

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
B E T W E E N:

Claim No: CO/3149/2018

THE QUEEN
on the application of
PLAN B. EARTH

Claimant

- and -

SECRETARY OF STATE FOR TRANSPORT

Defendant

-and-

HEATHROW AIRPORT LIMITED

First Interested Party

-and-

ARORA HOLDINGS LIMITED

Second Interested Party

PLAN B POSITION STATEMENT
FOR PRE-TRIAL REVIEW OF
15 JANUARY 2019

INTRODUCTION

1. In accordance with §18 Holgate J's order dated 4 October 2018, this position statement sets out the directions that Plan B. Earth ("**Plan B**") will contend for at the pre-trial review on 15 January 2019.
2. In summary, Plan B seeks directions:
 - (a) to require the Secretary of State to make reasonable efforts to agree the statement of common ground in relation to climate change;
 - (b) to require the Secretary of State to disclose matters relating to UK Government policy on climate change, which he was bound to consider by virtue of section 5(8) of the 2008 Act; and
 - (c) to provide for the live-streaming of proceedings.

A. STATEMENT OF COMMON GROUND

3. §7 of Holgate J's order of 4 October required that:

"By no later than 4pm on 25 October 2018, all parties in claims CO/2760/2018, CO/3089/2018, CO/3147/2018, and CO/3149/2018 must agree and file with the Court a draft statement of common ground."
4. Following an extensive and involved process of co-operation, the claimants in the four cited claims served their proposed amendments to the Secretary of State's version of the statement on 19 October 2018 (just 11 days after the sealing of the order). Friends of the Earth served the part relating to the UK's government's climate change policy shortly after the other parts of the text, which was served by the Hillingdon claimants. The text on climate change is, or at least ought to be, non-controversial, in that it is drawn principally from the government's own statements and sources of evidence.
5. Given the complexities surrounding government policy on climate change, and in order to avoid technical argument before the court, identification of the common ground in this area would not only advance the timely and efficient resolution of these proceedings generally but would assist the Court in the interpretation of "*Government policy relating to the mitigation of, and adaptation to, climate change*" for the purposes of section 5(8) of the 2008 Act, which is a critical issue in the case.

6. The Secretary of State, however, has made no serious attempt to agree the statement of common ground in so far as it relates to climate change. Rather he complained on 25 October 2018 of having had inadequate time to address the claimants' proposals:

"Given the Secretary of State provided a draft over 3 weeks previously, and only got a response late last Friday [ie 19 October] this left wholly inadequate time to consider the very considerable changes proposed on climate change."

7. Even if that were a reasonable complaint on 19 October 2018 (at which point he still had 6 days to consider the revisions advanced before the 25 October deadline), it has long since ceased to be so. The Secretary of State has now had some months to consider whether he agrees with the claimants' summary of UK Government policy on climate change and the surrounding context. As it is, he has neither agreed to it; nor explained why he disagrees with it; and consequently the parties are no further forward.
8. In accordance with §21 and §22 of Holgate J's order of 4 October, the claimants must file a core bundle, to include a final agreed statement of common ground by 4pm on 28 January 2019. As things stand the claimants will be unable to comply with the terms of that order, on account of the Secretary of State's non co-operation.
9. Further, the time estimates for the hearing were premised on the assumption that uncontroversial facts relating to climate change would be agreed between the parties. Plan B must present its case in full within half a day. It is neither fair nor proportionate for Plan B to expend a significant part of its limited time resource on setting out matters, which should reasonably be agreed in the statement of common ground. The Secretary of State should play his part in supporting the efficient administration of justice by agreeing uncontroversial material that would reduce the matters in dispute and promote the efficient use of court time.
10. Consequently Plan B seeks an order from the Court that the Secretary of State identifies by 21 January 2019:
 - (a) those parts of the draft statement of common ground on climate change, as advanced by the claimants, with which he agrees; and
 - (b) those parts with which he disagrees, together with the reasons for any such disagreement.

B. DISCLOSURE

11. In his detailed grounds of defence, the Secretary of State:
 - (a) denies that it is UK Government policy “to limit warming to the more stringent standard of 1.5°C and “well below” 2°C”¹; and
 - (b) disputes that the Paris Agreement is likely to require amendment to the 2050 Target².
12. Both are live issues in the proceedings, the resolution of which is key to the proper interpretation of “government policy” on climate change for the purposes of section 5(8) of the 2008 Act and critical to the fair disposal of these proceedings.
13. It is, or at least ought to be, common ground that:
 - (a) in January 2018 the CCC advised the Government that the Paris Agreement was likely to require amendment to the 2050 Target;
 - (b) that in April 2018 the Government announced it would review the 2050 Target in light of the Paris Agreement; and that
 - (c) in May 2018 the Government informed Parliament that it wanted to understand how to reach a net zero carbon economy by 2050.
14. Clearly, the matters cited at §13 above relate to Government policy on climate change, and the Secretary of State was therefore bound to take them into account by virtue of section 5(8) of the 2008 Act.
15. Plan B seeks specific disclosure of the evidence which relates to the matters above, and which the Secretary of State may be presumed to have considered in discharging his obligations under the 2008 Act. Plan B understands, for example, that in announcing the review of the 2050 Target at the Commonwealth Heads of Government Meeting on 17 April 2018, the Energy Minister, Claire Perry was explicit that it was UK Government policy to commit to the Paris Agreement temperature limit.
16. On that basis the Secretary of State was bound to consider the announcement in its proper context, together with the Energy Minister’s subsequent announcement in Parliament in May, by virtue of section 5(8) of the 2008 Act.

¹ DGR, §15

² See Secretary of State’s DGR to Friends of the Earth, §34(3)

³ <https://www.judiciary.uk/announcements/launch-of-live-stream-of-civil-appeal-hearings/>

17. Consequently Plan B presumes that the Secretary of State obtained and considered Government material relevant to the matters set out §13 above, in order to discharge his obligations under the 2008 Act.
18. If he did not do so, he should make that clear. If he did, he should disclose the relevant material.
19. As it is, the Secretary of State claims in his letter of 17 December 2018 that the documents requested are:
- “not reasonably related to the issues in dispute or concern clearly privileged material.”*
20. That assessment cannot be correct in relation to material that relates directly to significant developments in government policy on climate change, occurring prior to the designation of the ANPS.
21. In this context, it is notable that Plan B has recently obtained a letter, dated 23 March 2018, addressed to the Secretaries of State for Housing, Communities and Local Government and for Business, Energy and Industrial Strategy. The letter relates to the need to tighten emission reductions targets for buildings in light of the Paris Agreement:
- “Dear Secretaries of State,*
- As you know, the Paris Climate Agreement commits participating countries to limiting global warming to well below 2°C this century. With the UK’s buildings contributing 30% of our greenhouse gas emissions ... we call on you to act swiftly to introduce robust new energy performance standards for the UK’s buildings.”*
22. The letter has been signed by, among others, John Holland-Kaye, the Chief Executive for Heathrow Airport. The letter, which evidences Heathrow Airport’s knowledge that the Paris Agreement demands more stringent carbon emission reduction targets, is relevant to the issues in these proceedings, including the position of the First Interested Party, and ought to have been disclosed to the claimants, whether by the Secretary of State or the First Interested Party. Relevant excerpts are annexed to this position statement.

C. LIVE-STREAMING

Reasons for a joint application with Friends of the Earth for an order that the proceedings be live-streamed

23. Together with Friends of the Earth, Plan B applies for an order that the proceedings be live-streamed. The application is made for the reasons advanced by Friends of the Earth and for the reasons set out below.
24. First, these proceedings relate to the control and accountability of public decision-makers who exercise public law powers, but who are ultimately under a duty to act in the public interest. Specifically, this case raises issues of exceptional concern to the population at large, relating to the long-term future of the country's aviation and environmental strategies, and the Government's compliance with the Paris Agreement, which marks what is, according to the best available science, the boundary between humanity and environmental and economic disaster. There is therefore an inherent democratic value in facilitating, and indeed encouraging, public engagement with the grave matters in issue in these proceedings.
25. The Supreme Court routinely live-streams its proceedings. In November 2018, Court of Appeal proceedings relating to West Ham United and the Olympic Stadium were live-streamed. Sir Terence Etherton, the Master of the Rolls, noted³:
- "This is an exciting way of opening up our courts to help the public understand and see for themselves the way that courts work, and how appeals are heard."*
26. Second, these proceedings are relevant to people across the country. In accordance with the principles of equality and open justice, the public should be able to follow the proceedings as easily as technology will allow, recognising the difficulties that more vulnerable members of society may have in physically attending court and the fact that many people will be unable to attend court in person because the cost and inconvenience of travel to London is prohibitive.
27. Third, it appears that substantially more people will wish to attend the proceedings than even two courtrooms will accommodate. For the Directions hearing on 4 October, Court 76, the largest court in the building was full. On 8 January 2019, Plan B made an inquiry over social media to test public interest in following the proceedings. In the space of less than 54 hours (and in circumstances where Plan B's social media reach is far from expansive), nearly 1,000 people have expressed in writing a desire to follow the proceedings. In the absence of live-streaming, it may transpire that people travel long distances, at substantial expense, only to be turned away from the court because of lack of capacity.

³ <https://www.judiciary.uk/announcements/launch-of-live-stream-of-civil-appeal-hearings/>

28. Fourth, the case does not raise issues of individual privacy that might argue against such an order. Consequently the balance of interest is in favour of as open and accessible a process as possible.

Practical issues

29. As Plan B understands it, the technical capacity to live-stream proceedings from Court 76 already exists. If that is correct, it seems unlikely that utilising the facility would incur very substantial expense.

The legal framework

30. So far as Plan B is aware there is as yet no specific legal or procedural provision relating to the live-streaming of legal proceedings in the High Court. The Criminal Justice Act 1925, section 41, The Contempt of Court Act 1981 and The Crime and Courts Act 2013, s. 32, address the unauthorised recording and photography of proceedings by third parties, and provide for exceptions to be made to general prohibitions. But none of the legislation addresses live-streaming.

31. On that basis, it falls within the Court's inherent jurisdiction to grant the application.

Signed



Timothy John Edward Crosland, Director Plan B

Dated 10 January 2019

Annex – Excerpts from letter to Government signed by HAL CEO



To: Rt Hon Sajid Javid MP, Secretary of State for Housing, Communities & Local Government
Rt Hon Greg Clark MP, Secretary of State for Business, Energy & Industrial Strategy

23 March 2018

Dear Secretaries of State,

As you know, the Paris Climate Agreement commits participating countries to limiting global warming to well below 2°C this century. With the UK’s buildings contributing 30% of our greenhouse gas emissions¹ – and with emissions from buildings on the rise again after years of good progress – we call on you to act swiftly to introduce robust new energy performance standards for the UK’s buildings.



Rab Bennetts	Director	Bennetts Associates
Karl Whiteman	Executive Director	Berkeley Group
Steve Burr	Director	Black Architecture
Chris Grigg	Chief Executive	British Land
Paul Lewis	Chief Executive	Carbon Credentials
Austin Reid	Group Director of Development	Clarion Housing Group
Tony Horrell	CEO - UK and Ireland	Colliers International
John Frankiewicz	Non-Executive Director	Collinson plc
David Dryden	Chairman & Partner	Cundall
Alan Somerville	Partner; Head of Energy, Infrastructure & Sustainability, EMEA	Cushman Wakefield
Peter Madden OBE	Director	Ecovivid
Doug Kerr	Managing Director	Elementa Consulting
Jorge Mendonca	Portfolio Director, London Estate	Grosvenor Britain and Ireland
Simon Miller	Chief Operating Officer	GVA
Kevin McCloud MBE	Chairman	HAB Housing Ltd
Daniel Cooper	Chief Executive Officer	Hanson UK
John Holland-Kaye	Chief Executive	Heathrow Airport