CO/3093/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN
on the application of
GEORGIA ELLIOTT-SMITH

Claimant

- and -

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY, UK GOVERNMENT
(2) DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND
(3) THE SCOTTISH MINISTERS
(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

SKELETON ARGUMENT ON BEHALF OF THE CLAIMANT
for hearing on 14-15 April 2021

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*References in the form [**PB/***] are to pages of the Permission and Evidence Bundle*

*References in the form [**DB/***] are to pages of the Documents and Disclosure Bundle*

Recommended pre-reading (half day):

- *Claimant's Statement of Facts and Grounds **("SFG")** [**PB/48**]*
- *First Defendant's Detailed Grounds of Resistance **("DGR")** [**PB/201**]*
- *Claimant's Reply [**PB/248**]*
- *Witness evidence of the Claimant and Vähk [**PB/274 and 343**]*
- *Witness evidence of Mr Lewis and Mr Preston on behalf of the First Defendant [**PB/288 and 326**]*

INTRODUCTION AND SUMMARY

1. The UK "emissions trading scheme" **("UK ETS")**, established as the UK left the EU ETS on Brexit, could be a major component of the UK's efforts to help tackle climate change.

2. It could have been established to help drive decarbonisation of the UK economy by creating real incentives for businesses to reduce greenhouse gas **("GHG")** emissions.

3. Indeed, the statutory power under which it is established requires it to be set up to work that way. And it is assumed to have that effect (and is relied on as if it did indeed have that effect) for the purposes of decisions to authorise major infrastructure projects (such as the recent Drax Power Station expansion), as explained further below.

4. But, as below, it has (unlawfully) not actually been set up that way.

5. This case concerns two consequences of the decision by which the Defendants (acting together) established the UK ETS:

    a. The exclusion from it of emissions from municipal waste incinerators, and

    b. the level of the "cap" under the scheme (i.e. the volume of permitted emissions), the effect of which is that the UK ETS does not actually achieve even its statutory purpose.

6. In particular, as explained below, the Defendants' have set the scheme up in such a way that (a) it puts no downward pressure on the emissions and (b) which excludes from its scope all of the (very substantial) emissions from municipal waste incinerators.

7. These failings flow from the errors of law that the Claimant identifies in her two grounds in this claim (for which Morris J granted permission on 1 December 2020):

    a. In exercising the statutory power to set up the UK ETS, the Defendants were required to have regard to (but unlawfully failed to have regard to) the short and medium term imperatives arising under the Paris Agreement on Climate Change. They were "so obviously material that [*they*] had to be taken into account", per the Court of Appeal's conclusion in **R (Plan B Earth) v SSfT** [2020] EWCA Civ 214, paragraph 237). Had they been taken into account, the Defendants may (1) have chosen to include municipal waste incinerators within the scope of the scheme and (2) set the cap at a level that would place downward pressure on GHG emissions including the short and medium term.

    b. The admitted purpose for which the Defendants acted when setting the cap was in order to alleviate pressures on businesses. That was not a lawful purpose for which to be acting in setting up the ETS, because the

relevant statutory power could only lawfully be exercised for the purposes of limiting or encouraging the limitation of emissions. The Defendants could of course have taken into account countervailing factors (such as business competitiveness) in scheme design, but only if they nonetheless still achieved the statutory purpose at issue (per **R v Secretary of State for Foreign and Commonwealth Affairs Ex p World Development Movement Ltd** [1995] 1 WLR 386). The chosen cap, however, puts no downward pressure on emissions and does not achieve the statutory purpose, so those other matters could not lawfully be relied on to dilute its effect.

8. A consequence of this is that the scheme was unlawfully set up. A wider and more serious consequence is that it undermines the UK's efforts to address climate change. There are a number of policy measures in place that could address GHG emissions, but either do not or only do so to a limited extent, because they rely upon the (flawed) assumption that the UK ETS tackles GHG emissions from businesses. The Scheme, thus, not only fails to achieve its own statutory purpose, it also hampers the UK's ability to respond to climate change.
9. The Claimant seeks declarations as to those illegalities so that the Defendants replace the existing UK ETS with a lawfully designed scheme.
10. This skeleton argument is structured as follows:
    a. Why the errors of law identified by the Claimant matter;
    b. Statutory basis for an ETS;
    c. Factual Background;
    d. The cap for the UK ETS does not put downward pressure on emissions;
    e. Ground 4: Failing to act for or meet the statutory purpose;
    f. Ground 1: Failure to have regard for the Paris Agreement; and
    g. Section 31 of the Senior Courts Act 1981.

WHY THE ERRORS OF LAW IDENTIFIED BY THE CLAIMANT MATTER

11. The Defendants have described the function of the UK ETS in ambitious terms, asserting that it will achieve GHG emission reductions:

> "A replacement carbon pricing policy is required to stimulate emissions reduction from large emitters within the industrial, power and aviation sectors currently participating in the EU ETS" (Explanatory Memorandum to The Greenhouse Gas Emissions Trading Scheme Order 2020, paragraph 7.1) [**DB/1516**]
>
> "The UK ETS will cover a significant proportion of emissions within scope of our carbon budgets (between 2013 and 2020 the EU ETS has covered

around a third of UK emissions) and will play an important role in cross-government efforts to deliver the net zero target …" (Consultation Response, paragraph 24) [DB/200]

12. That is not an accurate description of the UK ETS because, as explained below, in reality it fails to put downward pressure on GHG emissions. Despite its inaccuracy, however, the assumption (flawed in the event) that the UK ETS does achieve downward pressure on emissions underpins the design and climate ambition of a range of other policy measures. Those other policy measures are not designed to address GHG emissions because those emissions are assumed to be dealt with by the UK ETS.

13. The consequence is that not only is the UK ETS inadequate (and unlawful), it also undermines other opportunities to reduce GHG emissions and tackle climate change (such as through imposing conditions on development consents under National Policy Statements used as the basis for development consent decisions on major infrastructure projects).

14. That parasitic reliance on the UK ETS (and assumption as to its effect) was recently highlighted by the Court of Appeal's recent judgment in **R (Client Earth) v Secretary of State for Business, Energy and Industrial Strategy and Drax Power Limited** [2021] EWCA Civ 43. That case concerned the relevance of GHG emissions to decisions to grant development consents for power stations burning fossil fuels under the Energy National Policy Statement **("Energy NPS")**. The claim failed in part because (as the Court held) the Energy NPS expressly incorporates the assumption that the EU ETS (now the UK ETS) tackles GHG emissions (which was to be relied on to bring GHG benefits from the development in question). It says at paragraph 2.2.12 (see paragraph 13 of the judgment):

> "[the] EU Emissions Trading System … forms the cornerstone of UK action to reduce greenhouse gas emissions from the power sector"

15. The Energy NPS goes on to state that GHG emissions do not need to be accounted for when granting and setting conditions on development consents because of that assumption. It says at paragraph 5.2.2 of EN-1 (see paragraph 30 of the judgment):

> "5.2.2 CO2 emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology). However, given the characteristics of these and other technologies … and the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS … , Government has determined that CO2 emissions are not reasons to prohibit the consenting of projects which use these technologies or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs (e.g. the CCR and, for coal, CCS

requirements). Any ES on air emissions will include an assessment of CO2 emissions, but the policies set out in Section 2, including the EU ETS, apply to these emissions. The IPC does not, therefore, need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO2 emissions or any Emissions Performance Standard that may apply to plant." (emphasis added)

16. It repeats this conclusion at paragraph 2.5.2 of EN-2 (which relates specifically to fossil fuel power installations) (see paragraph 32 of the judgment).

17. The Energy NPS could have been used to place downward pressure on GHG emissions; more conditions could have been imposed on development consents granted under it that would cap emissions. That is not the case, because it assumes that the ETS will tackles those emissions. But, of course, that only works if the UK ETS does that job.

18. Unsurprisingly, since it was not an issue in the Drax claim or appeal (nor could it have been), neither the Court of Appeal (nor the High Court at first instance) considered whether the ETS actually worked like that. On well-established principles, they assumed and were required to assume – for the purposes of evaluating the Drax DCO – that the ETS regime would do its job. That assumption then underpinned the Court's reasoning that the Defendant (the First Defendant in the present claim) had lawfully decided that the climate change impacts of the proposed power installations were outweighed by other factors: see paragraphs 84-97, particularly:

> "86. Seen in this context, the policy itself is plain in its meaning. It says that '… CO2 emissions are not reasons to prohibit the consenting of projects which use these technologies …'. And it adds that although an assessment of CO2 emissions will be included in an environmental statement for a proposed development, the policies in Part 2 of EN-1 apply to them, and in decision-making it is unnecessary 'to assess individual applications in terms of carbon emissions against carbon budgets …'. The same policy, but specifically for 'fossil fuel generating stations', appears in paragraph 2.5.2 of EN-2, which acknowledges that 'CO2 emissions are a significant adverse impact of fossil fuel generating stations'.
>
> …
>
> 88. The Secretary of State's understanding of the policy was, in my view, the correct one. Having concluded that 'the presumption in favour of fossil fuel generation' applied, she directed herself to consider 'whether any more specific and relevant policies … in the relevant NPSs clearly indicate that consent should be refused', given the examining authority's conclusion that 'there would be significant adverse effects from the [development] in respect of GHG emissions which gave rise to a perceived

conflict with the decarbonisation objective of EN-1' (paragraph 4.14). She thought not, for three reasons. First, as she reminded herself in the light of section 2.2 of EN-1, 'climate change and the UK's GHG emissions reduction targets contained in the [Climate Change Act] have been taken into account in preparing the suite of Energy NPSs' (paragraph 4.15 of the decision letter). Secondly, having in mind the policy in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2, she acknowledged 'the significant adverse impact of the proposed Development on the amount of greenhouse gases that will be emitted to atmosphere', but recognised that the policy 'makes clear that this is not a matter that … should displace the presumption in favour of granting consent' (paragraphs 4.15 and 4.16). And thirdly, she concluded, unequivocally, that "the Development's adverse carbon impacts do not lead to the conclusion that the Development is not in accordance with the relevant NPSs or that they would be inconsistent with the [Climate Change Act]" (paragraph 4.17)." (emphasis added)

19. In other words, it was not necessary to focus within that development consent process on the GHG emissions involved (and the need to reduce GHG emissions) because that would happen via the ETS, within which the power station would fall.

20. The UK ETS is, therefore, not only important in its own right, but it also has a crucial function in the design of other climate-related policies and efforts to reduce GHG emissions.

21. This claim scrutinises the legality of the UK ETS. Unless the UK ETS is properly designed it will be both unlawful and a significant hindrance to the UK's efforts to tackle climate change. That necessary proper design is: a cap set at the right level of ambition and with appropriate coverage of GHG emitting installations. This is the concern that underlies both of the Claimant's grounds.

LEGAL BASIS FOR AN ETS

Climate Change Act 2008

22. Section 44 of the Climate Change Act **("CCA 2008")** provides that:

> "(1) The relevant national authority may make provision by regulations for trading schemes relating to greenhouse gas emissions.
>
> (2) A "trading scheme" is a scheme that operates by—
>
> (a) limiting or encouraging the limitation of activities that consist of the emission of greenhouse gas or that cause or contribute, directly or indirectly, to such emissions, or

(b) encouraging activities that consist of, or that cause or contribute, directly or indirectly, to reductions in greenhouse gas emissions or the removal of greenhouse gas from the atmosphere."

23. See also the Explanatory Notes to the CCA 2008 [DB/20], quoted in the Claimant's Reply [PB/261]).

24. It follows that an ETS is only lawful if established for one or other (or both) of the purposes set out in section 44(2): limiting or encouraging the limitation of activities that cause GHG emissions or encouraging activities that reduce GHG emissions.

Pergau Dam

25. The case law is clear in saying that other considerations can come into play in scheme design, but only provided that the statutory purpose(s) is always achieved. In other words, those other considerations cannot provide a lawful basis not to achieve the statutory purpose: R v Secretary of State for Foreign and Commonwealth Affairs Ex p World Development Movement Ltd [1995] 1 WLR 386 ("Pergau Dam"), at pages 401-403, particularly:

> "The Secretary of State is, of course, generally speaking, fully entitled, when making decisions, to take into account political and economic considerations such as the promotion of regional stability, good government, human rights and British commercial interests. In the present case, the political impossibility of withdrawing the 1989 offer has been recognised since mid-April of that year, and had there, in 1991, been a developmental promotion purpose within section 1 of the Act, it would have been entirely proper for the Secretary of State to have taken into account, also, the impact which withdrawing the 1989 offer would have had, both on the United Kingdom's credibility as a reliable friend and trading partner and on political and commercial relations with Malaysia. But for the reasons given, I am of the view, on the evidence before this court, that there was, in July 1991, no such purpose within the section. It follows that the July 1991 decision was, in my judgment, unlawful. This, of course, serves to reinforce the conclusion already indicated, that the Applicants have standing.
>
> …
>
> When the decision was made in July 1991, there was nothing in aid terms to justify the use of public money for the Pergau project. The Secretary of State's power to provide financial assistance under section 1(1) of the 1980 Act was not triggered. Had it been, that would have brought into play the opportunity for the Secretary of State to take into account

political and wider economic considerations, such as British commercial interests. But it was not." (underlining added)

26. As explained below, one of the key legal problems here is that the Defendants have taken other factors as the basis for designing a scheme which (as a result) does not achieve the statutory purpose. That is simply unlawful.

Decision taken by the Devolved Administrations

27. The other point to note is that UK ETS is a UK wide scheme in an area of devolved competence. The "relevant national authority" with the power to establish the scheme in section 44 CCA 2008 is each of the Defendants independently. None of the Defendants can exercise the section 44 power on behalf of any of the others.

28. It follows that, in order for the scheme (which was adopted by them all) to be lawful, each Defendant must independently have made the decision lawfully. That particularly matters when, as considered further below, one considers the factors known to and considered by each of them.

FACTUAL BACKGROUND

29. The Defendants' decision is contained in a response to a consultation on the UK ETS, *The future of UK carbon pricing: UK Government and Devolved Administrations' response* ("the Response") dated June 2020 [DB/193].

30. The Defendants have since remade identical decisions when they established the scheme through the *Greenhouse Gas Emissions Trading Scheme Order 2020/1265* ("the UK ETS Order") [DB/1425]. The Defendants have agreed that any decision the Court makes in respect of the Response would apply to the UK ETS Order as well [PB/192, 194, 196].

31. The UK ETS is made under section 44(1) CCA 2008. It replaced the pre-existing EU ETS with Brexit on 1 January 2021.

32. The fundamental idea of an ETS is to be a 'cap and trade' system: it sets a total cap on the volume of emissions from the covered sectors of the economy; the cap is divided into allowances, which installations can purchase at auctions or by trading with each other. The theory is that the "trading approach helps to combat climate change in a cost-effective and economically efficient manner" (see the *What is the EU ETS?* Extract from the *EU ETS Handbook* [DB/21]).

33. However, it can only actually do that if the cap is set at a level that will cause the price of allowances to be higher than the cost of taking steps to reduce emissions (i.e. it has to put downward pressure on emissions to incentivise change). It also can only do that if it the scheme includes the relevant GHG emissions sources within its scope.

THE CAP FOR THE UK ETS DOES NOT PUT DOWNWARD PRESSURE ON EMISSIONS

34. The Defendants' decision-making Response document correctly recognised the importance of the cap in determining whether the UK ETS will apply downward pressure to emissions:

> "25. The overall cap for the UK ETS will determine the limit on total emissions allowances." [DB/200]

35. Similarly, the Joint Emissions Trading Scheme Board (which consisted of representatives from the four Defendants) acknowledged [DB/1250]:

> "In an ETS, the cap sets the ambition level"

36. However, the Defendants together decided that the cap for the UK ETS in its first year should be 156 million tonnes of CO_2 equivalent emissions **("mtCO_2e")** (Response, paragraph 60 [DB/206]). The Defendants described this as the "notional -5% cap" throughout their documents, but that label is addressing a different point, and should not be taken as indicating actual downward pressure on emissions. That is seen in the fact that the accompanying impact assessment explained that the "business as usual" **("BAU")** emissions (i.e. what is already happening in the real world) for the same period as substantially less than the proposed cap: "ranging from around 126 to 131 MtCO2e" (paragraph 23 [DB/267]).

37. The effect is that the cap is set higher than BAU, so there is a substantial surplus of allowances (in the order of 15-24%). The documents disclosed by the Defendants in this claim admit (which the published response document failed to acknowledge) that this cap is incapable of applying downward pressure to GHG emissions. The Policy Design Group within the First Defendant's Department, for example, explained to him, and he is therefore taken to have proceeded on the basis, that [DB/1260]:

> "Based on these [Marginal Abatement Cost Curves] – and assuming hedging behaviour continues unchanged – our modelling shows that some abatement could theoretically be driven by the Notional -5% and Notional -10% caps.
>
> Notional -10% has more theoretical potential to drive additional abatement but only if our hedging assumptions hold and carbon values are very high.
>
> Even if carbon values are very high, there remain practical barriers to delivering such levels of abatement in early years.
>
> No abatement would be driven in either scenario if the power sector chooses not to build up hedges as we expect."

38. Similarly, the Joint Emissions Trading Scheme Board of officials from each of the four Defendants' departments recognised that a cap above the BAU emissions would be incapable of putting downward pressure of emissions [DB/1250]:

> "In an ETS, the cap sets the ambition level. Setting the ambition level of the UK ETS at the level of the notional phase IV cap would mean that the cap is higher than projected BAU emissions.
>
> This means that no effort would be needed from participants to achieve the set level of ambition and we would not expect any traded sector abatement to be driven by the UK ETS."

39. This was reflected in the candid advice to the First Defendant that downward pressure would not be achieved by the chosen cap (13 January 2020 [DB/1451]):

> "Little/No abatement is needed to meet the Notional Cap or Notional - 5% cap across our range of demand scenarios (see fig. 1)."

40. Similarly, the Fourth Defendant was advised in January 2020 that setting the cap above the level of BAU emissions would lead to there being no downward pressure on emissions [DB/2483]:

> "The Cap & Trajectory
>
> This sets the ambition level for the scheme. Analysis using the most recent available data applied to BEIS economic models suggests setting the ambition level of the UK ETS at the notional phase 4 EU ETS cap would mean that the cap is higher than projected business as usual (BAU) emissions. This means the policy would have no effect at stimulating additional decarbonisation. This is not consistent with UK wide Ministerial ambition to drive action on climate change."

41. The First Defendant's DGR asserts that there will nonetheless be downward pressure from the UK ETS (paragraph 135 [PB/238]). But that is not the position of (or supported by) the Defendants' own evidence.

42. This assertion is based on p.14 of the Impact Assessment which states that there could be abatement of 4-11 $mtCO_2e$ from 2021-2024 [DB/277]. This says:

> "The main driver of the carbon values at this end of the range in this IA is therefore the introduction of the ARP, which in our model reduces the supply of allowances to the point at which the £15/tCO_2e reserve price is achieved. At this value, we estimate that it would be cost-effective for UK participants to deliver around 4 $MtCO_2e$ in total from 2021 to 2024." (paragraph 62)

43. That expressly recognises that the cap of 156 $mtCO_2e$ will generate surplus allowances. The price will then be determined by the Auction Reserve Price ("ARP") rather than the market. The Defendants have not identified any basis for the claim that that process would lead to abatement and it is contradicted by

the contemporaneous documents. Thus, for example, the Committee on Climate Change **("CCC")** had explained to the Defendants on 20 March 2020 that the chosen cap with the chosen ARP would be inadequate [**DB/190**]:

> "If the Government chooses to keep the cap as proposed, then a higher Auction Reserve Price will be necessary since this will effectively become the price-setting mechanism and not merely a backstop."

44. That is then borne out by the Defendants' disclosure, which acknowledges that the chosen ARP will not compensate for the inadequacies of the chosen cap and will not apply downward pressure either. For example, the First Defendant's Policy Design Group recognised that the ARP of £15 would discourage investment in abatement measures (i.e. not apply downward pressure) because it would be too low [**DB/1404**]:

> "[£15 ARP] Could be perceived as reducing the price of carbon compared to the current system and therefore weaken investment signal.
>
> RISK: Reputational risk to UK as a climate leader.
>
> …
>
> Based on current EUA price projections, a £15 ARP will be below EUA [EU average] prices giving UK industry a competitive advantage, though EUA value uncertainty ranges could see them fall to near this level. As with [ARP at] £5, there is the potential for retaliatory measures from the EU, though this is considered unlikely in the immediate term for which we are considering an ARP.
>
> RISK: ARP set lower than EUA values could hamper linking negotiations, but we think this risk is manageable."

45. This is contrary to the publicly stated assumptions in the Impact Assessment on which the First Defendant now relies. The effect is that both the cap and the ARP, and thus the scheme as a whole is not demonstrated to be capable of applying downward pressure to emissions.

46. That is relevant to the Claimant's ground 4 because it shows that the Defendants knew there would be no downward pressure when they chose to set the cap above the level of BAU emissions.

47. What follows is that, as outlined in the next section, they did not act so as to limit or encourage the limitation of GHG emissions (which is the only lawful purpose for the scheme). Instead, they acted for the extraneous purpose of assisting businesses to be competitive and alleviating pressures associated with Brexit. Having failed to achieve the statutory purpose, acting for that extraneous purpose was unlawful.

GROUND 4: UNLAWFULLY FAILING TO ACT FOR OR MEET THE STATUTORY PURPOSE

48. The simple point is that the Defendants did not – in the scheme design – achieve the statutory purpose in section 44 CCA 2008. Put another way, they did not act so as to advance that purpose.

49. Instead (as they candidly admit) they acted for (or justified not achieving statutory purposes by reference to) the extraneous purpose of assisting businesses to be competitive and alleviating pressures associated with Brexit.

50. As above, that could have been lawfully taken into account in the detailed design of a lawful scheme (i.e. a scheme which achieved the statutory purpose); but it was not a lawful basis for designing a scheme that which did not achieve those purposes.

51. The published Response itself makes the position clear [DB/206]:

> "59. The UK is committed by law to reducing emissions to net zero by 2050, and the UK ETS will play a key role in decarbonising the power sector, EIIs [energy intensive industries] and aviation. However, it is important that in meeting this commitment the UK Government considers the traded sector's competitiveness, and other pressures that businesses currently face as a result of our departure from the EU. In addition, the UK ETS will be a new emissions market, whereby any uncertainties around how the market will respond will need to be considered when setting the cap.
>
> 60. To balance these objectives, the cap for a UK ETS will initially be set at 5% below the UK's expected notional share of the EU ETS cap for Phase IV of the EU ETS. Based on the proposed design scope, this equates to around 156 million allowances in 2021. These cap figures include our proposed aviation scope." [underlining added]

52. In other words, the objectives being pursued were not the statutory objectives; and the effect was a failure to achieve the statutory objectives.

53. Explaining that further, the briefing to the Fourth Defendant on 22 January 2020 said that the cap would be set above the level of BAU emissions because of concerns about the impact of Brexit on businesses [DB/2485-2486]. In particular, the First Defendant's officials notably wanted to avoid the risk of any downward pressure having a negative effect on businesses even in the latter stages of the first decade (first "phase") of the UK ETS:

> "BEIS had also analysed notional a [*sic*] -10%[1] decrease in the total cap, which would mean the number of allowances would start above BAU in early years (allowing businesses to manage the impact of Brexit) and then

[1] The -10% cap considered here was even tighter than the -5% cap actually chosen

further into the phase would take effect to create more pressure to decarbonise.

Whitehall officials were nervous about this approach particularly the response of industry to the policy, so a compromise has been brokered. Officials are jointly recommending a day 1 cap of 5% below the notional EU cap, demonstrating a direction of travel."

54. The subsequent briefing to the Fourth Defendant on 27 April 2020, which is heavily redacted, confirms this. It shows that "the current economic slowdown due to Covid-19" motivated the decision to continue with the chosen cap of 156 million allowances [DB/2498].

55. Similarly, the Third Defendant was told on 30 April 2020 that the CCC's advice of 20 March 2020 to tighten the cap was rejected, not in order to ensure that the UK ETS "functioned effectively" (as the First Defendant now claims) or to advance the statutory purpose, but rather to protect businesses from the pressures of competition [DB/2466-2467]:

> "The UK Government is seeking your agreement to continue with the -5% proposal for the interim UK ETS cap with future tightening (and the Auction Reserve Price of £15), as agreed at the February Quadrilateral, despite the CCC advice.
>
> The UK Government's rationale is that tightening the cap further would risk the economic recovery after COVID-19, and that the CCC's detailed advice in CB6 (due later this year) is needed to inform a net zero consistent UK ETS cap"

56. The Second Defendant was advised in October 2020 to agree to the cap and set up of the UK ETS on the basis that it was balance of climate ambition with business competitiveness [DB/2458]. Having failed to achieve the statutory purpose, however, this was not a "balance" lawfully open to the Defendants.

57. The advice for the First Defendant's ministers on 16 April 2020 also made clear that the purpose for rejecting the CCC's advice of 20 March 2020 (and, thus, the purpose pursued in the choice of the cap) was in order to avoid putting additional pressures on businesses in light of COVID-19 [DB/1535]. It made clear that neither the statutory purpose, nor more generally a desire to ensure the effective functioning of the market, were the purpose behind the chosen cap:

> "7. The CCC advised that our proposal on the cap at the starting point of the new UK ETS market was not tight enough, potentially leading to an initial oversupply of allowances in the market, and that it would be more appropriate to set the cap based on actual UK emissions (rather than the UK's expected notional share of the EU ETS cap). They acknowledged some headroom may be needed, however.

8. In light of the potential over-supply, the CCC indicated their preference for a higher ARP under the current plans for the cap but noted that £15 could work if the cap was tightened. Their rationale being that because of the loose cap, the price will sit at the ARP, which would be below the EU ETS price (notwithstanding any effects of Covid19).

9. Our legal obligation is that we must obtain and take into account the advice from the CCC2, but we are not obliged to follow their advice. Although it is unusual to not follow their advice, circumstances have moved on significantly in terms of Covid since the advice was given and we are fundamentally in agreement with the CCC in our intention to, in the near term, align the cap to a net-zero consistent trajectory."

58. The political considerations being discussed in those passages are, of course, not matters for the court. The court is concerned only to ensure that the scheme is lawful. But, as above, the scheme is only lawful if created by a lawful exercise of section 44 and that means having been created for one or other of the purposes it sets out.

59. Just as, in Pergau Dam, the court was not – in ascertaining the legality of the proposal – concerned with the political merits of the considerations which had led to the design of a scheme that did not achieve the statutory purpose, the court here is not concerned with the merits of the thinking which led to a ETS that does not achieve the statutory purpose.

60. To be clear: that is not the court taking any view at all on whether those other factors are good or bad (which is not for the court); the point is that they simply do not (or should not have) come into play without the statutory purpose nonetheless always being achieved.

61. As a result of the above, the Defendants have failed to act for the statutory purpose, failed to achieve that purpose in fact and instead unlawfully acted for the extraneous purpose of alleviating business competitiveness.

GROUND 1: FAILURE TO CONSIDER THE IMPERATIVES OF THE PARIS AGREEMENT

62. The Claimant's ground 1 is that the decision to exclude municipal waste incinerators ("MWIs") from the UK ETS and the decision to set its cap at 156 $mtCO_2e$ were made by Defendants without having regard to mandatory relevant considerations, namely the short and medium term imperatives set out in the Paris Agreement.

The evidence

63. As noted above, the UK ETS is a UK wide scheme in an area of devolved competence. The "relevant national authority" with the power to establish the scheme in section 44 CCA 2008 is each of the Defendants independently. None of the Defendants can exercise the section 44 power on behalf of any of the

others. It follows that, in order for the scheme to be lawful, each Defendant must independently have made the decision lawfully.

64. That is significant here because the Second, Third and Fourth Defendants have provided little evidence (beyond what is mentioned in the Response document itself) of the matters they took into account when reaching their decisions.

65. The First Defendant has provided evidence as to what was considered, but it is overwhelmingly evidence as to what was considered by civil servants, and not evidence as to what the Secretary of State himself knew or considered, which is what actually matters,

66. In particular, the First Defendant has provided material from civil servant witnesses who seek to augment the contemporaneous decision-making documents by saying (for example) that they took the short and medium term imperatives of the Paris Agreement into account (despite the absence of reference to this in the disclosed contemporary materials). But this is not admissible in a challenge to the legality of the First Defendant's decision as it does not go to what the actual decision-maker (the Minister) knew. The relevant decisions were taken by Ministers personally. In such cases, a Minister only knows what he or she is actually told and is not taken to know what the civil servants know simply because they know it, as McCombe LJ explained in **Bracking v Secretary of State for Work and Pensions** [2013] EWCA Civ 1354 at paragraph 26(3):

> "The relevant duty [the Public Sector Equality Duty] is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154 at [26-27] per Sedley LJ."

67. Mr Lewis's witness statement is also "after the event" evidence. It is inconsistent with the contemporaneous documents and is inadmissible, as the court explained in **R (United Trade Action Group Ltd v TfL** [2021] EWHC 73 (Admin), paragraph 12:

> "the Court should take a strict approach to the admissibility of "after the event" evidence, limiting its consideration to material which was demonstrably taken into account by the Defendants when the decisions were taken."

68. Even if submitting the evidence of what civil servants in London thought about at the time were a legitimate response to the claim – which it is not (because it says nothing about what the decision-maker knew) – it would apply only to the First Defendant.

69. No similar evidence has been provided by the remaining Defendants. It follows that these passages in the witness statements of Mr Lewis, on which the First Defendant relies at paragraph 116 of the DGR [PB/232], are no answer to this ground. Instead, the lawfulness of each Defendant's decision has to be based on the contemporaneous decision-making documents.

What follows

70. The remainder of this section deals with:

    a. The short and medium-term imperatives in the Paris Agreement;

    b. The substantial GHG emissions left unabated by the exclusion of MWIs from the UK ETS, and the relevance of this to the imperatives of Paris Agreement;

    c. The cap for the UK ETS, and the relevance of this to the Paris Agreement imperatives;

    d. The reasons why the short and medium-term imperatives of the Paris Agreement were mandatory relevant considerations; and

    e. The evidence that each of the Defendants failed to have regard to this mandatory relevant consideration.

The short and medium-term imperatives of the Paris Agreement

71. The primary imperatives of the Paris Agreement are provided for by Articles 2(1) and 4(1) (as noted in SFG, paragraph 11 [PB/53]), namely:

> "Article 2
>
> 1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:
>
> > (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
>
> …
>
> Article 4
>
> 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." (emphasis added)

72. These Articles seek to limit global temperature increases to 1.5°C above pre-industrial levels **and** (alongside that and in any event) to reach peak global emissions and start to reduce them as soon as possible.

73. All that requires substantial GHG emission reductions in the short and medium-term. i.e. the Paris agreement is about much more than just achieving "net Zero" by 2050. The trajectory to net Zero is also fundamental. In particular, the climate change impact of GHG emissions is cumulative. That is in part because the greater the volume of emissions in the short and medium term, the harder it will be to achieve the objectives of the Paris Agreement, because as the IPCC explained in its Special Report (by reference to the problem being the accumulation of CO_2 over time), *Global Warming of 1.5°C* (pp.126-127) [DB/57-58]:

> "The later emissions peak and decline, the more CO2 will have accumulated in the atmosphere. Peak cumulated CO2 emissions – and consequently peak temperatures – increase with higher 2030 emissions levels (Figure 2.12). … Based on the implied emissions until 2030, the high challenges of the assumed post-2030 transition, and the assessment of carbon budgets in Section 2.2.2, global warming is assessed to exceed 1.5°C if emissions stay at the levels implied by the NDCs until 2030 (Figure 2.12). The chances of remaining below 1.5°C in these circumstances remain conditional upon geophysical properties that are uncertain, but these Earth system response uncertainties would have to serendipitously align beyond current median estimates in order for current NDCs to become consistent with limiting warming to 1.5°C."

74. As explained at SFG paragraphs 20-24 [PB/57-59], the Paris Agreement obligations are not co-extensive with the UK's obligation in section 1 of the Climate Change Act 2008 to achieve net-zero GHG emissions by 2050 or meet the interim carbon budgets. The Paris Agreement requires a specific climate outcome (a 1.5°C temperate increase, and a global peak of emissions as soon as possible). The net-zero commitment and the climate budgets require gradual reductions in emissions on a trajectory to 2050. But they are not co-extensive, because the net-zero commitment is in practice insufficient alone to meet the Paris Agreement obligations. The IPCC made this clear in its Special Report, *Global Warming of 1.5°C* [DB/54, 57-58]]:

> "Under emissions in line with current pledges under the Paris Agreement (known as Nationally Determined Contributions, or NDCs), global warming is expected to surpass 1.5°C above pre-industrial levels, even if these pledges are supplemented with very challenging increases in the scale and ambition of mitigation after 2030 (*high confidence*). This

increased action would need to achieve net zero CO_2 emissions in less than 15 years. …

The later emissions peak and decline, the more CO_2 will have accumulated in the atmosphere. Peak cumulated CO_2 emissions – and consequently peak temperatures – increase with higher 2030 emissions levels … Based on the implied emissions until 2030, the high challenges of the assumed post-2030 transition, and the assessment of carbon budgets in Section 2.2.2, global warming is assessed to exceed 1.5°C if emissions stay at the levels implied by the NDCs until 2030" (emphasis added)

75. This is accepted by the First Defendant in Mr Lewis's witness statement (paragraph 29), where it is stated that: "The Government does not dispute that the Paris Agreement has mitigation aims that cannot be met simply through setting a net zero GHG target by 2050" [PB/294].

76. The May 2019 advice from the CCC [DB/798] (quoted by the Defendants at paragraph 27 of the DGR [PB/207]) also makes clear that, whilst the net-zero commitment is "consistent with" the Paris Agreement, that does not mean that aspiring to net Zero does all that needs to be done because the net-zero commitment has to be "coupled with ambitious near-term reductions in emissions" for there to be even a 50% changes to meeting the 1.5°C commitment (a key aspect of the Paris Agreement):

> "A net-zero GHG target for 2050 would respond to the latest climate science and fully meet the UK's obligations under the Paris Agreement:
>
> …
>
> - If replicated across the world, and coupled with ambitious near-term reductions in emissions, it would deliver a greater than 50% chance of limiting the temperature increase to 1.5°C." (emphasis added)

77. The First Defendant suggests (in reliance on R (Packham) v Secretary of State for Transport [2020] EWCA Civ 1004) that the Paris Agreement has been "translated" into the CCA 2008. But that suggestion is based on a misreading of paragraph 95 of Packham. In that paragraph, the Court explained that it was concerned with "the main aspiration of the Paris Agreement". There are several aspirations and aspects to the Paris Agreement: one of them (achieving net-zero emissions by the latter half of the 21st Century) is broadly analogous with the commitment to achieving net-zero emissions by 2050. To the extent that any of the Paris Agreement is translated into domestic law, it is this aspect. This says nothing about the other imperatives arising under the Paris Agreement.

78. Even if it were correct that the long-term aspects of the Paris Agreement had been translated into the CCA 2008, that is clearly not the case in respect of the

short and medium-term aspects. The CCA 2008 addresses the short and medium-term though carbon budgets set under its section 4. The next (fourth) budget (for 2023-2027)[2] and the following (fifth) budget (for 2028-2032)[3] were set before the UK had ratified the Paris Agreement (on 18 November 2016). These budgets were set prior to the existence of (and so necessarily without reference to) the obligations under Articles 2(1) and 4(1) of the Paris Agreement. They also substantially pre-date the amendment of section 1 CCA 2008 committing the UK to net-zero by 2050 on 27 June 2019, and so to the extent that amendment "translated" the Paris Agreement into domestic law, it had no impact on the content of these budgets[4]. There is no plausible basis on which these budgets can be said to "translate" or implement the Paris Agreement as a result. These are the budgets that cover the short and medium-term, which is exactly the period to which this claim relates.

79. None of this is to say that the Defendants were legally obliged to act consistently with the Paris Agreement. Rather, it is to demonstrate the short and medium-term imperatives of the Paris Agreement were a different set of considerations to the net zero commitment; all of which were relevant to the Defendants' decision and had to be taken into account. As explained below, no consideration at all was given to the short and medium-term imperatives of the Paris Agreement by any of the Defendants.

GHG emissions from MWIs and the relationship to the short and medium-term aspects of the Paris Agreement

80. MWIs incinerators generate energy from the combustion of waste. They are a significant part of the UK's power sector, the rest of which is within the scope of the UK ETS.

81. The implications of this omission are substantial: on the Defendants' own statistics, incinerators released 6.3 $mtCO_2e$ in 2018 (see the statement from Lord Duncan, then Parliamentary Under Secretary of State for the Department of Business, Energy and Industrial Strategy dated 5 February 2020 [DB/149]). The CCC indicates that this is an underestimation, stating that 6.8 $mtCO_2e$ were emitted by MWIs in 2018 (see page 79 of the CCC's June 2020 report, *Reducing UK Emissions* [DB/305]).

82. The scope of the UK ETS for 2021 is 126-131 $mtCO_2e$ (see, the June 2020 Impact Assessment [DB/267]). The emissions from MWIs are, thus, equivalent to approximately 5.4% of the entire volume of GHG emissions within the scope of the UK ETS, and alone make up 0.8% of total UK GHG emissions on the First Defendant's own evidence [PB/333]. This exclusion removes (or at the very least, dramatically reduces) any incentive for MWIs to reduce their GHG emissions.

[2] The Carbon Budget Order 2011/ 1603 (29 June 2011)

[3] The Carbon Budget Order 2016/785 (20 July 2016)

[4] As the CCC made clear to the Defendants on page 30 of its May 2019 report, *Net Zero – The UK's Contribution to Stopping Global Climate Change* (available at [**DB/817**]).

The First Defendant's attempts to dispute this are wrong, as explained at paragraph 46 of the Claimant's Reply [PB/260] and Mr Vähk's witness statement, paragraph 11 [PB/345].

83. This is a particular problem for tackling climate change (to which the short to medium term emissions are of crucial importance), because MWIs create huge quantities of emissions instantaneously when waste is combusted (see Johnke, et al, *IPCC Good Practice Guidance, 'Emissions from Waste Incineration'* [DB/6] and pp.1 and 7 of the UKWIN report, *Evaluation of the climate change impacts of waste incineration in the United Kingdom* October 2018 [DB/70, 76]). In contrast, other forms of waste disposal such as recycling can avoid these (see pp.183-184 of the CCC June 2020 report, *Reducing UK Emissions* [DB/307-308]). Even landfill can act as carbon sinks or cause emissions (at a lower total level) to be released slowly over many years (see pp.1, 16-19 of the UKWIN report, *Evaluation of the climate change impacts of waste incineration in the United Kingdom* October 2018 [DB/70, 85-88]). Compared to other forms of energy production (which are covered by the UK ETS), MWIs are also particularly inefficient as they produce proportionately more emissions per unit of energy than the alternatives (see pp.10-14 of the UKWIN report, *Evaluation of the climate change impacts of waste incineration in the United Kingdom* October 2018 [DB/79-83]).

The cap for the UK ETS, and the relevance of this to the Paris Agreement

84. As explained at paragraphs 34-46 above, the cap for the UK ETS is substantially higher than BAU emissions and it places no downward pressure on emissions.

85. The consequence is that emissions covered by the UK ETS will not be reduced on anything like the timeline envisaged by the Paris Agreement and may potentially even increase in the short and medium-term.

The short and medium-term imperatives of the Paris Agreement were mandatory relevant considerations

86. The short and medium-term imperatives of the Paris Agreement are unincorporated international law principles that were "obviously material" to the very discharge of a statutory purpose (i.e. limiting GHG emissions) that is axiomatically linked to those principles. They come within the "third category" of considerations in **R v Somerset County Council, Ex p Fewings** [1995] 1 WLR 1037, at 1049, which must be accounted for when they are "obviously material": **Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government** [2018] EWCA Civ 1305; [2018] PTSR 2063, paragraphs 20-26.

87. Per the Court of Appeal in **R (Plan B Earth) v Secretary of State for Transport** [2020] EWCA Civ 214:

> "237. … the only reasonable view open to [the Secretary of State] was that the Paris Agreement was so obviously material that it had to be taken

into account. It is well established in public law that there are some considerations that must be taken into account, some considerations that must not be taken into account and a third category, considerations that may be taken into account in the discretion of the decision-maker (see, for example, the opinion of Lord Brown of Eaton-under-Heywood in *Hurst*, at paragraphs 57 to 59). As Lord Brown observed of that third category (in paragraph 58 of his opinion), there can be some unincorporated international obligations that are "so obviously material" that they must be taken into account. The Paris Agreement fell into this category." (emphasis added)

88. The Supreme Court in R (Friends of the Earth Ltd) v Heathrow Airport Ltd [2020] UKSC 52 specifically left that conclusion of the Court of Appeal in place:

> "122. The Divisional Court (para 648) and the Court of Appeal (para 237) held that the Paris Agreement fell within the third category identified in Fewings. In so far as it is an international treaty which has not been incorporated into domestic law, this is correct. …
>
> 134. In light of the factual position [i.e. the Supreme Court's conclusion that the Secretary of State had in fact taken the Paris Agreement into account], it is not necessary to decide the different question whether, if the Secretary of State had omitted to think about the Paris Agreement at all (so that this was a case of the type described in para 120 above), as an unincorporated treaty, that would have constituted an error of law. That is not a straightforward issue and we have not heard submissions on the point. We say no more about it."

89. The Supreme Court left that conclusion from the Court of Appeal in place, because of its conclusion that, on the facts of the case, not only had relevant aspects of the Paris Agreement had been incorporated into the domestic CCA 2008 (see paragraphs 122-125), but also the evidence was that the Secretary of State had indeed considered those aspects of the Paris Agreement.

90. The same cannot be said here, either in terms of whether the short and medium-term aspects of the Paris Agreement had been given effect via the CCA 2008, or whether the Defendants had directly or indirectly considered those aspects in their decision-making.

The evidence that each of the Defendants failed to have regard to this mandatory relevant consideration.

91. The Defendants' decision to exclude MWIs from the scope of the UK ETS is explained at paragraph 52 of the Response [DB/204]:

> "52. We acknowledge respondents' comments regarding expanding the scope of the scheme to include municipal waste incinerators. The complex environmental requirements placed on municipal waste

incinerators, as well as their role in diverting waste from landfill, make it difficult to include them in a UK ETS."

92. The Response gives no express consideration to the consequences of that decision on GHG emissions in the short and medium-term. As the Claimant set out in her Reply (paragraphs 31-40) [PB/255-258], there is nothing in the contemporaneous decision-making documents that suggests (let alone shows) that any of the Defendants (let alone all of them which would need to be the case for the decision overall to be lawful) took these emissions into account or the consequences of them for the short and medium-term aspects of the Paris Agreement.

93. Had the Defendants considered this, they would have had good reason to set a tighter cap on total emissions and may well have done so. They would also have had good reason to include MWIs within the scope of the UK ETS and may well have done so.

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94. The Defendants contend that it is highly likely they would have reached the same conclusion even if they had not acted unlawfully. That, of course, is only a response to Ground 1 (relating to the Paris Agreement) and can have no relevance to Ground 4 (as above).

95. In any event, the applicability of section 31 of the Senior Courts Act 1981 in this context was considered and rejected as misconceived by the Court of Appeal in Plan B

> "233. We would add this observation. It was not submitted to us that in designating the [Airports National Policy Statement] ANPS the Secretary of State committed no error of law – or that, if he did, the error itself was immaterial – because the relevant consequences of meeting the targets already in place under the Climate Change Act would have been, or at least might have been, the same as those of implementing the United Kingdom's commitments under the Paris Agreement. Such an argument, had it been put forward, would in our opinion have been mistaken. If the Secretary of State was to comply with his duty under section 5(8) of the Planning Act, the implications of the Paris Agreement for his decision, and whether they were different from the implications of meeting the targets under the Climate Change Act, were matters for him specifically to consider and explicitly address in that very exercise. But he did not do so. It is clear that, in deciding to designate the ANPS, he did not take the Paris Agreement into account at all. On the contrary, as we understand it, he consciously chose – on advice – not to take it into account. And in our view, as we have said, his failure to take it into account was enough to vitiate the designation.
>
> …

> 273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is 'highly likely' that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old Simplex test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales L.J., as he then was, in **R. (on the application of Public and Commercial Services Union) v Minister for the Cabinet Office** [2017] EWHC 1787 (Admin); [2018] 1 All E.R. 142, at paragraph 89)."

96. None of that was touched by the Supreme Court's judgment.

97. There is simply no proper basis for the First Defendant's assertion that the outcome would have been the same, let alone that this is "highly likely".

98. The outcome is a UK ETS that has been set up without urgency: it permits substantial emissions over the short and medium-term and ignores the additional emissions generated by incineration relative to other forms of waste disposal and energy production. It *may* have been possible for the Defendants lawfully to design such a scheme, but the fact that they did so having failed to consider the short and medium-term aspects of the Paris Agreement (from which urgency as a relevant consideration is derived) means the Court can have no confidence that that would be the case.

99. But in any event, there is here an exceptional public interest that warrants granting the declaratory relief sought. There is a fundamental failing in the Defendants' decision-making for the UK ETS. There will likely be many more decisions responding to climate change in the near future, to which the Paris Agreement will similarly be a mandatory relevant consideration. Clarification from the Court of the need to consider the short and medium-term aspects of the Paris Agreement would lead to improved decision-making and be in the public interest.

100. In particular, the fact that the Defendants will review some aspects of the UK ETS in the future demonstrates this public interest. That is because, if the Court finds that the decision was unlawful, the outcome of that future review

may well be different, given that the Court would have clarified for the Defendants what they were lawfully required to account for and identified the lawful purposes of the scheme. As such, it is not highly likely that the outcome (i.e. the scheme) would be the same if the Claimant is granted declaratory relief.

CONCLUSION

101. For the reasons given above and in the Claimant's pleadings, the Claimant submits that declaratory relief should be granted in respect of grounds 1 and 4 and the Defendants should be directed to revisit the set up the UK ETS.

David Wolfe, Matrix
Ben Mitchell, 11KBW
23 March 2021