

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

Royal Courts of Justice  
Strand  
London WC2A 2LL

Tuesday, 20th October 2009

**B e f o r e:**

**MR JUSTICE SALES**

**Between:**

**THE QUEEN ON THE APPLICATION OF PEOPLE AND PLANET\_**

**Claimant**

v

**HM TREASURY\_**

**Defendant**

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WordWave International Limited  
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(Official Shorthand Writers to the Court)

**Mr Wolfe & Mr Squires** (instructed by Leigh Day & Co) appeared on behalf of the **Claimant**  
**Mr Eadie QC & Ms S Fatima** (instructed by Treasury Solicitor) appeared on behalf of the  
**Defendant**

J U D G M E N T  
(As approved)

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MR JUSTICE SALES:

1. This is an application for permission to bring judicial review proceedings in relation to the policy adopted by HM Treasury for handling its investment in Royal Bank of Scotland ("RBS"). As a result of major financial support provided to RBS in 2008 the UK government is now ultimate owner of 70 per cent of the issued share capital in RBS. The claimant is a body which presses for action to combat climate change and improved performance in relation to securing respect for human rights.

2. The government's interest in RBS is held in this way. The 70 per cent shareholding is owned by a company, UK Financial Investment Ltd ("UKFI") which is itself 100 per cent owned by HM Treasury. RBS remains a separate company with its own board of directors. They have a statutory obligation under section 172 of the Companies Act 2006 to manage the company for the benefit of the shareholders as a whole and acting fairly as between them. I will return to this later in this judgment.

3. For the purpose of this application Mr Wolfe, for the claimant, accepts that the relevant legal powers being exercised by HM Treasury in framing its policy as to the role UKFI should adopt in relation to its 70 per cent shareholding in RBS should be taken to be the Crown's common law powers as the legal person who owns all the shares in UKFI.

4. HM Treasury is bound by public law principles in framing its policy regarding UKFI's role, but the point is of significance because there is no statutory framework which identifies what considerations ought in law to be taken in account or disregarded by HM Treasury in formulating its policy on the role to be adopted by UKFI. Accordingly, HM Treasury has in law a very wide discretion to choose what to take into account or not when formulating that policy.

5. The claimant argues that HM Treasury has acted unlawfully in adopting the policy it has promulgated relating to how UKFI should manage the investment in RBS. The policy adopted calls for a commercial approach on the part of UKFI. The claimant objects to this policy. It wishes to see a policy adopted which requires UKFI to try to promote a more interventionist approach as a major shareholder in RBS, whereby it would seek to persuade or require RBS to change its current commercial lending practices and policies and adopt instead lending practices and policies which did not support ventures or businesses which might be said to be harmful to the environment by reason of their carbon emissions or be said to be insufficiently respectful of human rights.

6. The claimants say that RBS is a bank which lends or invests in such ventures and businesses more than other banks. HM Treasury does not accept that. But purely for the purposes of deciding whether the claimants have an arguable case fit for the grant of permission, at this stage the point is to be treated as arguable.

7. The claimant says that the adoption by HM Treasury of its policy regarding UKFI's role was unlawful under three headings. First, it says that it had a legitimate expectation, said to be founded on a range of materials referred to in the Grounds of Claim, that a different policy would be adopted. The relevant legitimate expectation is pleaded in paragraph 54 of the Grounds in these terms:

"that when the government exercises its powers, it does so with a view to preventing public money being spent on projects that have the most obviously detrimental impact on climate change."

8. Secondly, the claimants say that the policy was not adopted after proper consideration by HM Treasury in accordance with the procedures and standards laid down in the Green Book -- Appraisal and Valuation in Central Government ("the Green Book"), which sets out HM Treasury guidance regarding decision-making in central government. HM Treasury accepted that a Green Book assessment should be undertaken, but the claimants say it failed to carry it out properly. For the purposes of this permission hearing it is arguable that where HM Treasury accepted that it should carry out a Green Book assessment before taking a particular decision, then under ordinary principles of public law it is required to carry out such an assessment properly: compare, by way of analogy, R v North and East Devon Health

Authority, ex p. Coughlan [2001] QB 213 at [108](if a decision is taken to embark upon public consultation, even though that is not legally required, the consultation must be carried out properly). So, here, although there was no obligation upon HM Treasury to carry out a Green Book assessment before it adopted the policy, it is arguable that because it decided that a Green Book assessment should be carried out it came under an obligation to carry out that assessment properly.

9. Under this heading, the claimant relies on three grounds. First, they say that HM Treasury failed properly to evaluate arguments in favour of a more interventionist policy for UKFI on environmental grounds and human rights grounds, as was required by the Green Book; secondly, they say HM Treasury had regard to an irrelevant consideration, namely the desirability of industry-wide regulation (rather than a policy focused just on RBS and Lloyds-TSB, another bank in which the Government holds a major stake) to deal with environmental problems affecting climate change, in circumstances where there are no government proposals to regulate the banking industry generally in this way; and thirdly, they say there was a misdirection of law by HM Treasury in the course of the Green Book exercise as to the effect of section 172 of the Companies Act.

10. The third heading under which complaint is made is that it is said that the policy adopted was unlawful on human rights grounds under section 6 of the Human Rights Act 1998.

11. I deal with the first and third headings first. In my view there is no arguable case based on legitimate expectation. The statements relied on in support of the alleged legitimate expectation are all at a high level of generality. They address macroeconomic or broad political concerns. They are not addressed to the claimant. They do not contain the assurance pleaded at paragraph 54 of the Grounds as the legitimate expectation. The claimants also said that the Climate Change Act 2008 created a legitimate expectation. Section 1 of that Act creates a broad duty on the Secretary of State but does not support the legitimate expectation pleaded. For these reasons, in particular, I consider that this head of claim is hopeless.

12. As to the claim under the third heading (the Human Rights Act), I consider that also is hopeless. Mr Wolfe barely touched upon it in his submissions. There is nothing in section 6 of the Human Rights Act which imposes a duty on HM Treasury to adopt any different policy. The adoption of the existing policy violates no Convention rights of any kind.

13. The claim under the second heading (based on the Green Book) is the most substantial head of claim. In my view, however, this also fails to cross the relevant arguability threshold for the grant of permission to bring judicial review proceedings.

14. The policy that HM Treasury has adopted for UKFI was developed in three stages. First, on 3rd March 2009 a Framework Document was adopted. It set out the basic objective for UKFI:

"Our goal as we manage these investments, as set out in the Framework Document (see Annex A), is to develop and execute an investment strategy for disposing of the Investments in an orderly and active way through sale, redemption, buy-back or other means within the context of an overarching objective of protecting and creating value for the taxpayer as share holder, paying due regard to the maintenance of financial stability and to acting in a way that promotes competition. This objective includes:

consistent with HM Treasury's stated aim that it should not be a permanent

investor in UK financial institutions, maximising sustainable value for the taxpayer, taking account of risk;

□ maintaining financial stability by having due regard to the impact of its value realisation decisions; and

□ promoting competition in a way that is consistent with a UK financial services industry that operates to the benefit of consumers and respects the commercial decisions of the financial institutions.

In pursuing this goal we will operate like any other active, engaged shareholder to protect and create value, operating on a commercial basis and at arm's length from Government."

15. The point was emphasised later in the document, at paragraph 7.1, as follows:

"PRESERVATION OF INVESTEE COMPANY INDEPENDENCE

7.1 [UKFI] will manage the Investments on a commercial basis and will not intervene in day-to-day management decisions of the Investee Companies (including with respect to individual lending or remuneration decisions). The Investee Companies will continue to be separate economic units with independent powers of decision and, in particular, will continue to have their own independent boards and management teams, determining their own strategies and commercial policies (including business plans and budgets)."

16. The Framework Document was not adopted on the basis of a Green Book assessment. It looked forward to the creation of a more detailed policy document, the Investment Mandate, which was to be adopted within the scope of the broad objective set out in the Framework Document.

17. Secondly, on 20th July 2009 officials completed their Green Book assessment for the Investment Mandate. It is clear that in carrying out that assessment they in fact revisited, and assessed by reference to Green Book standards, the wider objective set out in the Framework Document as well. Accordingly, on the facts, HM Treasury conducted a Green Book assessment in relation to the adoption of the commercial policy set out in the Framework Document at the same time as it conducted such an assessment of the more detailed policy in the Investment Mandate.

18. The Green Book assessment of these policies included the following:

"1. The Framework Agreement between HM Treasury and UKFI requires HMT to prepare an Investment Mandate with which UKFI must comply in respect of the management of Government's investments. It states that, once that Investment Mandate is in place, value realisation decisions will still require HMT approval.

2. In developing the Investment Mandate we have considered the guidance set out in the Green Book. That is an HM Treasury publication setting out guidance for government departments on the evaluation and appraisal of new government policies, programmes and projects before they are adopted. It sets out (chapter 2, page 9) a range of generic issues that may need to be considered as part of policy formulation.

3. The list of issues covers a wide variety of factors, as is understandable given that the Green Book applies to such a wide range of policies, programmes and projects. They include factors that are central to the direction of UKFI, given its Overarching Objective as set out in the Framework Agreement (described below). These include strategic impact on the organisation, economic rationale, achievability and consumer focus. However the list also includes other considerations, such as environmental impact, human rights, rural issues, equality, health and health and safety, that might be very relevant to the construction of a new motorway but are less obviously directly relevant to the holding of shares taken in banks in the interests of financial stability.

...

5. This note considers the relevance of these wider considerations in decisions around how the Investment Mandate should be developed.

**Argument:**

6. The decision to provide support to the financial services sector through the recapitalisations was taken with the objective of preserving the stability of the financial system in the UK, while minimising the cost to the taxpayer. The shares that Government holds in the recapitalised banks are held in pursuit of that objective. The Government did not wish to become a permanent investor in the UK financial institutions, or to skew the performance of those institutions in an anti-competitive way. Nor was it the Government's aim to effect any wider changes in the institutions' policies, beyond promoting financial stability and economic recovery by an increase in residential and business lending.

7. In line with the objective of the recapitalisations, our objectives for UKFI in the management of the shares, as described in the HMT/UKFI Framework Agreement, are: 'to develop and execute an investment strategy for disposing of the Investments in an orderly and active way... within the context of achieving value for money for the taxpayer as shareholder, paying due regard to the maintenance of financial stability and to acting in a way that promote competition.'

8. In agreeing the Framework Agreement, it was stated that, to allow UKFI to successfully deliver that objective, it should manage the shares in a commercial way and should not intervene in the day-to-day management decisions of the Investee Companies. In managing the shares in a commercial way, UKFI as a responsible institutional investor will of course take into account the extent to which Investee Companies' corporate social responsibility policies will benefit the Investee Companies and therefore their shareholders. UKFI will expect the Investee Companies to pursue responsible policies with regard to environmental issues and human rights, because of the negative implications - reputational, regulatory and other, which all affect the value of the company - for any company and its shareholders of not doing so.

9. In drafting the Investment Mandate, we have considered whether UKFI should seek to impose wider policy constraints on the strategic policies of the Investee Companies, beyond those resulting from this commercial approach. For example, UKFI might influence the companies to give a higher priority to social or environmental considerations in their lending policies than commercial

considerations would lead them to do.

10. We have assessed the merits of those options in the light of their impact on the likely effectiveness of UKFI in achieving its objectives and with reference to those issues listed in the Green Book which are relevant. These include most of the factors mentioned in paragraph 3 above, since in theory UKFI could influence the Investee Companies' behaviour in almost any direction. We have also borne in mind the extent to which other more effective means of achieving particular aims are available (eg direct regulation, industry-wide initiative, etc.).

11. It is our assessment that a commercial approach, in the sense outlined above, is the best way for UKFI to achieve its objectives. We have taken into account that for UKFI to seek to exercise a more policy-driven influence over the strategic policies of the banks might have benefits in terms of certain of the Green Book issues, such as environmental, human rights or other wider impacts. We have also taken into account the importance of reducing the UK's dependence on fossil fuels and emissions of greenhouse gases, as reflected in the Climate Change Act 2008. We recognise that to require the banks in which the Government holds shares to take greater account of environmental issues in their lending policy than purely commercial considerations would cause them to do could make a limited contribution to these aims. And finally, we are aware of (without necessarily accepting) criticisms that have been made to the effect that RBS, in particular, has failed to pay sufficient regard in its lending policies to environmental and human rights issues.

12. On the other hand, we have taken into account that other banks regard it as in their and their shareholders' interests to pursue responsible environmental and social policies. Those groups who have recently criticised RBS' record have noted that other major banks in the UK and abroad have taken on board concerns about climate change and have adopted environmental standards to govern their investments (apparently this includes Lloyds/HBOS to influence its lending policies). If it proves to be the case that RBS' corporate social responsibility policies, including their environmental policies, are worse than other banks', such that they have a negative effect on the value of the company and its shares, we would expect UKFI to use its influence to improve the position, in order to protect the value of its holding. UKFI, has been established expressly as a body having the necessary commercial expertise to assess such issues.

13. Accordingly, we regard the commercial approach set out in the Framework Agreement as giving UKFI the necessary latitude to influence the banks in which the Government holds shares to adopt corporate social responsibility policies at least as advanced as those of other major banks. To go beyond that:

a. could threaten the continued financial health of the banks concerned and thus threaten achievement of the recapitalisation scheme's objectives;"

b. would damage investor confidence in the banks, thereby threatening the objective of disposing of the shares and achieving value for money for the taxpayer as shareholder through that sale;

c. would only affect lending by two institutions. Measures to promote such ends should be taken on an industry-wide basis;

- d. would be contrary to the objectives of allowing the banks to maintain their commercial freedom and minimising the cost to taxpayers;
- e. would cut across the fundamental legal duty of boards to manage their companies in the interests of all their shareholders;
- f. would put the Investee Companies in a different and disadvantageous position compared to other major banks, whose policies are not criticized; and.
- g in any event a more efficient and effective means of promoting such ends is by direct regulation, industry-wide incentives, etc..."

Officials also prepared a background analysis which fleshed out certain of the reasons set out in that assessment.

19. Thirdly, on 5th August 2009 Ministers approved the Green Book assessment of the policy in the Framework Document and the Investment Mandate with a minor, immaterial change. It is this decision of 5th August which is now sought to be impugned.

20. I turn to address the three grounds of claim put forward under this heading. First, I refer to the alleged failure by HM Treasury to carry out a proper analysis of factors in favour of adoption of a more interventionist policy for UKFI, of the kind the claimant would wish to see in place.

21. In my judgment, the legal framework is important here. HM Treasury was exercising the common law powers of the Crown in deciding what to do in relation to the management of its investment in UKFI and, through UKFI, in RBS. HM Treasury had a very wide discretion as to the matters which should be taken into account or left out of account in formulating its policy.

22. Next, it is relevant to refer to the nature of the Green Book. The Green Book contains guidance as to the general approach to formation of policy in relation to the whole of central government. It does not lay down a prescriptive regime setting out clear indications of what are to be treated as mandatory relevant considerations or as irrelevant considerations in any particular evaluation exercise. This much is clear both from its general context and its purpose. It is a document which is addressed to the formulation of all forms of government policy and, clearly, having regard to the very wide area of activity which it covers and provides guidance for, it is not intended to be highly prescriptive.

23. In that regard, I refer in particular to paragraph 1.1 of the Green Book, which provides:

"All new policies, programmes and projects, whether revenue, capital or regulatory, should be subject to comprehensive but proportionate assessment, wherever it is practicable, so as best to promote the public interest. The Green Book presents the techniques and issues that should be considered when carrying out assessments.

The purpose of the Green Book is to ensure that no policy or project is adopted without first having the answer to these questions:

- Are there better ways to achieve this objective?
- Are there better uses for these resources?"

24. Paragraph 2.25 of the Green Book states (with emphasis added):

"There is a wide range of generic issues that may need to be considered as part of any assessment. The following listed should be checked for relevance to options under appraisal, and used for later evaluations:

Strategic impact- new proposals can be said to have strategic impacts on organisations if they significantly affect the whole or major part of an organisation over the medium to long term. Proposals should therefore be considered in terms of their potential scale of impact, and how they fit in with the strategy of the organisation(s) they affect.

Economic rationale - proposals need to be underpinned by sound economic analysis, which should be provided by a cost benefit analysis in an option appraisal. See Chapter 5 in particular.

Financial arrangements and affordability - proposals need to be affordable, and an affordable financial plan needs to be developed. See Chapter 6.

Achievability - all proposals should be assessed for their achievability, and recognised programme and project management arrangements set up as necessary. See Chapter 6.

Commercial and partnering arrangements - proposals need to take account of commercial, partnering and procurement arrangements; what can be delivered in the market; how costs and benefits can guaranteed through commercial arrangements; how contracts will be managed through to completion. See Chapter 6.

Regulatory impact - as discussed previously, the impacts of new proposals on businesses, voluntary sector and charities should be assessed. See Chapter 2.

Legislation - consideration should be given to legislation specific to the case in hand, as well as statutes that affect many proposals, such as the Human Right Act, or the Data Protection and Freedom of Information Acts.

Information management and control - The information requirements of proposals, including the data needed for later evaluation, and the supporting IT that may be required. Further guidance is available from the OGC.

Environmental impacts - The effects on the environment should be considered, including air and water quality, land use, noise pollution, and waste production, recycling and disposal. Further guidance is available from ODPM, Defra and DFT.

Rural issues - The government is committed to ensuring that all its policies take account of specific rural circumstances. Appraisers should assess whether proposals are likely to have a different impact in rural areas from elsewhere. Further guidance is available from Defra.

Equality - Impacts on various groups in society should be considered as part of an appraisal. Chapter 5 describes how distributional impacts should be brought into the appraisal process... [etc] ..."

25. In my judgment, these passages underline the point that policy-makers retain a large measure of discretion as to what considerations they may take into account or leave out of account when conducting an assessment in accordance with the Green Book in formulating policies and taking decisions. The Green Book left HM Treasury with a very wide discretion to decide what factors to treat as relevant or weighty or not for the purposes of formulating its policy in respect of UKFI, in accordance with ordinary principles of public law (as illustrated by CREEDNZ v Governor General [1981] 1 NZLR 172, 183; Re Findlay [1985] AC 318, 333-334; and Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759). The Green Book also left HM Treasury a wide discretion to decide what investigations it thought were required to inform itself about relevant factors applying the guidance in Secretary of State for Education and Science v Tameside MBC [1977] AC 1014.

26. In the present case, paragraphs 3 and 10 to 13 of the Green Book assessment, in particular, show that regard was had by HM Treasury to environmental and human rights considerations in the formulation of the policy. As with all reasons for administrative decisions, the approach of the court is strongly against trawling with a fine tooth comb through reasons which are given looking for errors. Even after looking carefully for errors, I can detect no arguable error here.

27. The primary objective for the policy is properly identified in paragraph 6 of the Green Book assessment, which identified a consideration of very great weight. HM Treasury was perfectly entitled to give the factor identified there that weight. That paragraph inevitably then affects the reasoning in the rest of the document and the extent to which consideration of other matters was required in order to arrive at a conclusion in accordance with the Green Book procedure.

28. Paragraphs 3 and 10 of the Green Book assessment show that environmental and human rights considerations were taken into account. Paragraphs 12 and 13 show that a sensible reconciliation of those factors with the main consideration set out at paragraph 6 was identified as being available. In the context of that reasoning, it was not necessary under the Green Book approach for HM Treasury to analyse the matter further.

29. It is also relevant that any analysis of what could in practice be done in relation to RBS, which might be capable of affecting its dealings in respect of particular projects, would be likely to be very onerous and difficult. That underlines, in my view, the rationality of the approach adopted here by HM Treasury.

30. Accordingly, in my judgment there is no arguable case identified by the claimant based on that particular ground of challenge.

31. I refer to the second ground under this head: the alleged taking into account of an irrelevant consideration, namely that industry-wide regulation would be preferable to an ad hoc approach directed only at RBS and Lloyds-TSB. In my view, here again there is no arguable case identified by the claimant.

32. The point set out in paragraph 13(c) of the Green Book assessment, on which the claimant relies, has to be read in the context of the whole paragraph, and indeed the whole document. The main point made in paragraph 13(c) relates to the unfairness to RBS and Lloyds-TSB of concentrating on them alone, which also links with sub-paragraphs (a) and (f) in particular. It is a subsidiary point in sub-paragraph (c) that picking on those two institutions is not a good or appropriate approach if one wishes to have an impact on climate change and human rights by means of regulating the banks and that a more appropriate approach - if that is the route to be gone down - would be to regulate the whole banking

industry. There will be many arguments for and against such an approach to regulation of banks as a means to promoting policies to combat climate change and protect human rights. In my view, HM Treasury was perfectly entitled to form the view that that was a large topic not suitable to be resolved in the context of this assessment - that was a fair subordinate point to be made in favour of saying that they should not now seek to impose a special regime on RBS and Lloyds-TSB alone.

33. The third ground under this head is that relating to the alleged misdirection of law under section 172(1) of the Companies Act. Section 172(1) provides:

“(1) 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.”

34. At paragraphs 12 and 13 of the Green Book assessment officials correctly identified the proper way in which social and environmental considerations may be taken into account by the directors of RBS in the context of the duties of those directors under section 172. The question then was whether HM Treasury should have sought to go further, so as in effect to seek to impose its own policy in relation to combating climate change and promoting human rights on the Board of RBS, contrary to the judgment of the Board. In my view, that clearly would have a tendency to come into conflict with, and hence would cut across, the duties of the RBS Board as set out in section 172(1). It would also have given rise to a real risk of litigation by minority shareholders seeking to complain that the value of their shares had been detrimentally affected by the Government seeking to impose its policy on RBS, as was identified in the background document which accompanied the Green Book assessment. In my judgment, therefore, there was no arguable misdirection of law in this case.

35. The basic point is that decisions regarding the management of RBS will be matters for the judgment of the directors of RBS. The policy adopted by HM Treasury is that UKFI can properly seek to influence the Board of RBS to have regard to environmental and human rights considerations in accordance with the RBS Board’s duty under section 172 (see paragraphs 12 and 13 of the Green Book assessment). It was a legitimate argument against going further than that that there would be a risk of trying to press the RBS Board beyond the limits of their own duties, and in my view that is all that has been said in paragraph 13(e) of the Green Book assessment, read in its proper context as one reason among others. In my view, on a fair reading of that document, it was not being said that there was an absolute legal bar to the introduction of a different policy, but rather that was a good reason for not pressing the RBS Board by means of a more interventionist policy for UKFI.

36. For these reasons I reject this application for permission.