IN THE HIGH COURT OF JUSTICE **Claim No. CO/2003/2020**
QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT
BETWEEN:-

THE QUEEN
on the application of
TRANSPORT ACTION NETWORK LIMITED

Claimant

- and -

THE SECRETARY OF STATE
FOR TRANSPORT

Defendant

- and -

HIGHWAYS ENGLAND COMPANY LIMITED

Interested Party

CLAIMANT'S REPLY

Introduction

1. This is the Reply on behalf of the Claimant to the main points in the Defendant's Amended Detailed Grounds of Resistance ("**ADGR**") dated 22 April 2021. The Claimant's Reply is served in accordance with ¶7 of the Order of Lang J dated 2 March 2021 ("**the Order**"). It adopts the abbreviations and defined terms used in the Amended Statement of Facts and Grounds ("**ASFG**").

2. This Reply deals first with the Defendant's misplaced objection to new arguments advanced by the Claimant in the ASFG, and then responds substantively to what the Defendant says about those aspects of the Claimant's case.

Nothing objectionable about the additional material in the ASFG

3. The ground on which the Claimant was granted permission ("**Ground 1**") alleges an unlawful failure by the Defendant to take into account mandatory considerations

when purporting to discharge his duty under s.3(5) IA 2015 to have regard to the impact of RIS2.

4. On well-established principles, what matters is what the actual decision-maker (rather than, say, advisers) had in mind. Therefore, it is obviously necessary for that challenge to establish what the Secretary of State himself personally considered.

5. The first witness statements of Dr Bob Moran and of Philip Andrews on behalf the Defendant, and their supporting exhibits, shed some new light on that issue (although the Defendant still chooses to redact large amounts of the material). In particular, Mr Andrews set out for the first time the detail of analysis undertaken by the Defendant's officials and Interested Party's employees of the GHG emissions from RIS2 schemes ("**the GHG Analysis**"). However, notably, there is no suggestion that the Secretary of State took that (or indeed any) GHG Analysis into account; rather what emerged from his evidence was the very limited extent to which the Defendant himself actually considered the GHG issue at all.

6. Paragraph 4 of the Order gave the Claimant permission to amend the SFG "to take account of […] the evidence filed" by the Defendant. In accordance with that permission, the Claimant in its ASFG developed its existing ground of challenge in two ways:

    a. Ground 1(iv) (**ASFG ¶73A-B**) pointed out that the Defendant had not taken into account the GHG Analysis presented by Mr Andrews. This, it transpires, is not in dispute (**ADGR ¶46B**), although it raises further issues about the Defendant's reliance on that material in these proceedings (see ¶12-16 below); and

    b. Ground 1(v) (**ASFG ¶73C-J**) identified four errors in the GHG Analysis, of which the Claimant of course only became aware <u>after</u> the filing of its SFG. The Claimant alleged in the ASFG that these were serious technical errors vitiating the Decision as irrational. The legal consequence of the alleged errors has,

however, also shifted in light of the Defendant's clarification that the GHG Analysis was not taken into account when setting RIS2 (as explored further at ¶12-16 below).

7. While this additional material developed the Claimant's existing ground of challenge, but it clearly did so in ways that: (i) would not have been possible before the Claimant had seen the Defendant's evidence; and thus (ii) were wholly within the permission granted to the Claimant to amend its SFG to take account of that evidence. The Claimant was under no obligation to "foreshadow" these points at the hearing before Lang J, but in any event that hearing was largely concerned with the admissibility of the Claimant's own witness evidence, which points out the flaws in the GHG Analysis. As a result, the points now pleaded were foreshadowed at the hearing by virtue of the submissions made by the Claimant as to the relevance of its evidence to the claim.

8. The Court is therefore respectfully invited to disregard any suggestion by the Defendant (made faintly at best at ADGR ¶46A) that the Claimant should not be allowed to argue these points at trial.

Ground 1(iv): what the SST actually considered

9. The Defendant has now clarified that he did not take into account even the limited GHG Analysis undertaken by officials for the RIS2 decision. [1]

10. Instead, that analysis is freshly relied on in these proceedings only in support of the Defendant's legal submission about the "obvious materiality" or otherwise of the

[1] The Claimant does not accept that this is in any way clear from the unamended DGR: ¶19 gives no hint that the analysis was a separate exercise, and ¶35, immediately after summarising the Defendant's approach to the duty in s.3(5) IA 2015, refers to the "evidence of Mr Andrews and Dr Moran about the consideration given to environmental effects, and the carbon impacts of RIS2 in particular" – plainly implying that this was consideration by the decision-maker. See also ¶46. The point was not, to the recollection of the Claimant's representatives, explained in clear terms at the hearing on 2 March 2021; at any rate it was not understood. The suggestion that the Claimant has wilfully (i.e. deliberately) misinterpreted the Defendant's case is bizarre – it would not benefit the Claimant to do so – and is refuted. However, the question is academic and need not trouble the Court, since the Defendant's position is now clear.

matters which the Claimant alleges he failed to take into account: the Paris Agreement, and the carbon budgets and Net Zero target set under the CCA.

11. As the Claimant pointed out in its ASFG (¶73B), and not disputed in the ADGR, that means that the only consideration by the Defendant of GHG emissions when setting RIS2 was the bare statement in a legal briefing before him that: "RIS is consistent with a major carbon saving required to deliver net zero." That statement, unsupported by any analysis or quantification of the GHG emissions from RIS2, does not amount to lawful consideration of the impact of RIS2 on the environment, because – apart from anything else – it does not say anything about what the GHG impact of RIS2 actually is. Indeed, the statement is wholly ambiguous and essentially meaningless. The negligible consideration undertaken by the Defendant therefore reveals:

    a. A free-standing failure to discharge the duty in s.3(5) IA 2015, regardless of the materiality of the Paris Agreement, the carbon budgets and the Net Zero Target; as well as

    b. A failure to take into account the Paris Agreement or the carbon budgets (about which RIS2 is silent); and

    c. A failure to take lawfully into account the Net Zero Target, because it told the Defendant nothing of any substance about the impact of RIS2 on achieving that target, not least because any increase in GHG emissions (however great) could, potentially at least, be "consistent" with the Net Zero Target if sufficient emissions reductions and GHG removals[2] are brought forward elsewhere in the economy.

[2] That is, removal of carbon dioxide from the atmosphere combined with permanent storage; a technology in early development that will be necessary to offset residual emissions so as to achieve net zero emissions.

Ground 1(v): Treatment of the GHG Analysis in these proceedings

12. The Claimant had previously challenged the analysis referred to by Mr Andrews on the understanding that it formed part of the Defendant's decision-making. On that understanding, the Claimant proceeded on the basis that it needed to show that that analysis itself was irrational.

13. However, as set out above, it turns out that the Claimant's understanding was wrong: the analysis in question turns out to have been separate from the Secretary of State's RIS2 decision, and indeed, some elements of it actually post-date the Decision. It was not before the decision-maker or part of his decision-making. Rather, it is only advanced by the Defendant in these proceedings in support of the legal submission to the court that the GHG emissions from RIS2 schemes were *de minimis*, and thus the climate change objectives relied on by the Claimant were not obviously material to the decision to set RIS2.

14. Given that the GHG Analysis formed no part of the Decision, the Claimant need not demonstrate a "serious technical error" rendering the Decision irrational (although for the reasons given in the ASFG at ¶75C-J, and the statements of Phil Goodwin and Jillian Anable, it could discharge even that burden).

15. Rather, it is for the Defendant to demonstrate that the emissions were *de minimis*, in support of its legal submission denying obvious materiality. The Court must simply ask itself whether the GHG Analysis was wrong to determine that emissions from RIS2 schemes were *de minimis*. While the Court is not asked to adjudicate between competing view of experts in a technical area, it is entitled simply to prefer the logic of the Claimant's approach to assessing the scale and significance of the emissions: for instance, as to which schemes fell to be assessed, and what the appropriate comparator was for the emissions from those schemes.

16. Unless the Defendant persuades the court that the GHG emissions of the national roads programme are so small they can be ignored, then the Defendant's argument

about obvious materiality is unsound and relief should follow: for the reasons given in ¶9 above, the Defendant has not had lawful regard to GHG emissions from RIS2 schemes, or their impact on achieving the three climate change objectives on which the Claimant relies.

Ground 1(v): flaws in the GHG Analysis

Failure to take into account schemes previously supported by RIS1

17. Mr Andrews explains that GHG emissions from the 45 RIS1 schemes that were not completed during the first Road Period, and which were carried forward into RIS2, did not form part of the GHG Analysis (**PA2/8** and **fn8**). He states that this was done pursuant to Green Book guidance, which requires a comparison between the policy under consideration and a "business as usual" ("**BAU**") scenario in which existing policy only is continued. He equates the BAU scenario with the continuation of RIS1 in the absence of RIS2.

18. While this may be the approach set out in the Green Book to policy appraisal, it does not result in a complete assessment of the impact of RIS2 on the environment, as required by s.3(5) IA 2015. This is because RIS2 did not supplement RIS1 when it was set in March 2020, it replaced it. RIS1 ceased to have effect, and all former RIS1 schemes that were "carried over" into RIS2 became RIS2 schemes. The decision to set RIS2 involved decisions (which were part of the section 3(5) exercise) to carry forward the RIS1 schemes.

19. Indeed, that was necessarily the case because the sequential nature of a RIS and its successor is inherent in the structure of statutory scheme. Section 3 of IA 2015 contemplates a single RIS being in place at any given time. Further, by s.3(2), a RIS is to relate to a period defined by the Defendant. RIS1 related to the first Road Period (financial years 2015-2020), whereas RIS2 relates to the second Road Period (financial years 2020-2025) [**PA1/28**].

20. As Mr Andrews explains: "A RIS provides […] a statement of the funding that government commits over the period to which the RIS applies" [**PA1/27,** emphasis added]. Therefore, RIS2 committed afresh to fund the 45 schemes carried over from RIS1. Those schemes formed part of RIS2, and their impacts had to be taken into account in discharging the s.3(5) duty.

21. Furthermore, the assessment of RIS1 schemes on which the Defendant relies was conducted in March 2015 (or earlier). At that date, (i) the schemes were at a very formative stage, and (ii) neither the Paris Agreement nor the Net Zero Target had been adopted. Any analysis of emissions from those schemes at the time RIS1 was set was therefore necessarily only preliminary, and moreover, the schemes have never (at any stage of development) been considered against the changed and more challenging circumstances that existed by the time they formed part of the RIS2 in 2020.

Failure to take into account construction emissions

22. Mr Andrews accepts that emissions embodied in construction materials were not included in the GHG analysis, but relies on the fact that they are accounted for through the ETS [**PA2/27-28**]. There are two problems with this response:

    a. First, these emissions do not cease to be a relevant impact of the RIS2 schemes (for the purposes of s.3(5) IA 2015) simply because they are also treated within some other legal regime (and, in particular, form part of a cap-and-trade scheme); and

    b. Second, the UK ETS cap (i) has only so far been set until 2023 and (ii) is not aligned with a pathway to achieving the Net Zero Target.[3] It cannot therefore be said that construction emissions arising from RIS2 schemes can be set aside in any analysis of the compatibility of RIS2 with carbon budgets or targets, simply because they are included in the ETS.

[3] *The future of UK carbon pricing: UK Government and Devolved Administrations' response*, June 2020, ¶58-63

Assessment period

23. The Claimant's criticism of the Defendant's assessment period relates to the figure of 0.28 MtCO2e, put forward as representing the "cumulative effect of RIS2 during carbon budget 5" [**PA1/63**]. This is the figure that is relied on as supposedly demonstrating that GHG emissions from RIS2 were *de minimis*.

24. Notably, the Defendant does not deny that assessment was carried out for other years, but it is unclear what weight, if any, was given (at best by officials) to GHG impacts in other years. Nor has Mr Andrews answered the Claimants' criticism that the fifth carbon budget is a period during which not all RIS2 schemes will yet be operational, and therefore represents an underestimate of emissions in subsequent carbon budgets and indeed in 2050.

Comparison with UK-wide emissions

25. Mr Andrews defends the use of a whole economy comparator, without addressing the Claimant's criticism that such a comparison takes no account of the additional emission reductions that need to be made to achieve the fifth carbon budget.

26. It is misleading to express RIS2 emissions as a small fraction of the total allowable emissions in the budget period, without acknowledging that on current policies, emissions are forecast to exceed that total, and the additional contribution from RIS2 schemes is therefore exacerbating that problem.

27. Indeed, the comparison is all the more misleading given that the fifth carbon budget is not even aligned with the pathway to Net Zero emissions by 2050.

28. As Mr Goodwin points out, this is also not the way in which the benefits of road schemes are treated.

29. But of course, the bigger problem with making that comparison is that it amounts to a licence generally to disregard GHG emissions (because the GHG impact of almost anything that is contemplated is going to be small compared to the GHG impacts of the whole of the UK economy).

30. And, of course, (as recognised, for example, by the recitals to the Paris Agreement itself) it also ignores the fact that tackling climate change precisely requires both government and others to take a myriad of actions each of which may make only a modest impact but which, together, are essential (such that the impact of each is itself material in the overall challenge of tacking climate change):

> *"Recognizing the importance of the engagements of all levels of government and various actors, in accordance with respective national legislations of Parties, in addressing climate change,*
>
> *Also recognizing that sustainable lifestyles and sustainable patterns of consumption and production, with developed country Parties taking the lead, play an important role in addressing climate change,"*

David Wolfe QC

Peter Lockley

6 May 2021