**Appeal number: NV/2019/0018/P**

**FIRST-TIER TRIBUNAL**
**GENERAL REGULATORY CHAMBER**
**ENVIRONMENT**

**CAROL MASON** **Appellant**

**- and -**

**THE SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY** **Respondent**

**TRIBUNAL: JUDGE ALISON MCKENNA (CP)**

**Sitting in Chambers on 8 April 2020**

## MODE OF HEARING

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers and without a hearing, in accordance with rule 32 of this Chamber's Procedure Rules[1].

## DECISION

2. This appeal is allowed.

3. The Secretary of State's Decision of 2 October 2019 is hereby withdrawn, and the matter is remitted to the Secretary of State to make a fresh decision, which must take account of my reasons set out below.

## REASONS

*A: Background to Appeal*

4. The Green Deal is a statutory scheme intended to assist in increasing the energy efficiency of residential properties. The scheme operates through companies called 'Green Deal Providers'. Green Deal Providers offer loans and arrange the installation of relevant equipment at their customers' properties under a 'Green Deal Plan'. They are required to conduct themselves in accordance with a Code of Practice. If they breach the Code of Practice, they may be sanctioned.

5. This appeal concerns the Secretary of State's Decision on 2 October 2019 to impose the sanction of 'reduction' on GDFC Assets Limited ("GDFC") as a 'relevant person' in relation to breaches of the Code of Practice by a Green Deal Provider known as Home Energy and Lifestyle Management Limited ("HELMS"), in relation to Green Deal Plan ID AC0000117720.

6. Mrs Mason is a 'person directly affected' by that decision, because she entered into the Green Deal Plan referred to above in respect of her home. As such, she has a right of appeal against the decision to this Tribunal, pursuant to regulation 87 of The Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012[2].

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[1] https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules

[2] http://www.legislation.gov.uk/uksi/2012/2079/contents/made

7. I am grateful to the parties for their clear written submissions. I have considered carefully the agreed hearing bundle comprising 208 pages.

*B: The Law*

8. The Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012 were made pursuant to powers contained in the Energy Act 2011.

9. The Regulations materially provide as follows:

> ***24.***— *(1) A green deal provider must—*
>
> *(a) comply with any provisions of the code of practice which apply to green deal providers;*
>
> …
>
> ***53.*** *Subject to chapter 3, the Secretary of State may impose under this Part the sanctions of—*
>
> *(a) cancellation or reduction on a relevant person;*
>
> *(b) compensation further to cancellation on an improver or a notifier, as applicable;*
>
> *(c) a compliance notice on a green deal provider;*
>
> *(d) a financial penalty on a green deal provider;*
>
> *(e) suspension on an authorised person other than a green deal provider;*
>
> *(f) withdrawal on an authorised person.*
>
> …
>
> ***67.***— *(1) This regulation applies where the Secretary of State is satisfied that there is a breach of the relevant requirements by a green deal provider and—*
>
> *(a) the breach is severe; or*
>
> *(b) there have been other breaches of the relevant requirements by the green deal provider in respect of the property or other properties.*
>
> *(2) The Secretary of State may impose on the green deal provider one or more of—*
>
> *(a) a compliance notice;*
>
> *(b) a financial penalty;*
>
> *(c) withdrawal.*
>
> *(3) Where the Secretary of State is satisfied that the bill payer has suffered substantive loss, the Secretary of State may, in addition to any sanction imposed under paragraph (2), impose cancellation or reduction on the relevant person.*
>
> …
>
> ***72.***— *(1) This regulation applies where under this Part—*
>
> *(a) cancellation or compensation must or may be imposed;*
>
> *(b) the following may be imposed—*
>
> *(i) reduction;*
>
> *(ii) a financial penalty;*
>
> *(iii) suspension;*

*(iv) withdrawal.*

*(2) Before imposing a sanction, the Secretary of State must give notice (an "intention notice") to any person other than the relevant energy supplier whom the Secretary of State considers to be an affected person, specifying—*

*(a)that the Secretary of State intends to impose the sanction;*

(b)that affected persons may make written representations and the time limits for such *representations;*

*(c)where the Secretary of State intends to suspend or withdraw the authorisation of a green deal certification body, that the relevant members of the certification body may make representations concerning a deferral in accordance with regulation 81; and*

*(d)subject to paragraph (3), those matters which the Secretary of State would be required to include in a sanctions notice, if the sanction is imposed.*

*(3) Where the Secretary of State intends to impose a financial penalty, the intention notice need not include—*

*(a)how payment may be made; and*

*(b)details of the early payment discounts.*

*(4) Where after consideration of any representations the Secretary of State decides to impose the sanction, the Secretary of State must give a sanctions notice in accordance with regulation 78.*

*(5) For the purposes of this regulation, "affected person" means any person whose interests will be directly affected by the imposition of the sanction.*

*…*

***78.**— (1) A sanctions notice must be given to—*

*(a) any person to whom the Secretary of State is required to give a notice under regulation 72(2); and*

*(b) where cancellation or reduction is imposed—*

*(i) the relevant energy supplier; and*

*(ii) the complainant, if that person is not the bill payer.*

*(2) A sanctions notice must include—*

*(a) the sanction imposed;*

*(b) the person on whom the sanction is imposed;*

*(c) the reason for imposing the sanction; and*

*(d) information on appeals which may be made under regulation 87.*

*(3) A sanctions notice containing cancellation, reduction, suspension or withdrawal must include the date on which the sanction has effect.*

*(4) A sanctions notice containing reduction must include—*

*(a) the total amount of the reduction;*

*(b) how the reduction has been calculated; and*

*(c) the revised amount due under the energy plan.*

*(5) A sanctions notice containing a financial penalty must include—*

*(a) the amount of the penalty;*

*(b) the period within which payment must be made;*

*(c) how payment may be made;*

*(d) details of the early payment discounts; and*

*(e) the consequences of non-payment.*

*(6) A sanctions notice containing suspension must include the date on which the suspension ceases to have effect.*

*…*

***79.** Any sanction imposed under this chapter must be proportionate to the breach in relation to which it is imposed.*

*…*

***87.**— (1) Subject to paragraph (5), any person directly affected by a decision of the Secretary of State—*

*(a) to refuse an application for authorisation under Part 3 to act as a green deal assessor certification body or a green deal installer certification body;*

*(b) to impose or not to impose a sanction under Part 8,*

*may appeal to the First Tier Tribunal.*

*(2) The Tribunal must determine the standard of proof in any case.*

*(3) The Tribunal may suspend a decision pending determination of the appeal.*

*(4) The Tribunal may—*

*(a) in relation to a decision under Part 3 or 8—*

*(i) withdraw, confirm or vary the decision;*

*(ii) remit the decision to the Secretary of State;*

*(b) in relation to a decision whether to impose a sanction under Part 8, impose a different sanction or take different action.*

*(5) A relevant energy supplier may not appeal under this regulation unless it is affected by a decision for a reason which is not connected with its collection of payments under a plan.*

10. The Tribunal's jurisdiction in determining an appeal under regulation 87 above is *de novo* i.e. it requires the Tribunal to stand in the shoes of the Secretary of State and to take a fresh decision about whether to issue a sanction notice - and if so which type of sanction notice - on the evidence before it at the hearing, giving appropriate weight to the reasons for the Secretary of State's decision. The nature of such an appeal is described in *El Dupont v Nemours & Co v ST Dupont* [2003] EWCA Civ 1368 by May LJ at [96][3].

11. In taking a fresh decision, I note that the Tribunal is not required to undertake a reasonableness review of the Respondent's decision, but instead to decide whether it would itself issue the same Notice on the evidence before it. The Tribunal has no supervisory jurisdiction – see *HMRC v Abdul Noor* [2013] UKUT 071 (TCC)[4].

[3] http://www.bailii.org/ew/cases/EWCA/Civ/2003/1368.html

[4] http://taxandchancery_ut.decisions.tribunals.gov.uk/Documents/decisions/HMRC_v_Abdul_Noor.pdf

12. In *R (Hope and Glory Public House Ltd v City of Westminster Magistrates' Court* [2011] EWCA Civ 31[5], the Court of Appeal decided that "*careful attention*" should be paid to the reasons given by an original decision-maker, bearing in mind that Parliament had entrusted it with making such decisions. However, the weight to be attached to the original decision when hearing an appeal is a matter of judgment for the Tribunal, "*taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given in the appeal"*. The approach recommended in *Hope and Glory* was approved by the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] 1 WLR 4799[6].

13. Pursuant to rule 15 (2) (a) (ii) of the Tribunal's Rules[7], the Tribunal may when hearing an appeal admit evidence whether or not it was available to the previous decision maker. The burden of proof in a *de novo* appeal rests with the Appellant as the party seeking to disturb the status quo. The usual standard of proof to be applied by the Tribunal in making findings of fact is the balance of probabilities. Regulation 87 (2) requires the Tribunal to determine the appropriate standard of proof in hearing an appeal against a Sanction Notice. I have not received submissions on this point but consider it appropriate to direct that the civil standard ('the balance of probabilities') should be applied in this case.

*C: The Facts*

14. The background facts, which were not in dispute, may be summarised as follows.

15. Mrs Mason entered into a Green Deal Plan in relation to the instalment of solar panels on the roof of her property in Glasgow in October 2014. The Green Deal Provider was Home Energy and Lifestyle Management Limited ("HELMS"), which no longer exits. Before it was dissolved, HELMS was sanctioned for breaches of the Code of Practice with which Green Deal Providers are bound to comply.

16. Mrs Mason's Green Deal Plan included provision for her repayments under a credit agreement with HELMS to be made to GDFC Assets Limited ("GDFC"). GDFC is therefore the 'relevant person' for the purposes of a decision whether to impose a sanction of cancellation or reduction under regulation 53 (a) of the 2012 Regulations, referred to above. It also provided

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[5] http://www.bailii.org/ew/cases/EWCA/Civ/2011/31.html.

[6] https://www.supremecourt.uk/cases/docs/uksc-2015-0126-judgment.pdf

[7] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/367600/tribunal-procedure-rules-general-regulatory-chamber.pdf

for the payments to which she was entitled on account of the energy produced by the solar panels (known as the 'feed-in tariff' or 'FiT') to be assigned to a third company, PVSI.

17. Mrs Mason complained to HELMS promptly that it had misled her about the cost of entering the Green Deal Plan. Her liabilities under the Plan were greater than she said she was told they would be and did not reduce her energy bill as she said she had been promised. She later complained to the Financial Ombudsman Service, but as HELMS had by then ceased to exist, no sanction could be imposed on upholding her complaint. This matter was therefore treated as referred to the Secretary of State under regulation 59 of the 2012 Regulations.

18. The Secretary of State, having received the Ombudsman's analysis, initially proposed the sanction of cancellation of Mrs Mason's Plan in a Notice of Intention dated 16 April 2019. However, after receiving representations from GDFC in response to the Notice of Intention, the Secretary of State decided instead to impose the sanction of reduction on GDFC. That is the decision of 2 October 2019 which is the subject matter of this appeal.

*D: The Notice of Intention and the Sanction Decision*

19. The Notice of Intention dated 16 April 2019 (page 65) informed GDFC that the Secretary of State had made certain initial findings of fact (set out in an annexe) and in reliance thereon proposed to impose the sanction of cancellation on GDFC in respect of Mrs Mason's Plan. The initial findings of fact included the identification of four separate breaches of the Code of Practice which directly impacted on Mrs Mason's ability to understand the nature of the transaction being offered to her, and contained the initial conclusions that *Mrs Mason would not have entered the credit agreement if not for HELMS' breaches of the CoP* and that *Cancellation of the Plan takes Mrs Leach back as closely as possible to the position she would have been in had HELMS not breached the CoP*. The Notice of Intention also noted that *We cannot be certain of what was said by the sales representative when dealing with Mrs Mason. However, the pattern of behaviour alleged in the complaint is consistent with that upon which sanctions were imposed on HELMS by the Secretary of State …on 19 November 2015 and in subsequent cases.*

20. GDFC made a 78 -paragraph representation in response to the Notice of Intention (page 71). It submits that Mrs Mason's complaint that she was told the solar panels would be free is unsustainable because standard documentation was used by HELMS and signed by her. It is submitted that the provisional findings in relation to breaches of the Code of Practice were unsustainable and that, in any event, the Code of Practice did not apply to the FiT contract with PVSI. GDFC submitted that the Secretary of State's approach to the initial fact-finding was flawed. Further, it was submitted that the proposed sanction of cancellation was both unreasonable and

disproportionate in its impact on GDFC, that it would provide Mrs Mason with the windfall of free panels and that her complaint about the FiT should be taken up directly with PVSI.

21. The Secretary of State considered only GDFC's submissions before reaching the final Sanction Decision, as Mrs Mason did not make any further representations.

22. I find it surprising that the Secretary of State does not refer to the Ombudsman's recommendations in either the Notice of Intention or the Sanction Decision. This makes it difficult to know what, if any, weight was given to the Ombudsman's findings of fact and conclusions thereon, reached after the Ombudsman's own investigation. It would appear that the |Secretary of State relied on the Ombudsman's findings of fact and did not conduct his own investigation on factual matters, but this is not stated. The Ombudsman's findings are included as documentary evidence in the bundle now before me and I refer to them below.

23. The final Sanction Decision dated 2 October 2019 confirmed the findings of fact set out in the Notice of Intention to the effect that there were breaches of the Code of Practice. It concluded that it was *reasonable to assume that Mrs Mason may not necessarily have thought that the panels were 'free'. However…. the HELMS representative did mislead Mrs Mason by telling her that her bills would not rise and that her savings would be sufficient to cover her repayments under the Plan...*

24. The Secretary of State finally concluded that the sanction of reduction should be imposed in these circumstances, to take Mrs Mason closest to the position she would have been in if HELMS had not misled her. The Secretary of State assumed energy savings of £120 per year and reduced Mrs Mason's payments so that they matched this figure. This involved reducing her liability under the Plan by £4,324.92, including an immediate refund of £746.46 in respect of overpayments already made. This is the decision which Mrs Mason now appeals against.

*E: The Appeal - Pleadings and Submissions*

25. Mrs Mason's Notice of Appeal dated 5 October 2019 relied on grounds that, whilst the sanction of reduction seemed reasonable, the amount of the reduction did not take account of the financial burden she has already carried and would continue to face for the next nineteen years. In particular, she says she is concerned that she will have to pay for the maintenance or replacement of the panels and that she will not be able to repair her roof or sell her house with the panels and the financial arrangements in place. She states that the outcome she seeks is cancellation of the Plan and compensation.

26. The Secretary of State's Response to the Notice of Appeal relied on the Secretary of State's decision as reasoned and proportionate. It was submitted

that removal of the panels was not a realistic option as the contract in relation to the panels was with PVSI so cancellation of the Plan could not affect Mrs Mason's obligations in respect of the panels. It described the panels as a tangible asset which Mrs Mason receives a benefit from but does not address the question she raised in her grounds of appeal about her ongoing liabilities if the Plan continues in operation, albeit that her payments are reduced.

27. In her Reply, Mrs Mason says that she feels aggrieved and is suffering financial hardship. She says she will be paying for the panels and any maintenance for the next nineteen years.

28. GDFC, having received a copy of the Notice of Appeal, informed the Tribunal that it did not wish to be joined as a party to this appeal but did wish to place its submissions before me. In these submissions, it is noted *inter alia* that there appears to be no clear evidential basis for certain conclusions reached by the Secretary of State as relied on in the decision letter. This may arise from the fact that there is no reference to the Secretary of State's reliance on the Ombudsman's findings. GDFC states that PVSI bears responsibility for the maintenance and repair of the panels so Mrs Mason is free to pursue PVSI if she wishes.

29. In a written skeleton argument for the Tribunal, Charles Streeten, counsel for the Secretary of State, reiterated that the sanction of reduction imposed in this case was intended to put Mrs Mason as close as possible to the position she would have been in had the Plan taken effect as sold to her by HELMS. He submits that the reduction of Mrs Mason's liability under her Plan so that her payments match her assumed savings is a proportionate decision to which the Tribunal should give weight.

*F: Evidence*

30. No formal witness evidence was relied on by either party.

31. The contractual documentation and correspondence with HELMS and with the Ombudsman is exhibited as documentary evidence (pages 128 to 208).

32. The other documentary evidence in the Tribunal's hearing bundle was the Financial Ombudsman Service's report (page 56). This records that Mrs Mason's original complaint was about the fact that she had been told by HELMS that the solar panels were free because they were 'Government funded'. This of course turned out not to be the case and the Ombudsman records that her energy costs have increased, causing her financial hardship and stress.

33. The Ombudsman points to the fact that Mrs Mason's credit loan agreement was signed some two months after the other contractual documentation. This *casts doubt as to what she was told about the credit agreement when she was told about the credit agreement when she entered into the Green Deal Plan. So, on balance she may well not have realised there was a loan involved.*

34. The Ombudsman concluded that Mrs Mason would not have entered into the Plan if she had understood it, and that HELMS had misled her into doing so. It also concluded that she had suffered substantive loss as a result of HELMS' *unfair and misleading practices.* The Ombudsman found there to have been four breaches of the Code of Practice (considered to be *severe)* in Mrs Mason's case and recommended cancellation of Mrs Mason's Plan as a proportionate sanction, with a refund of the payments already made by Mrs Mason.

*G: Conclusions*

35. In reaching my conclusions on this appeal, I remind myself that I stand in the shoes of the Secretary of State and must make a fresh decision considering all the evidence before me as at the date of the hearing. I note that there is the information before me now which appears not to have been considered by the Secretary of State in making his decision on 2 October 2019.

36. I am satisfied that the legislative basis for issuing a sanction is met in this case, as follows:

    (i) I agree with the Secretary of State that the evidence shows on the balance of probabilities that HELMS committed a number of breaches of the Code of Practice, as specified, which put them in breach of the over-arching requirement to comply with the Code of Practice.

    (ii) I agree with the Secretary of State's conclusion that these breaches were "severe" within the terms of regulation 67 (1) (a) and that Mrs Mason, thereby suffered "substantive loss" for the purposes of regulation 67 (3). This puts the Secretary of State in the position of being able to impose the sanction of cancellation or reduction on GDFC under regulation 67 (3).

37. This then raises the question of whether cancellation or reduction is the appropriate sanction. I note that regulation 79 requires any sanction imposed to be *proportionate to the breach for which it is imposed.* I cannot find in the Secretary of State's decision letter any proportionality analysis that links the seriousness of the breaches found to have been committed with the sanction imposed for those breaches. Looking at the Notice of Intention and the Notice together, it appears that the Secretary of State considered that cancellation or reduction were both proportionate to the breaches for which a sanction was merited, but that other factors influenced the final choice as to which of those sanctions to impose.

38. I find that the Secretary of State's reasoning on the question of the appropriate sanction is insufficiently clear for me to attach weight to it. It seems to me that a fresh decision should be made in this case. This should provide clear findings of fact and a clear explanation of why either sanction is merited, with

reference to the breaches themselves, in order to satisfy the proportionality requirement.

39. If the ability to put Mrs Mason as close as possible into the position she would have been if the Plan had taken effect as sold to her by HELMS is an appropriate factor to consider, then it seems to me that a more thoroughgoing analysis and a clear finding of fact as to her exposure to ongoing liability for the maintenance and repair of the solar panels should also be factored into that decision-making process.

40. Finally, whilst I am not here conducting a procedural review, I observe that I found it surprising that the Secretary of State considered it appropriate, having sought comments on the Notice of Intention to cancel Mrs Mason's Plan, to then decide to impose the sanction of reduction without any prior indication of this change of course. This meant that neither Mrs Mason nor GDFC were given the opportunity to comment on the proposed terms of the reduction or to dispute the calculations made in the final decision. It seems to me that it would have been fairer for the Secretary of State to have issued a fresh Notice of Intention inviting representations on the proposal to impose the sanction of reduction before issuing a final decision. In the absence of a second Notice of Intention, Mrs Mason had no alternative but to appeal to this Tribunal and this has undoubtedly been more resource-intensive for the public purse.

41. For all the above reasons, I have concluded that the Secretary of State's decision of 2 October 2019 cannot stand and so I allow this appeal and withdraw it. I remit the matter to the Secretary of State to make a fresh decision, in which he will exercise his own skill and judgement but must take into account all the evidence placed before me in deciding this appeal, and pay careful attention to the comments I have made in this Decision.

**(Signed)**

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| **Judge Alison McKenna** | **DATE:** | **8 April 2020** |
| **Chamber President** | **Promulgation Date:** | **14 April 2020** |