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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY DENNISON COMMERCIALS LIMITED FOR JUDICIAL REVIEW

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John Larkin KC & Richard Shields (instructed by Worthingtons) for the Applicant
Tony McGleenan KC & Michael Neeson (instructed by the Departmental Solicitor's Office) for the Respondent
Richard Harwood KC (instructed by TLT NI LLP) for the Notice Parties, Milltown Gravel Limited and Supermix Limited
Aidan Sands KC (instructed by the Crown Solicitor's Office) for the Notice Party The Office of Gas and Electricity Markets

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HUMPHREYS J

Introduction

[1] The applicant company is a long established business in Northern Ireland, selling new and used trucks and providing maintenance and repair services to the transport industry. It operates from six separate sites and employs some 280 people.

[2] In 2015 it decided to install 11 biomass boilers at its premises in Ballyclare at an investment cost of £650,000. It was incentivised to do so by the Renewable Heat Incentive ('RHI') Scheme as well as the economic and environmental benefits associated with a change from fossil fuels.

[3] The applicant successfully applied for accreditation under the Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012 ('the Regulations') with effect from 14 October 2015.

[4] In April 2017 significant changes were introduced to the tariffs payable to participants in the RHI Scheme.

[5] On 9 July 2021 the Office of Gas and Electricity Markets ('Ofgem'), on behalf of the respondent, the Department for the Economy ('DfE'), made a decision to revoke the applicant's accreditation for two of the boilers, NI RHI 16736 and NI RHI 16762. In addition, it required that overpayments of periodic support payments amounting to £53,296.42 be repaid.

[6] The applicant exercised its right to a statutory review of this decision pursuant to regulation 50 of the Regulations. On 20 October 2022, the respondent upheld the previous decision, and it is this determination which is the subject of challenge by way of this judicial review application.

The Regulations

[7] The primary obligation of the respondent under the scheme is expressed in regulation 3(2):

> "the Department must pay participants who are owners of accredited RHI installations payments, referred to in these Regulations as "periodic support payments", for generating heat that is used in a building for any of the following purposes—
>
> (a) heating a space;
>
> (b) heating liquid; or
>
> (c) for carrying out a process."

[8] By regulation 33, participants in the scheme are obliged to comply with a suite of obligations, including:

> "(o) they must, if requested, provide evidence that the heat for which periodic support payments are made is used for an eligible purpose;
>
> (p) they must not generate heat for the predominant purpose of increasing their periodic support payments;"

[9] Regulation 45 creates a power to withhold or reduce periodic support payments:

> "(1) Where the Department is satisfied that there has been a material or repeated failure by a participant to comply with an ongoing obligation during any quarterly period and the periodic support payment for that quarterly

period has not been paid, the Department may take one or more of the following actions—

(a) permanently withhold a proportion of the participant's periodic support payment which corresponds to the proportion of that quarterly period during which the participant failed so to comply;

(b) reduce a participant's periodic support payment for that quarterly period or for the quarterly period immediately following.

(2) Within 21 days of a decision to permanently withhold or to reduce a periodic support payments [sic], the Department must send a notice to the participant specifying, as applicable—

(a) the respect in which the participant has failed so to comply;

(b) the reason why a periodic support payment is being withheld or reduced;

(c) the period in respect of which any periodic support payment is to be withheld or reduced;

(d) the level of any reduction; and

(e) details of the participant's right of review including any relevant time-limits.

(3) Where reducing a periodic support payment in accordance with paragraph (1)(b), the Department may determine the level of the reduction (taking into consideration all factors which it considers relevant) up to a maximum reduction of 10 per cent of the periodic support payment in question."

[10] By regulation 46, the respondent is empowered to revoke accreditation:

"(1) Where the Department is satisfied that there has been a material or repeated failure by a participant to comply with an ongoing obligation it may take one or more of the following actions—

(a) revoke accreditation for the accredited RHI installation in respect of which there has been a material or repeated failure;

(b) revoke accreditation for any other accredited RHI installations owned by that participant;

(c) in relation to a participant who is a producer of biomethane for injection, revoke that participant's registration.

(2) Within 21 days of a decision to revoke accreditation or registration the Department must send a notice to the participant specifying—

(a) the reason for the revocation of accreditation or registration including, where applicable, details of the respect in which the participant has failed so to comply;

(b) an explanation of the effect of the revocation; and

(c) details of the participant's right of review including any relevant time limits.

(3) Where accreditation of an accredited RHI installation has been revoked, or a participant's registration has been revoked, the Department may refuse to accredit any eligible installations owned by the same person or refuse to register that person as a producer of biomethane for injection at any future date."

[11] Regulation 47 states:

"(1) Where the Department is satisfied that a participant has received a periodic support payment which exceeds that participant's entitlement or has received a periodic support payment whilst failing to comply with an ongoing obligation it may—

(a) require the participant to repay the periodic support payment as a civil debt owed to the Department; or

(b) offset the periodic support payment against any future periodic support payments.

(2) Within 21 days of a decision to offset or require the participant to repay any periodic support payment the Department must send the participant a notice specifying—

(a) the periodic support payment which the Department believes has been overpaid and the sum which it is seeking to recover from the participant;

(b) whether the sum specified in sub-paragraph (a) will be recovered in accordance with paragraph (1)(a) or (1)(b);

(c) where applicable, a date by which the sum specified in sub-paragraph (a) must be repaid;

(d) the consequences of failing to make any repayments requested including potential sanctions or civil action; and

(e) details of the participant's right of review including any relevant time limits."

[12] The right to seek a statutory review is found in regulation 50:

"(1) Any prospective, current or former participant affected by a decision made by the Department in exercise of its functions under these Regulations (other than a decision made in accordance with this regulation) may have that decision reviewed by the Department.

(2) An application for review must be made by notice in such format as the Department may require and must—

(a) be received by the Department within 28 days of the date of receipt of notification of the decision being reviewed;

(b) specify the decision which that person wishes to be reviewed;

(c) specify the grounds upon which the application is made; and

(d) be signed by or on behalf of the person making the application.

(3) A person who has made an application in accordance with paragraph (2) must provide the Department with such information and such declarations as the Department may reasonably request in order to discharge its functions under this regulation, provided any information requested is in that person's possession.

(4) On review the Department may—

(a) revoke or vary its decision;

(b) confirm its decision;

(c) vary any sanction or condition it has imposed; or

(d) replace any sanction or condition it has imposed with one or more alternative sanctions or conditions.

(5) Within 21 days of the Department's decision on a review, it must send the applicant and any other person who is in the Department's opinion affected by its decision a notice setting out its decision with reasons."

Arrangements between DfE and Ofgem

[13] On 21 November 2018 DfE and Ofgem entered into 'Arrangements' for the provision of conferred functions and ancillary activities in relation to the administration of the Northern Ireland Non-Domestic RHI Scheme. These were made pursuant to the power in section 114 of the Energy Act 2011. Somewhat peculiarly the 'Arrangements' are stated to be a 'business relationship' and whilst they have the legal effect of enabling Ofgem to perform certain functions the parties agreed that "no legal obligations or legal rights will arise between the parties from them."

[14] Certain functions were conferred on Ofgem, and others retained by DfE. Those retained included the powers and duties conferred on DfE by regulation 47(1)(a) of the Regulations to require a participant to repay payment as a civil debt.

Ofgem's investigation

[15] On 24 April 2019 the applicant's biomass installations were inspected by the respondent and on 14 May 2020 the matter was referred to Ofgem. On 19 November 2020 Ofgem issued a notice identifying that in relation to four of the installations a significant drop in heat use had been found since April 2017. This was stated to give rise to:

> "Potential overproduction of heat. The level of heat produced annually reduced following introduction of tariff tiering. Higher heat produced previously may not have been required. This is in breach of Regulation 33(p)."

[16] The applicant was asked to provide any explanation for these findings. In a response dated 24 November 2020, the applicant raised an issue in relation to the correct interpretation of regulation 33(p):

> "As long as a participant does not generate heat for the predominant purpose of increasing periodic payments they will not be in breach of the ongoing obligations … If we decided to generate additional cheap heat to increase the comfort of our people, improve our working environment, or to improve a process or the quality of an output, that is our legitimate choice, and does not appear to be in breach of the clear language of the regulations."

[17] In relation to the percentage heat reductions identified, the applicant referred to:

> "(i) A change in the business production process whereby ovens were used to bake paint at 75 degrees prior to the tariff changed were reduced to 60 degrees;
>
> (ii) The increased use of oil; and
>
> (iii) Reduction in the demand for heat."

[18] In the course of the investigations, Ofgem declared itself satisfied with the explanations put forward in relation to two of the installations. Its focus remained on NI RHI 16736 and NI RHI 16762. The average heat production per quarter was identified as follows (in kWh):

	2016	**2018**	**2019**
NI RHI 16736	137,205	45,653	32,079

NI RHI 16762	135,465	54,555	41,220

[19] The year 2017 was omitted as the tariff change occurred during the course of this year. The response from the applicant dated 17 February 2021 was:

> "Boiler 16736 heats the workshop space in half the building, and has a legacy fixed oil-fired blow heater as backup. Boiler 16762 heats the workshop space in the other half of the building, together with the office space. 16762 has no legacy alternative, but we do have a portable oil-fired heater which we use in this space. Oil is very much cheaper than biomass at the moment (and has been for some time). We have been using the oil-fired heaters as primary heat sources, leaving the biomass installations for backup/top up, to be used only where strictly necessary…"

[20] On 9 July 2021 Ofgem sent its Notice of Revocation and Notice of Overpayment in accordance with the Regulations. It stated that the accreditation for NI RHI 16736 and NI RHI 16762 would be revoked and the respondent would be seeking to recoup historic payments. It was considered that the non-compliance had been both repeated and material and that the courses of action were therefore appropriate.

[21] The letter stated that the use of oil as an alternative had been analysed and, having allocated all the alternative fuel evenly between the two installations under consideration, there remained significant levels of overproduction of heat, 55% in the case of NI RHI 16736 and 47% for NI RHI 16762. It was concluded that:

> "We are satisfied that the predominant purpose of producing the previously higher amount of heat was to increase your periodic support payments. This is in breach of regulation 33(p) … we are satisfied a portion of the heat used before April 2017 was not for an eligible purpose … you have failed to provide information we requested to demonstrate how much of this heat was for an eligible purpose. Therefore, you are in breach of regulation 33(o)."

[22] The applicant was informed that the respondent had decided to recoup partial payments made between October 2015 and April 2017, on the basis of the percentage figures identified, and these represented overpayments in the sum of £53,296.42.

[23] In terms of payment, the letter stated:

> "In line with Regulation 47(1) there are two options to repay ineligible payments:
>
> (1) Under Regulation 47(1)(a) you are required to pay the periodic support payment as a civil debt owed to DfE and this will need to be paid by 09/08/2021 either by cheque or bank transfer.
>
> If this amount is not paid by the time specified, the Department have the power to recover any outstanding sum as a civil debt …
>
> (2) Alternatively, under Regulation 47(1)(b) you can choose to offset the full overpayments amount against any future periodic support payment and all subsequent payments, until the amount you owe has been repaid. This includes any additional NI RHI installations owned by the organisation.
>
> Please email **RHI.Compliance@ofgem.gov.uk** to confirm which method of repayment you intend to use by 16/07/2021. If you fail to respond by this date, we will proceed with option 2 in the first instance."

[24] The applicant did not issue any such confirmation by the date referred to and, to date, it has not made any payment or had any amounts recouped.

The Statutory Review

[25] The DfE, in exercise of the regulation 50 function, designed a Statutory Review Panel with the stated aim of providing an impartial review of substantive decisions of the DfE or its agents, and to identify any procedural or regulatory irregularity.

[26] The Terms of Reference ('TOR') for the Panel laid down that it is a standing committee of the DfE, comprised of a chairperson and up to three supporting members, all of whom are senior civil servants 'seated within the Department.' The TOR provide:

(i) The Panel is to provide an 'accessible and effective avenue for a participant' and to 'improve transparency';

(ii) The Panel operates independently of the RHI Scheme Administrators (DfE, Energy Group); and

(iii) Its review will be based solely on objective and impartial assessment.

[27] The review process is prescribed as being paper-based, taking account of information and representations made by the participant and the decision maker. The TOR state:

> "There are no oral presentations and, accordingly, neither the original decision maker nor the participant is represented before the Panel."

[28] The approval of the Panel is required for any additional representations sought to be made after the application for review.

[29] Following consideration of the review, the Panel is empowered to:

(a) Revoke or vary the original decision;

(b) Confirm the decision;

(c) Vary any sanction or condition imposed; or

(d) Replace any sanction or condition imposed.

[30] All review decisions require to be affirmed by the Statutory Review Officer ('SRO'), who was also the Chair of the Panel.

[31] On 2 August 2021, the applicant, through its solicitor, invoked its right to seek a statutory review of the decision. The grounds advanced were:

(i) The applicant was not in breach of regulation 33(p) of the Regulations;

(ii) The revocation of accreditation was unlawful and unreasonable;

(iii) The recoupment of periodic support payments was unlawful and unreasonable; and

(iv) The decisions made were disproportionate and in breach of relevant EU and ECHR law.

[32] The Panel in this case was made up of a Grade 3 Deputy Secretary of the DfE who was the Chair and SRO, David Malcolm, together with three Directors of the DfE, Laura McPolin, Alan Russell and Graeme Wilkinson.

[33] The applicant's solicitors received, periodically, standard form letters from the DfE stating that it was in the process of obtaining and reviewing evidence, information and representations relating to the case but that the pandemic had caused delays to the process. Eleven such letters were sent between November 2021 and September 2022.

[34] On 18 July 2022 the Panel met with representatives of the DfE. The purpose of this meeting was stated to be:

> "… to clarify their position and process for decision making on what factors are considered specifically when it is decided to revoke a participant's accreditation. Furthermore, to request information on how they decide whether to seek full recoupment, or when they decide that they will seek 10% of payments, as per the 'Enforcement' Regulations."

[35] On 20 July 2022 each member of the Panel was sent a synopsis of the case and links to the relevant documentation. The following were made available:

(i) Ofgem's Non-Compliance Investigation Sheet;

(ii) Legal advice from the Departmental Solicitor's Office;

(iii) The TOR of the Panel;

(iv) A DfE document entitled 'Policy Background re Overproduction of Heat';

(v) A paper for the RHI taskforce entitled 'Non Domestic NIRHI Scheme - Overproduction of Heat' dated 13 May 2019;

(vi) An Ofgem paper entitled 'Clarification on Sanctions Imposed'; and

(vii) An Ofgem document entitled 'Statutory Review Ofgem Compliance Review - Explanation of Compliance Decision', relating specifically to the applicant's case.

[36] Document (i) was generated by Ofgem and contains information provided by the applicant and Ofgem's analysis of this. It considers the evidence presented by the applicant, particularly in relation to the decrease in oven temperature and the increased use of oil.

[37] The report states that a reduction of 15 degrees in the temperature of the ovens would cause a significant reduction in heat requirement and this would account for a 'significant share' of the heat reduction.

[38] In relation to the increased use of fossil fuels, it is noted that prior to 2017, the business was using 1,000 litres of oil per year. Following the tariff changes, this increased to 14,395 litres per annum. Applying a 'rough conversion value' of 12kWh per litre, this would account for 172,740 kWh per year across all installations. When one adds up the missing eligible heat output (EHO) from the five installations, this

gives a figure of 896,135 kWh per annum, and so the additional oil use accounts for 19% of the 'missing' EHO.

[39] However, the authors raise the caveat:

> "We must bare (sic) in mind that heating via oil is a very different process to heating via biomass and this may be more appropriate for the business' needs (especially for those ovens). The participant could easily argue that this is an unfair way of determining the amount of heat replaced by oil however 14% is certainly too little to account for all the missing EHO."

[40] The paper records that there was "considerable evidence" provided by the participant regarding the change in business model and increased use of alternative fuel. As a result, the opinion is given:

> "I think it will be very difficult to prove that heat was produced with the primary aim of increasing payments however I do believe the spikes in EHO seen in 16732, 16734 and 16735 require further clarification."

[41] Having sought and received further information, Ofgem concluded that the reasons supplied for these three installations explained the reduction and therefore these were 'closed.' It was stated:

> "This will build some goodwill with the participant and significantly increase the likelihood of a positive outcome. I do not believe sufficient explanation has been given regarding why the heat use in the later two installations [sic]… Closing the other three would greatly help build a good relationship to better understand the later installations."

[42] The document moves on to analyse the position in relation to the two installations which were ultimately the subject of sanction. The calculations reveal a combined reduction of 685,433 kWh whilst the additional oil (based on the previous rough conversion value) would only account for 172,740 kWh.

[43] The issue of sanction is subjected to analysis and an individual identified as 'DB' recommended a recoupment of 10% be applied. 'JS' disagreed and recommended recoupment on the basis of 52% of the payments for 16736 and 48% for 16762. In that context, however, JS says:

> "I believe we should clearly explain the new process for calculating overproduction including fossil fuels and

> present it to senior management and DfE to give their opinion if it is worth the risk. We should make it clear that there are a lot of assumptions in this process, and this could be open to challenge."

[44] By April 2021, the document records that Ofgem had a new fossil fuel and EHO calculator tool. Using this, and counting all the alternative fuel as going to the areas heated by these two installations, the figures of 55% for 16736 and 47% for 16762 are arrived at. It was concluded that a breach of regulation 33(p) had been made out and recoupment should be at the level of the percentages identified.

[45] Document (iv) is a statement of DfE policy on the question of overproduction of heat. It states that, in each case, EHO is compared with periods pre- and post-tariff change in April 2017. Where a heat drop of over 10% is observed, participants are required to explain and provide evidence to account for the level of change. It also considers the question of recoupment, stating that the full amount will be recouped where this can be accurately determined whilst 10% will be recouped if this is not possible. The authors noted that:

> "A reduction in the heat generated has been observed for almost 90% of installations, following the introduction of tariff changes in April 2017, with current levels now more in line with what was envisaged at the outset of the Scheme."

[46] The document at (v) above outlines the approach of the DfE RHI Taskforce to the overproduction of heat. The Taskforce had identified a year on year heat reduction, being around 25% in the year following the tariff changes. It recognises that there may be a number of reasons for a drop in heat generation including the use of alternative heat sources, improvements in energy efficiency, changes in demand and illegitimate heat generation prior to the tariff change.

[47] A number of stages are identified in a process to ascertain whether there has been a breach of regulation 33(p) – the collection of evidence, analysis and site inspection, compliance consideration and enforcement. In an appropriate case, the Taskforce then passes the matter to Ofgem to action for final determination and enforcement action. It states:

> "If, following this analysis, there is a clear breach of Regulation 33(p) the ultimate sanction will be to revoke the participant and aim to recoup all periodic support payments. If, however, following consideration of the factors above, revocation is not deemed proportionate, enforcement action can include the application of a metering condition for closer monitoring of future heat use

> and/or the claw back of a proportion, or all, of the support payments received."

[48] Document (vi) was generated on foot of a request by the DfE following the meeting with the SRO as the Panel was "endeavouring to improve its understanding around Ofgem's determinations and how they apply sanctions." It recites the powers contained in regulations 45, 46 & 47 and explains the circumstances in which Ofgem will invoke each of the options.

[49] The document also explains the 'fossil fuel calculator' which is said to take the average EHO from each quarter before April 2017 and thereafter, thereby calculating the overall drop in heat use. It then calculates the average kWh of all fuel purchased before April 2017 and after, calculating the percentage change, and the change in overall heat use.

[50] Document (vii) was produced by Ofgem for the benefit of the Panel and sets out the rationale for the Ofgem decision. In particular, it states:

> "The participant has failed to provide satisfactory explanation for the large drop in heat output following April 2017 tariff change. While the participant has provided explanations during our investigation, we are not satisfied that the high heat used before this date was not for increasing periodic support payments. We are therefore satisfied that there has been a material failure of regulation 33(p)."

[51] It also explains that the question that was posed by the Panel was why the particular sanction approach was adopted. The answer given is:

> "For this case we were satisfied that the breach was serious and repeated and together with the overpayment amount revocation from the scheme was appropriate. In cases where we use the 10% approach, while we cannot accurately calculate the overproduction, we are satisfied that some of the reasons provided can account for some of the overproduction. We are also satisfied that the resulting overproduction is more than the 10% threshold we hold."

The Panel decision

[52] The Panel met on 28 July 2022 and reviewed the case, including the documents set out above. The minutes of the meeting record the chair (and SRO), Mr Malcolm, as referring to:

> "the need to obtain a fair balance between protecting the public purse and giving a fair hearing when considering the participants' individual cases."

[53] The applicant's assertion that staff were now cold due to the reduction in heat production is "noted" in the minutes.

[54] In relation to the applicant's case, the Panel concluded:

(i) There was sufficient evidence that heat was being generated for the purpose of 'heating a space' and therefore regulation 33(o) had not been breached;

(ii) There had been an overproduction of heat and therefore a breach of regulation 33(p);

(iii) There had been a significant drop in heat production post April 2017 and the use of oil and the weather would not account for the drop;

(iv) The breach of regulation 33(p) was repeated and material and the sanctions appeared reasonable.

[55] However, the Panel went on to agree that it would be worthwhile to update the Accounting Officer of the DfE on the work of the Panel and:

> "the challenges and risks faced, namely the need to protect the public purse versus the risk of challenge and reputational risk."

[56] The evidence also reveals that the Panel considered whether, despite the established breach, a participant should be permitted to remain on the RHI scheme, which would further the objective of increasing the use of renewable energy and allow monies to be recouped from future payments. This issue was raised with DfE and a paper produced entitled 'NI Non Domestic RHI Compliance - Policy on Recoupment' on 17 August 2022. The context is set out:

> "In consideration of how the Department can best protect public money, the Statutory Review Panel commented that if a participant remains on the scheme … there is a better chance of recoupment of monies owed … and the policy intent of increasing the use of renewable energy within Northern Ireland would be better served."

[57] The paper records that, following the tariff changes, there was a marked reduction in heat output at a population level and behavioural change was observed at installation level.

[58] The paper noted, in particular, that failing to sanction participants who had overproduced heat had the potential to affect the reputation of both the scheme and the DfE. Where a material and repeated breach had been identified, it was considered that further breaches could occur and therefore sanction powers ought to be applied as a deterrent. In addition, such installations would require a high level of future scrutiny which would be prohibitively expensive

[59] Following consideration of this document, the Panel decided to proceed on the basis of its earlier findings. The Chair specifically commented in an email dated 18 August 2022:

> "I am content the preliminary findings in the cases below are consistent with the policy intent and rationale as documented."

[60] On 16 September 2022, over a year after the review was sought, the applicant's solicitor wrote stating that evidence had been sought from an independent energy consultant regarding the application and seeking confirmation that the review would not be decided until such evidence had been submitted to the DfE. On 21 September 2022 the DfE indicated that this request had been referred to the Panel for consideration. On 4 October 2022 a further standard form letter was sent by the DfE.

[61] A Panel meeting was convened on 5 October 2022 during which the request from the applicant's solicitor, along with 14 other similar requests, was discussed. The Panel agreed to grant a six week extension for each of the 12 cases which had not, at that stage, been heard and determined. The Panel also agreed, in respect of the three cases which had been heard, including the applicant's review, further evidence would not be accepted as the DfE was in the process of issuing decision letters.

[62] On 6 October 2022 the applicant was advised:

> "The Statutory Review Panel considered your request below and advised that, as the review had already been heard and the Department was in the process of preparing the decision letters for issue, it would not be possible to accede to your request."

[63] On 20 October 2022 the substantive decision of the Panel was ratified by the SRO and the outcome of the review communicated to the applicant by him. The decision stated:

> "Following consideration of the case, the Panel concluded there was sufficient evidence that the heat was being generated in a building for the purpose of 'heating a space' as per Regulation 3(2) and, therefore, there had not been a breach of Regulation 33(o).

> Regarding Regulation 33(p), the Panel agreed with Ofgem that there had, on the balance of probabilities, been a breach of Regulation 33(p).
>
> The Panel concluded that the sanctions imposed by Ofgem appeared reasonable based on the information provided, which indicated a repeated and material breach of 33(p).
>
> On this basis, the Panel agreed to uphold the original sanctions from Ofgem of revocation and partial recoupment. The amount to be recouped has been calculated as £53, 296.42.
>
> In my role as the Statutory Review Officer, I am content with the decision reached by the Panel."

The Grounds for Judicial Review

(i) Procedural Fairness

[64] The applicant observes that the uncontroverted evidence reveals:

(i) Ofgem provided extensive and detailed material to the Panel and neither the existence of these documents nor their contents was made known to the applicant and its advisors;

(ii) Similarly, the DfE produced documentary material to the Panel which was not disclosed to the applicant;

(iii) Meetings took place in June and July 2022 between members of the Panel and officials of the DfE; and

(iv) The applicant was denied the opportunity to place expert evidence before the Panel, ostensibly on the basis that it was not possible for the Panel to consider same.

[65] The applicant contends that these matters all give rise to conspicuous and material procedural unfairness in the context of this investigation and its outcome.

[66] In *R (Primary Health Investment Properties Limited) v Secretary of State for Health* [2009] EWHC 519 (Admin), a dispute relating to the fixing of market rent for GP's surgeries, McCombe J said:

> "it seems to me that elementary fairness in any decision making process requires that the parties should have seen

> all the documents in the case that are presented to the decision-maker and/or any adviser that the decision-maker may consult." (para [120])

[67] In *Re JR17* [2010] UKSC 27, a case about school suspension, the pupil was not informed of allegations made against him and therefore had no opportunity to give his version of events. Sir John Dyson said:

> "a person's right to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it is one of the fundamental rights accorded by the common law rules of natural justice." (para [50])

[68] In *R(Lumba) v SSHD* [2011] UKSC 12, an immigration detention decision was impugned on the basis that the Government operated an unpublished policy governing the exercise of statutory powers. Lord Dyson commented:

> "The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see In re Findlay [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it." (para [35])

[69] The extent to which the content of a policy need be disclosed was resolved in favour of the following:

> "What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made." (para [38])

[70] In the instant case, the DfE operated a 'NI Non Domestic RHI Compliance – Policy Background re Overproduction of Heat.' The existence and contents of this policy were not known to the applicant nor, clearly, did it have the opportunity to make any representations on it. It was provided to the Panel.

[71] Similarly, the document generated in May 2019 by the DfE and addressing the overproduction of heat was not disclosed to the applicant, either in whole or in part, and it had no opportunity to make any comment or representation thereon.

[72] Three separate documents were generated by Ofgem. Firstly, its non-compliance investigation sheet or synopsis; secondly, the paper entitled 'Clarification on Sanctions Imposed'; and thirdly, the document called 'Statutory Review Ofgem Compliance Review - Explanation of Compliance Decision.'

[73] Some parts of these documents were disclosed to the applicant as part of the information gathering process or the reasons given for Ofgem's decision. However, the analysis contained in these documents was, for the large part, not disclosed.

[74] Furthermore, after the Panel had made its provisional findings, a further DfE paper was produced dated 17 August 2022 and entitled 'NI Non Domestic RHI Compliance - Policy on Recoupment.'

[75] It is evident therefore that the applicant was unaware of the following:

(i) Ofgem used a 'rough conversion value' for fossil fuel use which might be regarded as an unfair way of determining the amount of heat replaced by oil;

(ii) Ofgem was motivated by building goodwill and good relationships with the applicant in order to achieve a 'positive outcome' in the case;

(iii) There was an internal disagreement in Ofgem relating to the appropriate level of sanction in the applicant's case;

(iv) In 2021 a new fossil fuel calculator tool was introduced to assess the usage of oil;

(v) Reductions in heat had been observed at almost 90% of installations post the change of tariff in April 2017;

(vi) A 25% drop in heat generation had been recorded in the year following the tariff change;

(vii) The Panel met with officials from the DfE to discuss the applicant's case;

(viii) Ofgem prepared a paper for the Panel clarifying the sanctions imposed and explaining the use of the fossil fuel calculator;

(ix) Ofgem also produced a paper for the Panel justifying and explaining its rationale for the outcome of the applicant's case;

(x) Following the Panel's provisional decision, DfE produced a rationale paper and the Panel subsequently agreed that its findings were consistent with the policy intent and rationale.

[76] It must be recalled that these non-disclosures occurred in the context of a review process which was stated to be "objective and impartial" and which would take account of "information and representations submitted by both the decision maker and the participant."

[77] It can be seen therefore that there was a ready and regular exchange of information between the Panel, the DfE and Ofgem, none of which was made known or available to the applicant or its advisors.

[78] This represents an egregious breach of the basic principles of procedural fairness at common law. The Panel, as decision maker, took into account an array of material in respect of which the applicant had no opportunity to comment or make representations.

[79] Whether and to what extent this material made a difference to the outcome of the review connects with the remaining issue of the denial of the request to submit a report from a consultant. The applicant says that the issues revealed by the previously undisclosed documentation only serve to underline the need for expert input on its behalf. No such report has been produced, to the court's knowledge, and therefore the impact it may have had on the process is necessarily unknown. However, it could not be said that such impact would have been negligible.

[80] The respondent's response of 6 October 2022 to the applicant's request was both wrong and misleading. The evidence now demonstrates that the operative decision was taken by the SRO two weeks subsequently and whilst it may have been inconvenient to reconvene the Panel it was certainly not impossible for that to occur.

[81] The question for the Panel to address was whether it would have been unfair to deny the applicant's request. Instead the only reason proffered in the minutes for the refusal was:

> "The Panel agreed that … they would not accept further evidence as the Department is currently in the process of preparing to issue the decision letters."

[82] Not only does this fail to consider the basic question of fairness, it also ignores the fact that the decision does not take effect at all until it is affirmed by the SRO. There was therefore no decision as of 5 October.

[83] It may have been perfectly lawful for the Panel to refuse to admit a late expert report into the process. However, in this case, it failed to address the question of delay balanced against the fairness to the applicant, particularly in the context of the Panel itself having considered an array of additional documents which had not been seen or considered by the applicant. This failing was exacerbated by the erroneous approach adopted at the meeting on 5 October and the entirely misleading letter sent the following day.

[84] All these errors and omissions only served to compound what I have already found to be an procedurally unfair process.

[85] On this basis alone, the applicant's claim must succeed. Whilst on one view that finding may be determinative of the applicant's case, I am conscious that there are number of other outstanding judicial review applications, and it was intended that this be a test case. I will therefore address the other grounds of judicial review.

(ii) Article 6 ECHR

[86] Article 6 ECHR provides:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[87] In this case, the applicant's scheme accreditation was revoked by the Department and a civil debt founded on the basis of breach of the Regulations. It is the applicant's case that civil rights and obligations were determined and therefore article 6 engaged.

[88] This must be correct. The Regulations give rise to an obligation on the DfE to pay periodic support payments once a participant has been accredited. The applicant in this case was successful in achieving accreditation and therefore had a statutory right to receive the payments. Whether that accreditation can be removed and payments recouped on the basis of a breach of a duty under the Regulations clearly involves the determination of civil rights and obligations.

[89] In reliance on the recent Grand Chamber decision in *Duric v Serbia* (App. 24989/17, 6.2.24), the applicant says that the lack of an oral hearing was, of itself, a breach of its article 6 rights. The jurisprudence in this area reveals that there is no absolute right to an oral hearing, indeed there are many cases which can properly be disposed of on the basis of written representations. Regulation 50 leaves open the procedure to be adopted in this type of statutory review. In the TOR, a decision was made to restrict to a written procedure. No doubt it was intended that this would reduce the time and cost associated with the process.

[90] I am not satisfied that the lack of an oral hearing, either generally or on the specific facts of this case, gives rise to any breach of article 6.

[91] In *Bryan v UK* [1996] 21 EHRR 342, the applicant complained that a planning inspector lacked the necessary qualities of independence and impartiality to determine a matter of planning enforcement. The ECtHR said:

> "In order to establish whether a body can be considered "independent", regard must be had, *inter alia*, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence." (para [37])

[92] The Panel in this case was made up entirely of senior officials from the DfE. Whilst its TOR spoke of impartiality and transparency, the level of engagement identified between the Panel, Ofgem and other DfE officials during the course of the review process, together with the references to the 'public purse', rather belies any appearance of independence.

[93] However, this is a statutory scheme, and it should be recognised that the legislature intended that the DfE would be responsible for any review of its own decisions.

[94] Even where there is a lack of independence and/or impartiality in the decision maker, there will be no breach of article 6 if the proceedings before that body are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1)" (see *Bryan* at para [40]).

[95] There have been a number of decisions, some difficult to reconcile, on the issue of whether the availability of the judicial review procedure suffices to meet the 'full jurisdiction' requirement – see *Bryan; Tsfayo v UK* [2009] 48 EHRR 18; *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5; *R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54; *Re Bothwell's Application (No 2)* [2007] NIQB 25 and *Re Foster's Application* [2004] NIQB 1.

[96] The conclusion to be drawn from these authorities is that the answer will depend on the context of the decision making process. Lord Bingham stressed in *Runa Begum*:

> "… the court may not only quash [a] decision … if it is held to be vitiated by legal misdirection or procedural impropriety or unfairness or bias or irrationality or bad faith but also if there is no evidence to support factual findings made or they are plainly untenable or … if the decision-maker is shown to have misunderstood or been ignorant of an established and relevant fact."

[97] I am satisfied, in the context of this process, that the High Court's supervisory jurisdiction does provide the necessary safeguards, as this individual case illustrates. I therefore find that there has been no breach of article 6 ECHR.

(iii) Reasons

[98] Regulation 50(5) imposes a duty on the Panel to give reasons for its review decision. Where such an obligation exists, it is well established that the reasons must be adequate and intelligible, and they must enable the reader to understand why the decision was taken as it was – see *South Buckinghamshire District Council v Porter (No 2)* [2004] UKHL 33. The reasons do not need to condescend to every particular or consideration, but they do need to allow a disappointed party to understand why an adverse decision was made against it.

[99] In the planning context, it is often recognised that the parties are fully sighted on the issues in dispute. There will have been evidence produced in the form of opinions of planners and planning consultants and relevant policies.

[100] The letter from the Panel dated 20 October 2022 is not a set of reasons at all, but merely a statement of outcomes. In terms, it simply says:

> "The Panel agreed with Ofgem."

[101] There is, for instance, no analysis of why the applicant's claim that there is simply less heat being produced, resulting in staff being cold, is rejected.

[102] This manifestly fails to meet even the relatively low reasons threshold set out in *South Bucks*. There is no basis upon which the reader could gain an understanding as to why the grounds advanced by the applicant in its 16 page letter of 2 August 2021 had been rejected.

[103] Through the vehicle of these judicial review proceedings, it is now known that the Panel took into account various documents setting out the investigatory steps, rationale and policies of DfE and Ofgem. None of the analysis underpinning these found its way into the decision letter. This is antithetical to the stated aim of the review process to foster 'transparency.'

[104] The question arises as to whether the lack of adequate reasons can subsequently be rectified and/or whether any relief should be granted in a case where the duty to provide reasons has not been complied with. In *Lothian and Borders Police v Gemmell* [2005] CSOH 32, Lord Reed identified five principles in this area:

(i) The stringency with which the court requires a statutory duty to give reasons to be complied with will depend on the court's view of the intention of the particular statute, which it will infer from the language of the statute and the context;

(ii) Where there is a statutory duty to provide reasons as part of the notification of the decision to the parties, the court will normally interpret the legislation as having made the provision of adequate reasons with the decision a condition of the validity of the decision;

(iii) In other cases the court may, in principle, be willing to regard the provision of late reasons (either voluntarily, or in response to an order) as sufficient compliance with the statutory duty, and will not therefore, in such a case, necessarily quash a decision by reason of the earlier failure in compliance;

(iv) The court may in its discretion decline to quash a decision by reason of a failure to comply with a duty to give reasons;

(v) In the event that the court quashes a decision as the result of a failure to comply with a duty to give reasons, it follows that the matter must be reconsidered. (see para [70])

[105] The language of the statute, coupled with the purpose of the statutory review as set out in the TOR, leads to the clear conclusion that this is a case where adequate reasons are a condition of the validity of the decision. This serves to promote the transparency, effectiveness and impartiality of the Panel's decision making, and public confidence more generally.

[106] The applicant's claim therefore succeeds on the grounds of the inadequacy of the Panel's reasons for its decision.

(iv) Illegality: predominant purpose and burden of proof

[107] As long ago as 24 November 2020, the applicant raised the issue of 'predominant purpose', being the statutory test under regulation 33(p). It was contended that overproduction does not equate with the predominant purpose of increasing periodic support payments.

[108] A participant can be required, under regulation 33(o), to provide evidence that they are generating heat for an eligible purpose, as defined by regulation 3(2). There is no such obligation imposed by regulation 33(p) in relation to 'predominant purpose.' It is only where "the Department is satisfied that there has been a material or repeated failure" that accreditation may be revoked or where "the Department is satisfied that a participant has received a periodic support payment which exceeds that participant's entitlement" that the recoupment provisions may be invoked.

[109] As I have already found, there is little in the way of recorded analysis on the part of the Panel. In his affidavit Mr Malcolm states that, having reviewed Ofgem's reasoning, the Panel concluded:

> "there was sufficient evidence to conclude that there had been an overproduction of heat and the Applicant had breached Regulation 33(p)."

[110] The Regulations do not prohibit "overproduction of heat." Sanctions may only be invoked when the predominant purpose test is satisfied. Nowhere in any of the documents generated by Ofgem or the DfE, nor in the evidence relied upon in these proceedings, is this question properly grappled with.

[111] In the decision letter of 9 July 2021 Ofgem recites regulation 33(p) but then says:

> "You have been unable to provide us with evidence that you are, and were, complying with your ongoing obligation not to generate heat for the predominant purpose of increasing your periodic support payments … While you have provided explanations for the large drop in heat output, we are not satisfied that these explanations can account for the full drop…As a result, we are satisfied that the predominant purpose of producing this previously higher amount of heat was to increase your periodic support payments."

[112] Ofgem's Explanation of Compliance – document (vii) above – sets out the non-compliance found:

> "Potential overproduction of heat. The level of heat produced annually reduced following introduction of tariff tiering. Higher heat previously may not have been required. This is in breach of regulation 33(p)."

[113] In its summary, Ofgem states:

> "This participant was afforded multiple opportunities to explain the drop in heat. We carried out analysis on the reasons provided and gave a detailed explanation for why they were discounted and could not explain the significant drop in heat. For this case we were satisfied that the breach was serious and repeated …"

[114] The failure to consider how the statutory test is applied is a serious and obvious omission. If for, instance, a participant decides to generate heat for the purpose of making its premises warm and comfortable but, following the tariff change in April 2017, decides to let the premises become cold, this is not a breach of regulation 33(p) since it does not meet the predominant purpose test. Alternatively, the participant may be generating heat both for the purpose of keeping his premises warm and also to increase periodic support payments. In such a case, a decision has to be made as to which is the predominant purpose. Without undertaking the required analysis, the decision maker simply conflates a significant drop in heat production with a breach of obligation.

[115] The DfE's Policy document on Overproduction of Heat reveals that in almost 90% of cases there was a reduction in heat generation post April 2017 and there may be a variety of reasons for this. It does not, however, explain to decision makers either that the predominant purpose test must be met or how this exercise should be undertaken.

[116] The reason for this may be that the decision makers failed to recognise the distinction between regulation 33(o) and 33(p). The former imposes an obligation on participants to provide evidence to demonstrate that the purpose is eligible; the latter does not. However, the Ofgem reasoning is based squarely on the failure by the applicant to provide reasons for the drop in heat production. The statutory scheme does not require participants to show that they are not in breach of obligation. Rather, it requires the DfE to be satisfied that a breach has occurred.

[117] The respondent has therefore misinterpreted the scheme and fallen into an error of law in the manner in which it applied the provisions of regulation 33(p). By effectively accepting Ofgem's approach and rationale, the Panel failed to properly apply the evidence to the statutory test. It was incumbent upon it, just as the applicant had stated in its communication of 24 November 2020, to identify why the predominant purpose test was met on the facts of this particular case. This it manifestly failed to do, either because the need to identify a predominant purpose from a number of purposes was not understood or, wrongly, a burden of proof was placed on the applicant under regulation 33(p).

[118] This ground of review therefore succeeds.

(v) Illegality and recoupment

[119] In a related application for judicial review, brought by Thomas Paul, a decision made by the DfE to recoup periodic support payments was quashed by consent. It was accepted by the respondent that one of the retained functions under the arrangements with Ofgem is the regulation 47(1)(a) power to require a participant to repay payment as a civil debt. In the Paul case, the purported exercise of that power by Ofgem was therefore ultra vires.

[120] In this case, the approach adopted by Ofgem was to offer the applicant a choice of either repayment of the monies or recoupment from future periodic support payments. The default position was expressed to be the latter, ie the regulation 47(1)(b) route.

[121] Whilst the background threat of enforcement by way of civil debt remained, Ofgem did not itself engage this procedure and therefore it did not act ultra vires. It had the ability, as one of the conferred functions, to pursue the regulation 47(1)(b) remedy and this is the legal position in the applicant's case.

[122] This ground of review therefore fails.

(vi) Article 1 of the First Protocol ECHR

[123] The unlawful deprivation of a property right remained a separately pleaded ground of challenge in this application but, in the words of the applicant's counsel, became "submerged into common law fairness."

[124] Insofar as the complaint made by the applicant is that the interference with its property rights was disproportionate, this adds little to the existing claims. The overarching claim that the Regulations are incompatible with A1P1 rights was not actively pursued at the hearing. One can envisage many cases where the use of regulation 46 and 47 sanctions would be justified and in accordance with the public interest, based on a fair procedure and proper interpretation of the law. It would not be possible to establish that the enforcement scheme would operate incompatibly in "all or almost all cases" as required by *Christian Institute v Lord Advocate* [2016] UKSC 51.

Summary and conclusion

[125] In summary therefore:

(i) The applicant's claims based on procedural fairness, error of law in the interpretation and application of the Regulations and inadequacy of reasons succeed;

(ii) The claim that Ofgem acted ultra vires in relation to the recoupment of periodic support payments is dismissed;

(iii) The applicant's claims pursuant to article 6 and A1P1 ECHR are dismissed.

[126] For the reasons set out, the applicant's challenge succeeds, and I quash the decision of the Panel dated 20 October 2022.

[127] I will hear the parties on any consequential relief and on the issue of costs.