efforts "as defined in Articles 4, 7, 9, 10, 11 and 13" with a view to achieving the purpose set out in article 2. We have set out the most relevant parts of those articles in the annex. They provide, in broad summary, for:

i) Each party to prepare, communicate and maintain successive nationally determined contributions that it intends to achieve;

ii) The establishment of a global goal on enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change;

iii) Developed countries to provide financial resources to assist developing countries and to take the lead in mobilising climate finance;

iv) The establishment of a technology framework;

v) Parties to cooperate to enhance the capacity of developing countries to implement the Paris Agreement, and

vi) The establishment of an enhanced transparency framework to support developing countries in implementation.

44. These actions do not seem to us to be merely aims and aspirations as Stuart-Smith LJ thought. All these actions are to be taken (a) with the aim of strengthening the global response to the threat of climate change, (b) in the context of sustainable development and efforts to eradicate poverty, and (c) for purposes including "[h]olding the increase

in the global average temperature to well below 2ºC above pre-industrial levels" and "making finance flows consistent with a pathway towards low greenhouse gas emissions".

45. It is worth mentioning at this stage that, in our view, Friends of the Earth was correct to say that the temperature goal in article 2(1)(a) was a clear objective of the Paris Agreement to which all parties committed.

46. We do not make these points about the structure and contents of the Paris Agreement by way of construction of its precise meaning, but in order to clarify what it appears, from its wording, to be intending to achieve. We do not find it helpful either to point to conflicts in the wording, nor to seek to derive from its text hard-edged obligations that one might more commonly expect to find in a commercial agreement to be interpreted under domestic law. The Paris Agreement is pre-eminently an international agreement negotiated, as we have said, by some 197 states to deal with a global problem. As Lord Sumption pointed out at [12] in *Al-Malki v. Reyes* [2017] UKSC 61, [2019] AC 735, multilateral treaties are the result of an intensely deliberative process in which the language is minutely debated. The text is the only thing that all the many state parties can be said to have agreed: "A domestic court should not therefore depart from the natural meaning of [in that case, the Vienna Convention on Diplomatic Relations] unless the departure plainly reflects the intentions of the other participating states, so that it can be assumed to be equally acceptable to them". These characteristics apply equally to the Paris Agreement, and are important when one comes to consider the tenability issue.

47. It is also helpful to keep in mind in this context what the Supreme Court said in *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52, [2021] 2 All ER 967 at [71]:

> Notwithstanding the common objectives set out in articles 2 and 4(1), the Paris Agreement did not impose an obligation on any state to adopt a binding domestic target to ensure that those objectives were met. The specific legal obligation imposed in that regard was to meet any [nationally determined contribution] applicable to the state in question.

The tenability issue

48. Friends of the Earth placed reliance under this heading on the mandatory nature of article 31(1) of the VCLT which provides that: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The tenability approach advocated by the respondents was the antithesis of interpretation, was contrary to the principle of effectiveness and was inconsistent with a binding line of authorities starting with *Launder*. This was not a *Corner House* case because there was no evidence that the respondents would have reached the same decision if they had not thought that the project was compliant with the Paris Agreement. Friends of the Earth submitted that, once a question under a treaty is justiciable, the court must determine it.

49. Whilst compelling in one sense, this line of argument ignores constitutional norms and seeks to turn a series of exceptions into the general rule. Lloyd-Jones J (as he then was) put the point well in *R (ICO Satellite Limited) v. Office of Communications* [2010] EWHC 2010 (Admin) when he said at [92] that "… *Launder* and *Kebilene* were treated in *Corner House* as exceptions to the general rule (Lord Brown at [65]) and justified as cases in which there was no live dispute over the provisions of international law in issue or where there was a body of [ECHR] jurisprudence on which the national court could draw in deciding the issue before it (Lord Bingham at [44] and Lord Brown at [66])".

50. The reasons why the decision in this case is to be judged by the "tenability" standard, rather than the "correctness" test, can be summarised briefly as follows:

    i) We accept the respondents' submissions summarised at [26]-[30] above and reiterate our conclusions summarised at [40] above.

    ii) The respondents in this case chose, but were not compelled by domestic law, to take into account the UK's obligations under an unincorporated treaty that formed no part of it.

    iii) There is a lack of clear guidance as to how unincorporated treaties like the Paris Agreement should be construed as a matter of domestic law. The approach mandated by the VCLT does not remedy the absence of parameters that, for example, existed in the case of the ECHR in *Launder*, but do not exist here.

    iv) The Paris Agreement, therefore, was one of a range of factors to which the respondents decided to have regard in reaching the decision. It is not for the courts to allocate weight as between competing factors. Moreover, to make it necessary for the domestic courts definitively to construe unincorporated treaties every time the executive decided to have regard to them in making decisions would be problematic and unworkable for the reasons explained in *Corner House*.

    v) The fact that the respondents said they had concluded that their decision was compliant with the UK's obligations under the Paris Agreement does not affect this conclusion. It must be open to the executive to say that it wants to comply with an unincorporated treaty, even though there may be different views as to what precisely it means. It must also 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.

<u>The rationality challenge</u>

51. Friends of the Earth submitted that the respondents made an error of law in concluding that the decision to finance the project aligned with the UK's obligations under the Paris Agreement. Mr Taylor said that UKEF's analysis of and conclusions on whether the project was consistent with the Paris Agreement were set out in the CCR.

52. Those conclusions were contained in three places in the CCR (emphasis added):

i) First, the CCR said that gas from the project was "considered by the Government of Mozambique to be an important contributor to the energy transition of Mozambique in line with its NDC and its Paris Agreement commitments. **This aligns with the UK Government's commitment to support developing countries to respond to the challenges and opportunities of climate change as part of its own Paris Agreement obligations**".

ii) Secondly, the CCR contained this summary: "It cannot be stated with certainty whether or not the Project will contribute to fossil fuel transition due to the flexibility of the [supply purchase arrangements] and not knowing with any confidence how and where the Project's LNG volumes will be used. This uncertainty is an unavoidable consequence of the Project's off-taking arrangements and could not be resolved with further analysis or due diligence. For this Project, the end-uses are highly likely to be in multiple countries, so the impact of the Scope 3 emissions will contribute to the [greenhouse gas] emissions (and possibly the NDCs) of a range of countries and be spread across them. **Where the Project replaces and/or displaces coal or oil, the Project can be viewed as a transition fuel as it provides lower carbon energy. Where the Project displaces lower carbon fuels or potential use of renewable energy however, it cannot**".

iii) Thirdly, the CCR concluded: "**On balance**, taking the three posited scenarios, it appears more likely than not that, over its operational life, **the gas from the Project will at least replace some and/or displace some more polluting fuels, with a consequence of some net reduction in emissions**".

53. Friends of the Earth contended that science was the starting point. *The Special Report on 1.5 degrees* by the Intergovernmental Panel on Climate Change (IPCC) was crucial, because it included the various possible pathways to low emissions mandated by article 2(1)(c). Mr Taylor had confirmed in his evidence at [102.2] that UKEF had expressly considered whether the decision was consistent with a pathway towards low greenhouse gas emissions and had concluded that it was.

54. The case advanced by Friends of the Earth was not that the decision was irrational because it did not accord with UK Government policy as reflected in the CDC report or the new policy of December 2020 and March 2021 (see [17]-[19] above). It was irrational because, as a matter of law, as the Government itself later acknowledged in these policies, financing the project did not align with the UK's obligations under the Paris Agreement.

55. In our judgment, this argument breaks down for a number of reasons that can now be shortly expressed.

i) Whilst it was known and understood by UKEF that Scope 3 emissions from the project would significantly exceed its Scope 1 and 2 emissions, it was not clear to what extent the project would contribute to fossil fuel transition. If the liquified natural gas entirely displaced coal and oil, it would lead to an overall net reduction in emissions. If it displaced lower carbon fuels, it would lead to an overall net increase in emissions. This uncertainty and the reports and materials obtained by the respondents made clear that the precise outcome could not be predicted.

ii) In that situation, the respondents had to make the decision taking into account all relevant and material factors including the UK's obligations under the Paris Agreement. There was no domestic law requirement for them to be certain that the decision complied with those obligations, even if they did in fact eventually form the view that it did.

iii) Friends of the Earth's argument that the respondents had, in effect, to show that their decision was compliant, as a matter of law, with the UK's obligations under an unincorporated international agreement like the Paris Agreement points strongly, in our judgment, to the appropriateness of the tenability test in these circumstances. The compliance question is hugely complex as the CCR demonstrates. It is beset by uncertainties as to future events that were not and, in many cases, could not be known. It would be unworkable and impracticable if the Government could only make such a decision if it were able to demonstrate that its view of the factual and legal position was correct. In fact, the decision-makers knew that there were possible legal challenges whatever it decided.

iv) In our judgment, the correct standard by which such decisions must be judged is one of tenability. The question under this heading is only whether the respondents' view that the decision aligned with the UK's obligations under the Paris Agreement was a tenable one when it was taken – not with the benefit of hindsight.

v) In our judgment also, and because of the complexity we have mentioned, the respondents' view was indeed tenable. It was supported by the initial Wood Mackenzie report and by the CCR. In essence, however, the argument to the contrary could only succeed if Thornton J at [262]-[268] and Friends of the Earth's submissions as to the proper meaning of the Paris Agreement were correct. In our view, they are not.

vi) To reach this conclusion, we do not believe that it is necessary to take any firm view as to the precise nature of the UK's obligations under the Paris Agreement. It is necessary only to be clear about what the Paris Agreement did **not** oblige the UK to do. As we have already said, article 2(1)(c) does not create an obligation on the UK to demonstrate that its overseas funding was consistent with a pathway towards limiting global warming to well below 2°C and pursuing efforts to 1.5°C. Article 2(1)(c) demonstrably contains the aims and purposes of the Paris Agreement, including "holding the increase in the global average temperature" and "making finance flows consistent with a pathway towards low greenhouse gas emissions".

56. In short, it cannot possibly have been irrational for the respondents to decide to provide finance for the project, when they were being advised that the project could, in some scenarios, align with the UK's obligations under the Paris Agreement. That was at least a tenable view.

The *Tameside* challenge

57. The *Tameside* principle is well established and uncontroversial. As Lord Diplock said in *Tameside* at page 1065: "[T]he question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the

relevant information to enable him to answer it correctly?". Subject to an irrationality challenge, it is for the decision-maker, and not for the court, to decide upon the manner and intensity of the inquiry to be undertaken (*R (Khatun) v. Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37, at [35]). There is a wider margin of appreciation in decision-making involving the application of scientific knowledge or expertise (*R (Mott) v. Environment Agency* [2016] EWCA Civ 564; [2016] 1 WLR 4338, at [68]-[82], upheld by the Supreme Court at [2018] UKSC 10, [2018] 1 WLR 1022).

58. Friends of the Earth relied on six factual propositions: (i) the Environmental Audit Committee had said in June 2019 that quantification of Scope 3 emissions was essential, (ii) Scope 3 emissions dwarfed both Scope 1 and 2 emissions, (iii) Wood Mackenzie had been requested to assess Scope 3 emissions, but had said they could not do so, (iv) there was significant internal criticism of UKEF's failure to quantify the Scope 3 emissions, (v) UKEF also failed to consider the totality of the emissions against the world's remaining available carbon budgets having regard to the relevant timescales for their use, and (vi) when the Prime Minister requested a quantification, one was provided within 24 hours. These and other criticisms are explained in detail in [278]-[329] of Thornton J's judgment.

59. In our judgment, however, the flaw in Thornton J's approach appears from [335] of her judgment where she says that the failure to quantify the Scope 3 emissions and the other flaws in the CCR meant "that there was no rational basis by which to demonstrate that funding for [the project was] consistent with" article 2(1)(c) and a pathway to low greenhouse gas emissions. Article 2(1)(c), as already explained, is an aim and a purpose of the Paris Agreement, not an obligation of the UK Government, with which compliance or consistency must be demonstrated.

60. Moreover, UKEF was entitled, in the context of its decision, to decide to "consider Climate Change risks as part of its consideration of support for [the project]" (see [12] above), without being required to assess those risks mathematically. Mr Taylor's evidence explained the wide range of considerations that UKEF took into account in making its decision.

61. As we have already said, the project was going ahead whether or not UKEF contributed to its financing. The decision was, therefore, not one that could have reduced or avoided the project's Scope 3 emissions.

62. The ultimate question for the court is whether it can be said to have been irrational for UKEF to have taken the funding decision without quantifying the Scope 3 emissions and supplementing the CCR report. Quantification of the Scope 3 emissions did not answer the far more difficult question considered in both the CCR and the Wood Mackenzie report, which was whether, and to what extent, gas from the project would replace more polluting fossil fuels and over what timescale. It was, as we have already said, well understood that Scope 3 emissions would far exceed Scope 1 and 2 emissions.

63. We conclude that UKEF's decisions as to the quantification of the Scope 3 emissions and the adequacy of the CCR were well within the substantial margin of appreciation allowed to the decision-makers. The decision to fund the project was not irrational, even bearing in mind that an estimate of the Scope 3 emissions proved to be obtainable in a short timescale when the Prime Minister, in effect, asked for it. Any estimate is by its

nature uncertain. A failure to make such an estimate as part of a multifaceted decision-making process does not itself render the decision irrational.

Conclusion

64. For the reasons we have given, we dismiss Friends of the Earth's appeal.

Annex

The most relevant terms of the Paris Agreement

65. Article 2 of the Paris Agreement provides:

> 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 to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising 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;
> >
> > (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.

66. Article 3 of the Paris Agreement 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.

67. Article 4 of the Paris Agreement 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.
>
> 4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.
>
> 5. Support shall be provided to developing country Parties for the implementation of this Article, in accordance with Articles 9, 10 and 11, recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions.
>
> 6. The least developed countries and small island developing States may prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstance. …
>
> 19. All Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2 taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

68. Article 7 of the Paris Agreement provides:

> 1. Parties hereby establish the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal referred to in Article 2.

69. Article 9 of the Paris Agreement provides:

> 1. Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention. …
>
> 3. As part of a global effort, developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties. Such mobilization of climate finance should represent a progression beyond previous efforts.
>
> 4. The provision of scaled-up financial resources should aim to achieve a balance between adaptation and mitigation, taking into account country-driven strategies, and the priorities and needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island

> developing States, considering the need for public and grant-based resources for adaptation. …

70. Article 10 of the Paris Agreement provides:

> 1. Parties share a long-term vision on the importance of fully realizing technology development and transfer in order to improve resilience to climate change and to reduce greenhouse gas emissions. …
>
> 4. A technology framework is hereby established to provide overarching guidance to the work of the Technology Mechanism in promoting and facilitating enhanced action on technology development and transfer in order to support the implementation of this Agreement, in pursuit of the long-term vision referred to in paragraph 1 of this Article.

71. Article 11 of the Paris Agreement provides:

> 1. Capacity-building under this Agreement should enhance the capacity and ability of developing country Parties, in particular countries with the least capacity, such as the least developed countries, and those that are particularly vulnerable to the adverse effects of climate change, such as small island developing States, to take effective climate change action, including, inter alia, to implement adaptation and mitigation actions, and should facilitate technology development, dissemination and deployment, access to climate finance, relevant aspects of education, training and public awareness, and the transparent, timely and accurate communication of information. …
>
> 3. All parties should cooperate to enhance the capacity of developing country Parties to implement this Agreement. Developed country Parties should enhance support for capacity-building actions in developing country Parties.

72. Article 13 of the Paris Agreement provides:

> 1. In order to build mutual trust and confidence and to promote effective implementation, an enhanced transparency framework for action and support, with built-in flexibility which takes into account Parties' different capacities and builds upon collective experience is hereby established.
>
> 2. The transparency framework shall provide flexibility in the implementation of the provisions of this Article to those developing country Parties that need it in the light of their capacities. The modalities, procedures and guidelines referred to in paragraph 13 of this Article shall reflect such flexibility.