

IN THE ADMINISTRATIVE COURT

BETWEEN:

**PLATFORM, PEOPLE & PLANET,
THE WORLD DEVELOPMENT MOVEMENT**

Claimants

-and-

COMMISSIONERS OF HM TREASURY

Defendant

**REPLY TO THE DEFENDANT'S SUMMARY GROUNDS OF RESISTANCE including
AMENDED GROUNDS OF CHALLENGE**

Introduction

1. By this application for Judicial Review, the Claimants challenged the Defendant's failure even to consider (in particular, through a "Green Book assessment") whether or not to use its 70% ownership (through UKFI) of RBS to impose standards on RBS in relation to the impact of its lending on climate change and human rights.
2. Even since this claim was commenced (2 June 2009), the Government has continued to make statements which reinforce the need for everyone – including thus the Government itself - to take action in relation to climate change. For example, on 15 July 2009, in the joint foreword to the UK Low Carbon Industrial Strategy, Ed Milliband, Climate Change Secretary and Peter Mandelson, Business Secretary, said [page 2127]:

“Tackling climate change is about more than just averting environmental disaster. It can create a better kind of society and a stronger, more sustainable economy. There are tangible, immediate benefits for business. It can ensure that our economy emerges from the global downturn at the forefront of the technological and social shift that will define the next century.

Securing these benefits means recognising the urgency of action.”

3. The Low Carbon Transition Plan laid before Parliament by the Climate Change Secretary on 15 July 2009 said [page 2247]:

“Preventing dangerous climate change is self-evidently in Britain's national interest, in the interests of citizens who want a healthier life, a more prosperous economy and greater international and energy security. But more fundamentally, given the impact and permanency of the effects, it is a moral imperative. Future generations will pay the price if we fail to rise to this challenge.”

4. But the Defendant, indivisible in law from the rest of the Government nonetheless refused even to consider using (and now formally has decided not to use) its 70% ownership of RBS (which has the worst record of any UK bank when it comes to financing projects around the world which contribute to climate change as well as projects with particularly bad human rights records) to assist with such urgent action.
5. As for the position of RBS: although the Defendant does not admit the correctness of the concerns in the claim form about RBS' approach (as the agreed market leader in the lending to the energy market) to climate change and human rights issues (Grounds of Resistance (GOR) [page 152]), it has not disputed them and, unless and until it does so, the court should proceed on the basis that they are well founded.
6. This document responds to the GOR which was served on 21 July 2009. The Defendant offers two answers to the claim (GOR paragraph 14, page 157):
 - (a) The challenge is too late because its approach to the management of its investment in RBS by UKFI was determined as long ago as October 2008; but
 - (b) It has in any event now undertaken the Green Book assessment for which the Claimants were asking.
7. The first of those – timing - does not stand scrutiny, as considered further below. In any event, the exercise of control over RBS through UKFI is ongoing and the obligation to (for example) act compatibly with Convention rights by virtue of section 6(1) of the Human Rights Act is thus ongoing.

The fresh decision sent on 7 August 2009

8. As for the second basis on which the Defendant resists the claim (namely the new Green Book assessment and the decision in which it results): The Grounds of Resistance (served on 21 July 2009: [page 1154] wrongly referred to that fresh decision as if it had already been taken (GOR paras 16-17). Paragraph 16 GOR thus says that “HMT has concluded that ...” [underlining added]. That was simply not correct, as became clear when the Claimants asked the Defendant to identify the decision and when it had been taken [page 158].
9. In fact, as the Defendant's letter of 31 July 2009 [page 1162] admitted, the position had been only “provisional” at the time of the GOR. The GOR was clearly misleading.

10. In a letter of 7 August 2009 the Defendant explained that the “decision had now been taken by Ministers” [page 1168] and provided two documents underpinning it: (1) a “Green Book” assessment [page 1169-1172]¹, and (2) a “Background Analysis” [page 1173-1182]. Those documents have plainly been triggered by, and are intended as a response to, this claim².

11. This claim thus in effect now becomes a challenge to the legality of that latest, and very new, decision. The decision (albeit provisional only at that stage) was set out in paragraph 16 of the GOR [page 158]:

“HMT has concluded that UKFI should manage the shares which it holds in Investee Companies, including RBS, on a commercial basis, in a manner which:

- a. takes into account the extent to which corporate social responsibility policies will benefit the Investee Companies and the value of the Government’s holdings; and

...” [underlining added]

12. In other words, it has concluded that, in managing the shares, it should not – when it comes to considerations such as climate change and human rights – go beyond what is narrowly to the benefit of RBS and the value of the 70% share it holds.

13. In paragraph 17 [page 158- 159] (as then expanded in the later documents) it says that, to go beyond that “for example by imposing minimum environmental standards or human rights standards on the management of its investments into RBS” among other things:

- (a) would cut across the fundamental legal duty³ of boards – “the Directors (including those appointed with the agreement of the Government...) could not allow the Government to use its shareholding ... to enforce a strategy on the banks for its own policy reasons”⁴;
- (b) would not be efficient as compared with direct, industry-wide regulation – “a more appropriate means for the Government to impose environmental and human rights standards on banks is by industry-wide regulation ...”⁵ and “if

1 The document bears the date of 20 July 2009 [page 1182] but, as above, that is clearly the date of the provisional document/decision and not the actual document/decision as approved by Ministers.

2 See thus the opening paragraphs of the Background Analysis [page 1173] “We have taken into account the point made in the Platform’s [sic] claim form and supporting evidence served on 1 July 2009” and the fact that the documents bear the date of 20 July 2009 – one day inside the deadline for the GOR.

3 The way it has now been put in paragraph 13e of the Green Book Assessment [page 1172]

4 Background Analysis para 5 [page 1178]

5 Background Analysis paragraph 3 [page 1177]

banks are to be prevented from lending to particular industries⁶, or to be required to follow particular policies, that should be achieved through legally binding and certain regulation, or at least through Codes of Practice ... not by using the Government's influence as a shareholder of individual banks⁷"; and

(c) would result in RBS being seen as a branch of Government⁸.

14. Those are considered turn, below.

(a) The contention that the "fundamental legal duty of boards" prevents it

15. The Defendant's claim (namely that, in effect, it cannot do what the Claimants contend for because of the requirements of company law) would if correct, of course, be inconsistent with all the other reasons it gives (because, if it cannot do it then none of the reasons why it might not want to do it would have any bearing).

16. But it is not correct in any event. Firstly, it is wrong in law. And secondly it flies directly in the face of more general Government policy on what is known as Corporate Social Responsibility (or its alternative formulation which talks of Environmental Social and Governance (ESG) issues).

17. As for the law, the Defendant explains in the Background Analysis document (prepared in the context of this claim and clearly with the intention of forming part of the response to it) the basis on which it thinks it cannot – in law - do what the Claimants contend for. In particular, it quotes from and then comments on the effect of section 172(1) of the Companies Act 2006, thus⁹:

"The directors of each bank owe a fiduciary duty to act in the interests of the company as a whole, taking into account the interests of all shareholders:

"A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

...

(f) *the need to act fairly as between members of the company."*

6 Not actually what the Claimants have contended for

7 Background Analysis paragraph 7(vi) [page 1187]

8 Background Analysis paragraph 2(iv) [page 1176-1177]

9 Background Analysis paragraph 5 [page 1178]

Accordingly the directors (including those appointed with the agreement of the Government ...) could not allow the Government to use its shareholdings in the two banks to enforce a strategy on the banks for its own policy reasons. That would amount to a breach of their fiduciary duty to the company, unless the strategy was in the interests of the company as a whole.”

18. The Defendant’s answer is thus in its reading of section 172(1) and its reliance on section 172(1)(f).
19. But the quote from section 172(1) is highly misleading (and it is truly puzzling to find it set out that way in a document clearly prepared in the knowledge it would be used in litigation), because it omits clearly material parts of the section including section 172(1) (d). Section 172(1) actually says this:

“A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

- (a) the likely consequences of any decision in the long term,
- (b) the interests of the company's employees,
- (c) the need to foster the company's business relationships with suppliers, customers and others,
- (d) the impact of the company's operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- (f) the need to act fairly as between members of the company.” [underlining added]

20. Section 172(1) read as a whole is thus to exactly the opposite effect as that claimed (and presumably acted on) by the Defendant.
21. In particular, far from precluding consideration of the impact on the community and the environment (as the Defendant has directed itself), section 172(1) specifically requires the directors to consider the impact of the company’s operations on those other matters.
22. The Government’s policy on the matter has also (other than in the decision here) been consistent:
 - (a) Margaret Hodge, relevant Minister when the 2006 Act was introduced described (in a formal published Ministerial Statement [page 477b]) the (then) new section 172 as being:

“...a radical departure in articulating the connection between what is good for a company and what is good for society at large.”

And said that [page 477c]:

“... compared with most text-book definitions of the common law duties of directors, the new statutory statement captures a cultural change in the way in which companies conduct their business. There was a time when business success in the interests of shareholders was thought to be in conflict with society’s aspirations for people who work in the company or in supply chain companies, for the long-term well-being of the community and for the protection of the environment. The law is now based on a new approach. Pursuing the interests of shareholders and embracing wider responsibilities are complementary purposes, not contradictory ones.”
[underlining added]

(b) Alasdair Darling (now, of course the Chancellor) said [page 477h]

“For the first time, the Bill includes a statutory statement of directors’ general duties. It provides a code of conduct that sets out how directors are expected to behave. That enshrines in statute what the law review called “enlightened shareholder value”. It recognises that directors will be more likely to achieve long term sustainable success for the benefit of their shareholders if their companies pay attention to a wider range of matters...Directors will be required to promote the success of the company in the collective best interest of the shareholders, but in doing so they will have to have regard to a wider range of factors, including the interests of employees and the environment”.]underlining added]

(c) And indeed, even as recently as 9 July 2009 (again thus even since this claim was commenced), Government Minister Lord McKenzie of Luton said this in the House of Lords¹⁰:

“My Lords, the Government fully support the highest standards of corporate governance and ethical behaviour and believe they should contribute to better company performance by helping a board discharge its duties in the best interests of shareholders.

....

My Lords, it is the role of the trustees, under their fiduciary duty, to take account of members’ interests. It is the trustees’ role in particular, as guardians of that interest, to take account not only of strict and short-term financial returns on investments, but the wider context.”

¹⁰ Hansard 9 July 2009 [page 1152-1153]

23. The impact of a company's operations on the community and the environment are thus just as much material considerations (and can thus be balanced against) as the need to act fairly as between members of the company. And indeed they are mandatory considerations. (As it happens, the Defendant has also not identified the other members of the company, let alone put forward any evidence that it would actually be against their interests to do what the Claimants contend for.)

24. The Defendant's decision here is thus clearly wrong in law in that:

- (a) It was based on a very plain and very simple misdirection as to the law,
- (b) It was based on a failure to take into account material considerations, namely the matters set out in section 172(1)(d), and/or
- (c) It was entirely inconsistent with the Government's stated policy.

25. Indeed, it also shows that the Defendant is failing to use its position as a shareholder (indeed the overwhelming majority shareholder) to ensure that the three non-executive directors which it has appointed to the board of RBS¹¹ act in accordance with their duties under section 172 – a further clear failure to give effect to the legitimate expectation that the Government would take action on climate change and act in accordance with the obligations under section 6(1) Human Rights Act 1998 to act in a matter compatible with Convention rights.

(b) The contention that *another way would be better*

26. As above, the Defendant also resists doing what the Claimants contend for because it says that such action would not be efficient as compared with direct, industry-wide regulation:

- (a) “a more appropriate means for the Government to impose environmental and human rights standards on banks is by industry-wide regulation ...”¹² and
- (b) “if banks are to be prevented from lending to particular industries¹³, or to be required to follow particular policies, that should be achieved through legally binding and certain regulation, or at least through Codes of Practice ... not by using the Government's influence as a shareholder of individual banks¹⁴”.

27. Ignoring, for now, the positive obligations on directors, as above, the observation that another way would be better might be an answer if the Government was promoting

11 See Background Analysis paragraph 6 [page 1179-1180]

12 Background Analysis paragraph 3 [page 1177]

13 Not actually what the Claimants have contended for

14 Background Analysis paragraph 7(vi) [page 1181]

industry-wide regulation of the kind it describes (which the Claimants would welcome). But it is not. So the point goes nowhere.

RBS as a branch of Government.

28. The complaint that the action contended for by the Claimants would make RBS part of the Government (and, assuming that were correct, a reason not to act) is also based on a simple misdirection as to the law.
29. In particular, the holding of a 70% shareholding in a company simply does not make that company part of the Government.
30. The Defendant has misdirected itself in law and/or taken into account an irrelevant (and erroneous) consideration.
31. The true position is that the Government has public law power to own the 70% stake and to exercise the influence which comes with that ownership. That public law power must be exercised lawfully. That power must:
 - (a) thus be exercised consistently with the Government's legal obligations in relation to climate change (including those arising from the legitimate expectations identified by the Claimants¹⁵); and
 - (b) per section 6(1) of the Human Rights Act 1998 Act to act compatibly with Convention rights.
32. What the Defendant is purporting to do here is to decide that in the exercise of a particular public law power it will not (say) act compatibly with Convention rights. That is plainly impermissible. The Government is indivisible in law and must, at all times, act in accordance with the law. One part of the Government, here the Treasury, cannot somehow treat itself as not part of the Government as a whole and treat itself as not bound by the legal obligations that bite on the Government as a whole (whether arising from statutory provisions such as the Human Rights Act 1998 or the Companies Act 2006, or from the Government's wider commitments, say on climate change).

Overall on the fresh decision

33. Accordingly, the decision now taken (as per 7 August 2009 letter [page 1168]) was thus unlawful as above. Contrary to the suggestion in GOR paragraphs 18-19 [page 159-

15 ??

160], that is not a challenge to the “reasonableness of the exercise of judgment”, it is – as above – a challenge to key aspects of its substantive legality.

Where does that leave the judicial review claim?

34. By their grounds of claim, the Claimants challenged the Defendant’s failure even to consider (in particular through a Green Book assessment) whether to use its 70% stake to require RBS to give effect to environmental (in relation in particular to climate change) and human rights considerations.
35. The Defendant’s GOR starts by claiming that the challenge was brought out of time because “the grounds for this challenge arose many months ago” (indeed in October 2008 they say).
36. Even if that was right, then (as above), it is entirely overtaken by events because the Claimants accept (as above) that the Defendant has now (on or about 7 August 2009) considered the matters and done the assessment for which they called. Things have moved on.
37. The Claimants now, as above, challenge the legality of the decision(s) referred to in paragraphs 16-17 of the GOR [page 158-159] (which, as above, were not actually taken until some two weeks later). They could, of course, commence fresh proceedings relating to that matter but that would lead to an unnecessary increase of costs and the use of court resources. They thus now ask the court to give permission to amend the grounds of claim in accordance with the matters set out above.
38. As it happens, the allegation of lack of promptness bears no scrutiny in any event, as follows.
 - (a) In October 2008 (as the GOR sets out: paragraph 5b [page 154]) when undertaking the initial recapitalisation, the Government stated its intention to manage its shareholdings on a “professional and wholly commercial basis”;
 - (b) Likewise, in November 2008 (GOR paragraph 8 [page 154]) it again referred to a “commercial basis”.
39. But given that, as set out above, the directors of any company (running, presumably, on a “commercial basis”) is nonetheless required by law to have regard to the impact of its operations on the community and the environment, to say that RBS would be run on a “commercial basis” did not show, one way or the other, whether the Government

intended in practice to do what the Claimants contend for, or not. It evidenced no decision on the point and it was certainly not a decision based on a Green Book assessment. Indeed, when the Claimants asked (under the Freedom of Information Act) about assessments carried out concerning environmental matters and human rights implications with respect to the recapitalisation of RBS the Defendant confirmed [page 1052]:

“I can confirm that after a search of our information the Treasury has not found information relevant to these requests.”

40. Accordingly, any challenge would have been premature at that stage.

41. It was only on 3 March 2009 when the Defendant produced the “Framework Document” that anything of any substance was actually said (at least in public) about how UKFI was to operate in practice [pages 997-1020]. In particular, in compliance with an “Investment Mandate” that was to be developed (but which would remain confidential¹⁶) UKFI was told¹⁷ to act with an overarching “objective of protecting and creating value for the taxpayer as a shareholder, paying due regard to the maintenance of financial stability and to acting in a way that promotes competition” (i.e. coming off the fence). That was thus a decision on how UKFI should operate but taken without consideration (and certainly not in a Green Book assessment) of whether UKFI should exercise control (on behalf of the Government) to secure consideration of climate change and human rights matters by RBS.

42. On 27 March 2009, the Claimants wrote again to the Defendant explaining that [page 1040]:

“In particular, we consider that it is necessary to assess the consequence of imposing, or not imposing, minimum environmental standards with which banks that receive public money must comply.”

43. In its letter of 21 April 2009 [pages 1052-1055] the Defendant specifically rejected the suggestion that any Green Book assessment would necessarily include such matters [page 1053]:

“Nowhere does the Green Book list key or critical factors that must be assessed for any decision.”

44. The letter also stressed that [page 1054]:

¹⁶ Framework Document paragraph 4.7 [page 1012]

¹⁷ Framework Document paragraph 3 [page 1011]

“In March, UKFI published the framework document which governs the relationship between HMT and UKFI. ... The conduct of the banks’ day-to-day business will remain a matter for the management of those banks.”

45. That thus confirmed that it was the Framework Document (and not some earlier document or a document yet to come) which was the proper focus of the JR.
46. On 14 May 2009, the Defendant said [page 1070] that the Investment Mandate had not yet been agreed with UKFI and that a Green Book assessment would be conducted as part of that process. However, as above, there had been no suggestion before that it was the Investment Mandate (“detailed provisions” and a confidential document) which would (or was appropriate) to deal with big questions like climate change or compatibility with Convention rights. And in any event, as above, the Defendant had specifically said that a Green Book assessment need not include an assessment of environmental issues.
47. Against that background, the Claimants thus challenged, and were correct to challenge, the failure of the Framework Agreement even to consider the matters they said needed to be considered, let alone through a Green Book assessment.
48. In any event, the Defendant then finally did what the Claimants had been calling for and which it had strenuously said was not required and which it was now doing in response to and triggered by this claim¹⁸: it specifically considered, including through a Green Book assessment, the imposition of climate change and human rights standards. It recorded that decision in paragraphs 16-17 of the GOR [page 158-159].
49. As it happens, the GOR also refers (para 14b [page 157]) to the “Investment Mandate” (“the Investment Mandate has been considered by HMT in June and July”). But that was not said to be the relevant decision, no details were provided and nothing was said about the outcome of that process of consideration. As it happens, GOR paragraph 14b is also simply wrong in saying that the Claimants were told in the Defendant’s letter of 14 May 2009 that consideration of the Investment Mandate would include a Green Book assessment “including consideration of the relevance of environmental and human rights”. As above, the Defendant had previously strenuously resisted saying anything about the content of any assessment and disavowed the suggestion that it would necessarily include such matters. Insofar as the Defendant thus hints at an allegation of prematurity (wholly conflicting, of course, with its allegation of tardiness), that too thus goes nowhere.

¹⁸ As above, the decision was said in the GOR to have been taken even though it had not yet been taken; it is then supported by documents dated 20 July 2009, the day before the GOR was to be served, and those documents specifically refer to the Claim

50. The JR was thus brought against the correct decision, namely the 3 March 2009 Framework Agreement.

51. But, as above, that is in any event, now overtaken by events, namely the Defendant's fresh decision.

52. As for what follows, CPR Part 44.3(4) says that:

In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

...”

53. As noted below, and particularly in the light of the Defendant's conduct of this matter, the Claimants thus ask the court to order that the Defendant should now pay their costs of commencing the claim up to and including responding to the GOR. In particular, as above:

(a) In its GOR, the Defendant claimed to have made a formal decision not to apply environmental and human rights standards to RBS; its text was notably unspecific about when that decision had been taken; when the Claimants pressed the point, it emerged that no such decision had in fact yet been taken; the GOR was notably misleading; and

(b) Having strenuously resisted any suggestion that it should consider applying environmental and human rights standards to RBS, let alone by a Green Book assessment, the Defendant has now done so, but only in response to this JR claim – it is clear that the Defendant would not have done so if the Claimants had not commenced the proceedings;

54. Although the Defendant also complains about the fact that the Claimants fleshed out their initial (2 June 2009) grounds of claim on 1 July 2009, it does not identify, nor could it identify, any prejudice arising from that: the Claimants specifically put forward a consent order which would ensure that the Defendant had 21 days in which to respond to the latter document. Indeed, the Defendant has ironically benefited from the position

by being able to produce the provisional decision (as per GOR paragraphs 16-17 [page 158-159]) on 20 July 2009 and relying on it in response to the claim, which it would not have been able to do without the extension of time agreed to by the Claimants.

55. For completeness, it should also be noted that the Defendant rather strangely contends (GOR paragraphs 20 and 22 [page 160-161]) that the myriad of Ministerial statements and other matters set out in the claim form by which the Government had called for and promised action on climate change, and (even more strangely) the Human Rights Act 1998 did not create a legitimate expectation that it would at least consider whether to impose standards on those things on RBS. That is clearly wrong but is, in any event, overtaken by events and need not now be adjudicated upon because the Defendant has in fact considered those things.

Overall

56. As above, the Claimants thus ask the court to:

- (a) Grant permission for the claim to be amended as above so as to be a challenge to the legality of the decision manifested in the Green Book assessment [pages 1169-1172] and Background Analysis [pages 1173-1182];
- (b) Grant permission for that claim to proceed to a substantive judicial review – it is plainly arguable, as above;
- (c) Order that the Defendant pay the Claimants' costs of commencing the claim so far (i.e. the costs to date in any event), the Defendant having now finally done what they called for, and only done so in response to the claim¹⁹; and
- (d) In any event, make a Protective Costs Order limiting the Claimants' liability for costs to the Defendant and any interested parties arising from the proceedings as now continuing to £16,000, as below.

57. As for (d), the PCO:

- (a) the background to and basis for the application is set out in the Claimants' separate PCO application .
- (b) Notably, the Defendant does not resist the principle of a PCO limiting the Claimants' liability to £16,000 other than to say (GOR para 30 [page 163]) that a PCO should not be granted because the claim is not arguable. But that, of course, relates to the challenge which has now been overtaken by events, as above. The claim now is plainly arguable and the earlier position is irrelevant,

¹⁹ It would be quite fanciful to suggest that the assessment provided on 7 August 2009 and the Background Analysis in support of it would have been done without the Claimants having brought this challenge

so the reservation falls away so an order limiting the Claimants' liability to £16,000 should be made

- (c) GOR paragraph 31 no longer arises, because that dealt simply with the question of an interim PCO, i.e. a PCO pending consideration of the application of permission.
- (d) GOR paragraph 32 [page 164] considers the question of a cap limiting the Defendant's liability to the Claimants for their costs if they win at the end of the day. The Claimants have made clear that they have no objection to a cap which puts a ceiling on their costs (limiting them to a reasonable pre-estimate of the costs they would recover on assessment) so that the Defendant is aware of its costs exposure from the litigation. The Defendant says it wants to make submissions on the precise figure involved, and the Claimants have no problem with that. However, insofar as the point arises for determination now, they do resist the suggestion that their costs should be limited to "a single advocate of junior counsel status" [sic]. The Defendant has engaged James Eadie QC, the "First Treasury Counsel" (aka "Treasury Devil" - i.e. the Government's most senior advocate) and another barrister. That is an indication of the Defendant's evaluation of the public importance of the points in issue: it does after all concern two of the most important issues of the time (climate change, and the legality of the way in which many billions of pounds of tax payers' money should be deployed to support the banking system). The Claimants, in contrast, have only engaged "junior" advocates, but no QC. That can hardly be complained of, given the wider public importance of the issues in play. Nor should it be punished through the costs regime (what the Defendant contends for would mean that the Claimants' lawyers are, in effect, being asked to subsidise a case, the determination of which has been recognised to be in the public interest by the granting of a PCO). Nor do the cases referred to by the Defendant support its position in the present case because they predated the later clear recognition in Morgan of the need to secure compliance with the requirements of the Aarhus Convention on access to environmental justice, as set out in the Claimants' PCO application.

David Wolfe
MATRIX
17 August 2009