



**Appeal number: NV/2019/0020 /P**

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

**MICHAELA JANE TIBBS**

**Appellant**

**- and -**

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

**Respondent**

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

**Determined on the papers, the Tribunal sitting in Chambers on 20 April 2020**

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## DECISION

1. This appeal is dismissed.
2. The Secretary of State's Decision dated 24 April 2019 is confirmed.

## MODE OF HEARING

3. 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<sup>1</sup>.
4. I have considered an agreed hearing bundle comprising 151 pages, plus additional submissions.

## REASONS

### *A: Background to Appeal*

5. This appeal concerns the Secretary of State's Decision on 24 April 2019 to impose the sanctions of cancellation and compensation in relation to the Appellant's Greed Deal.
6. The Secretary of State had found the Appellant to have breached her statutory obligations under sections 12 and 14 of the Energy Act 2011 and also various regulations under the Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012. He decided to impose a sanction in respect of these breaches.
7. The breaches found to have been committed by the Secretary of State had occurred in the following way. The Appellant installed a new central heating system at her property using finance available under the Green Deal scheme. The installation was carried out by British Gas New Heating Limited (the "Green Deal Provider") but the financial arrangement was then sold to GDFC Assets Limited ("GDFC").
8. The Appellant subsequently sold her property, but the purchaser complained that the sale contract had not contained the required Green Deal provision and that he had not been provided with the requisite full Energy Performance certificate. He argued that these procedural failings meant that he ought not to be required to take over the payments to GDFC.
9. The purchaser complained to the Energy Ombudsman and eventually the matter was referred to the Secretary of State to adjudicate. On 5 March 2018, the Secretary of State issued a Notice of Intention to impose the sanction of cancellation. This

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<sup>1</sup><https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

would mean that the Appellant's contract with British Gas was cancelled so the purchaser had no obligation to make ongoing payments to GDFC. GDFC (which is a person affected under regulation 72(5) of the 2012 Regulations) made representations that the cancellation of the contract would have a disproportionate impact on it unless compensation were also to be awarded.

10. The Secretary of State then issued a second Notice of Intention on 6 December 2018, in which he proposed to issue the twin sanctions of cancellation and compensation, the latter requiring the Appellant to pay the outstanding amounts to GDFC. The Appellant's solicitors made representations to the Secretary of State that the Green Deal had been disclosed to the purchaser in the property questionnaire.

11. The Secretary of State decided to proceed with the sanctions of compensation and cancellation. This was the decision communicated by Final Notice dated 24 April 2019. This is the decision now appealed.

*B: The Law*

12. The Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012<sup>2</sup> were made pursuant to powers contained in the Energy Act 2011.

13. The Energy Act 2011<sup>3</sup> materially provides as follows:

**Section 12 Disclosure of green deal plan etc in connection with sale or letting out**

*(1) This section applies where—*

*(a) a green deal property, or a lease of such a property, is to be sold, or*

*(b) a green deal property is to be let out—*

*(i) under a tenancy or licence agreement, and*

*(ii) on the basis that the prospective tenant or licensee is to be liable for paying the energy bills for the property.*

*(2) The seller or prospective landlord or licensor must, in relation to the document, or each document, required to be produced or updated as mentioned in section 8(4)—*

*(a) obtain the document or, if the requirement to produce or update the document has not yet been complied with, produce a document containing the same information in connection with the green deal plan as that document would have contained, and*

*(b) provide the document free of charge to any prospective buyer, tenant or licensee at the specified time.*

*(3) An obligation under subsection (2) may be discharged by an agent.*

*(4) For the purposes of subsection (2) a person becomes a prospective buyer, tenant or licensee in relation to a property when the person—*

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<sup>2</sup> <http://www.legislation.gov.uk/ukxi/2012/2079/contents/made>

<sup>3</sup> <http://www.legislation.gov.uk/ukpga/2011/16/contents>

- (a) requests any information about the property from the seller, prospective landlord or licensor or an agent for the purpose of deciding whether to buy or let the property,*
- (b) makes a request to view the property for the purpose mentioned in paragraph (a), or*
- (c) makes an offer, whether oral or written, to buy or let the property.*
- (5) For the purposes of this section—*
  - (a) an agent is a person acting on behalf of a seller or prospective landlord or licensor in the sale or letting out of a property;*
  - (b) a property is a green deal property if there is a green deal plan in respect of the property and payments are still to be made under that plan;*
  - (c) specified, in relation to a time, means specified in regulations made by the Secretary of State.*
- (6) The Secretary of State may make regulations specifying cases or circumstances in which subsection (2) does not apply.*

**Section 14 Acknowledgment of green deal plan on sale or letting out**

- (1) This section applies where—*
  - (a) a green deal property, or a lease of such a property, is to be sold, or*
  - (b) a green deal property is to be let out—*
    - (i) under a tenancy or licence agreement which is in writing, and*
    - (ii) on the basis that the prospective tenant or licensee is to be liable for paying the energy bills for the property.*
- (2) The seller or prospective landlord or licensor must secure that the contract for sale or tenancy or licence agreement includes an acknowledgment by the buyer, tenant or licensee that the bill payer at the property is liable to make payments under the green deal plan and that certain terms of that plan are binding on the bill payer.*
- (3) Subsections (4) and (5) apply where the green deal property is in England or Wales.*
- (4) An acknowledgment required by subsection (2) must be in the form prescribed in regulations made by the Secretary of State.*
- (5) The Secretary of State may make regulations specifying cases or circumstances in which subsection (2) does not apply.*
- (6) Subsections (7) and (8) apply where the green deal property is in Scotland.*
- (7) The acknowledgment required by subsection (2) must be in the form prescribed in regulations made by the Scottish Ministers.*
- (8) The Scottish Ministers may make regulations specifying cases or circumstances in which subsection (2) does not apply.*
- (9) In this section references to a green deal property are to be read in accordance with section 12(5)(b).*

14. The 2012 Regulations materially provide as follows:

- 62.—***(1) A breach of the disclosure and acknowledgment provisions occurs where paragraph (2) or (3) applies.*
- (2) This paragraph applies where the notifier has failed to provide the disclosure document relating to a green deal property to the recipient in accordance with, as applicable, section 12 or chapter 2 of Part 7 of these Regulations.*

(3) *This paragraph applies where—*

(a) *the bill payer (“B”) suffers substantive loss which arises because—*

(i) *the disclosure document relating to a green deal property which was received by the recipient did not comply with the requirements of the Energy Performance Regulations;*

(ii) *the disclosure document was received by the recipient after the specified time; or*

(iii) *the recipient did not give an acknowledgment; and*

(b) *a reasonable period of time before the commitment date, B did not know that—*

(i) *B would be liable to make payments under the green deal plan; or*

(ii) *B would be bound by the terms of the green deal plan which bind a bill payer.*

(4) *For the purposes of this regulation,—*

*“commitment date” means—*

(a) *where section 12 applied, the date on which the contract for sale or lease or licence agreement was entered into;*

(b) *where regulation 44, 46 or 50 applied, the date on which the transaction or arrangement was entered into;*

*“required document” means—*

(a) *the contract for sale or lease, or the licence agreement referred to in section 14(2), which is required to include the acknowledgment;*

(b) *the document which is required to contain the acknowledgment under chapter 2 of Part 7;*

*“specified time” means—*

(a) *where section 12(1) applied, the time specified for providing the energy performance certificate in the Green Deal (Disclosure) Regulations 2012(1);*

(b) *where regulation 44, 46 or 50 applied, the time specified in that regulation.*

...

**66.—**(1) *This regulation applies where the Secretary of State is satisfied that there is a breach of the disclosure and acknowledgment provisions.*

(2) *The Secretary of State—*

(a) *must impose cancellation on the relevant person; and*

(b) *may impose compensation on the notifier.*

(3) *Where a person other than the notifier is wholly or partly responsible for the breach, imposing compensation means that the Secretary of State requires the notifier to pay to the relevant person such amount (as a fixed sum or in instalments) as the Secretary of State may determine, being an amount not exceeding the sum payable under paragraph (a) of the definition of compensation in regulation 51.*

**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.

15. There is another relevant Regulation - The Green Deal (Acknowledgement) Regulations 2012<sup>4</sup> which provide for a form of acknowledgement to be included in the contract for sale where the property is the subject of Green Deal finance.

16. 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]<sup>5</sup>.

17. 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)<sup>6</sup>.

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<sup>4</sup> <http://www.legislation.gov.uk/ukxi/2012/1661/contents/made>

<sup>5</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2003/1368.html>

<sup>6</sup> [http://taxandchancery\\_ut.decisions.tribunals.gov.uk/Documents/decisions/HMRC\\_v\\_Abdul\\_Noor.pdf](http://taxandchancery_ut.decisions.tribunals.gov.uk/Documents/decisions/HMRC_v_Abdul_Noor.pdf)

18. In *R (Hope and Glory Public House Ltd v City of Westminster Magistrates' Court* [2011] EWCA Civ 31<sup>7</sup>, 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<sup>8</sup>.

19. Pursuant to rule 15 (2) (a) (ii) of the Tribunal’s Rules<sup>9</sup>, 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: Submissions to the Tribunal*

20. The Appellant’s Notice of Appeal dated 22 May 2019 was prepared by her solicitors Meadow and Moran of Romford, who also conducted the conveyancing which forms the background to this appeal. They submitted succinct grounds of appeal, as follows: “*The details of the Green Deal were revealed to the purchaser during the routine conveyancing process.*”

21. The Respondent’s Response to the Notice of Appeal, dated 25 June 2019 was drafted by Tom Coates of counsel and relied on three grounds of opposition to the appeal as follows:

22. Firstly, the Secretary of State had found that the Appellant had not disclosed the required full five-page EPC to the purchaser but only the standard four-page version. No evidence had been provided by the Appellant to gainsay that conclusion, and the failure to provide the correct and complete document was a breach of regulation 62 of the 2012 Regulations. Mention of the Green Deal in the Property Questionnaire only was insufficient to cure that breach.

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<sup>7</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2011/31.html>.

<sup>8</sup> <https://www.supremecourt.uk/cases/docs/uksc-2015-0126-judgment.pdf>

<sup>9</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/367600/tribunal-procedure-rules-general-regulatory-chamber.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/367600/tribunal-procedure-rules-general-regulatory-chamber.pdf)



23. Secondly, the Appellant has not disputed that the contract for sale did not contain the required provision. This was a breach of s. 14 of the Energy Act 2011.

24. Thirdly, the Secretary of State had been entitled in these circumstances to exercise his discretion to impose a sanction under regulation 66 of the 2012 Regulations. Cancellation and compensation were appropriate and reasonable sanctions in all the circumstances of the case.

25. In a Reply dated 5 July 2019, the Appellant's solicitors submitted that they had disclosed the existence of the Green Deal scheme to the purchaser so that the purchaser was on notice and should have made further enquiries. It was submitted that it was not the Appellant's fault that the wrong EPC had been produced by British Gas. It was further submitted that it would be unfair for the Secretary of State to hold a member of the public responsible for a technical failure of the type which had occurred in this case.

26. The Tribunal received submissions from GDFC but not from the purchaser or from British Gas. GDFC stated that it did not wish to be made a party to the appeal and broadly supported the Secretary of State's Decision.

#### *D: Evidence*

27. I have received no witness statements in this appeal.

28. The documentary evidence in the bundle includes the two Notices of Intention (pages 21 and 76), the representations made in response by the Appellant's solicitors (pages 83 and 84) and by GDFC (included in the additional submissions). The Final Notice had not been provided by the Appellant with the Notice of Appeal as required. It was also omitted from the bundle in error, but was subsequently provided electronically).

29. I also have before me the agreement between the Appellant and British Gas (page 26), and the information about the property provided by the Appellant's solicitors during the conveyancing process (pages 40 to 73).

30. I have been provided with the Green Deal Guidance dated March 2013 (pages 85 to 142).

31. The Final Notice dated 24 April 2019 records the findings of fact by the Secretary of State as follows:

*"For the reasons given in the Intention Notice, the Secretary of State is satisfied that Mrs Michaela Jane Tibbs, (the "Seller") breached the disclosure and acknowledgment provisions when selling ...(the "Property") to.. (the "Buyer"). The breaches were as follows:  
– the Seller did not provide the full version of the Energy Performance Certificate (EPC) with details of the Plan to the Buyer (in breach of section 12 of the Energy Act 2011);*

*– the Seller did not secure that the contract for sale included an acknowledgment by the Buyer that the bill payer at the Property would be liable to make payments under the Plan and that certain terms of the Plan would be binding on the bill payer (in breach of section 14 of the Energy Act 2011).*

*8. Meadows & Moran have stated that the Property Information Form provided to the Buyer by the Seller prior to purchase should have made it evident that they were taking on the Green Deal loan. Question 7.7 asks “Have any installations been financed under the Green Deal scheme. If yes, give details of all installations and supply a copy of your last electricity bill.” The Seller has ticked the ‘yes’ box and indicated that details were enclosed. In the free text box, the Seller has written that a new central heating system was fitted in 2013 by British Gas.*

*9. There is, however, no evidence that further details of the Green Deal Plan were disclosed. The Property Information Form provided by Meadows & Moran does not include this enclosure and the Secretary of State has seen no evidence that it has been provided to the Buyer. It also appears from the evidence received, that an updated version of the EPC, revealing the Green Deal Plan, was not provided to the Buyer.*

*10. Accordingly, the Secretary of State has concluded that the Buyer may have known that improvements had been made to the Property with Green Deal funding. However, he considers that the Buyer could not have known at exchange of contracts, on the basis of information provided by the Seller, that the Plan was still extant and it was certainly not made clear to him that he would become liable for the repayments due under the Plan. Moreover, there is no evidence that the Buyer was notified of the amount of the repayments due under the Plan or its term. Therefore, the Secretary of State concludes that the Buyer has suffered or will suffer substantive loss in consequence of the breaches of the disclosure and acknowledgment provisions: he has become liable for loan repayments that he did not know about. In the circumstances, the Secretary of State is satisfied that it is proportionate to impose the sanctions of cancellation and compensation in this case.”*

32. The Secretary of State, on the basis of these findings, explains his decision to impose the twin sanctions of cancellation and compensation as follows:

*“12. Cancellation. Pursuant to regulation 66(2)(a) of the Framework Regulations, the sanction of cancellation is imposed on the Green Deal Provider. The effective date for this sanction is 9 January 2015, the date of completion of the purchase of the Property, when the Buyer first became liable for repayments under the Plan. Any repayments made by the Buyer since the effective date are to be refunded.*

*13. Compensation. Pursuant to regulation 66(2)(b) of the Framework Regulations, the sanction of compensation is imposed on the Seller. The Seller must pay the sum of £3,308.23 to GDFC Assets who now own the loan book.*

*This is at the agreement of the Green Deal Provider. The amount has been calculated as at 19 April 2019. A breakdown of this is as follows: This comprises the outstanding capital at the date ....[the purchaser] became the bill payers, together with the interest and servicing fee accrued between then and 19 April 2019. The level of compensation will continue to increase as interest and service charge continue to accrue (currently at a rate of £2.74 per week). The calculation is consistent with that used for the Intention Notice but the amount is higher because more time has elapsed. The Seller should agree with GDFC Assets the method in which payment is made. Contact details for the latter are as follows....”*

*E: Conclusion*

33. Having considered all the evidence and submissions carefully, I am satisfied that the Appellant failed to comply with her obligations under the sections 12 and 14 of the Energy Act 2011 and regulation 62 the 2012 Regulations. I agree with the Secretary of State that the conveyancing process conducted by her solicitors on her behalf breached both the 2012 Regulations and the 2011 Act. The Appellant has not persuaded me by any evidence or submissions in making this appeal that this was not the case.

34. Having reached that conclusion, I must decide whether I would exercise my discretion to impose the same sanctions as did the Secretary of State. I note that regulation 66 requires the Secretary of State to impose cancellation for these breaches, but gives him discretion to impose the sanction of compensation.

35. I give weight to the reasons given by the Secretary of State for exercising his discretion to award compensation in this case. As explained in the second Notice of Intention dated 6 December 2018, he considered it would be unfair to GDFC not to compensate it for the loss of income that cancellation alone would cause. I respectfully agree.

36. In conclusion, I find that the Secretary of State’s decision dated 24 April 2019 is within his discretion. I find it to be clear, cogent and proportionate. It is a decision that I would have made myself.

37. I note that the Appellant’s solicitors’ submissions are concerned with the liability she will face as a result of the Secretary of State’s decision. However, as she was professionally advised during the conveyancing process and was entitled to rely on her solicitors to act with professional skill and diligence in that transaction so as to meet her legal obligations, I would in these circumstances expect her to ask her solicitors to make the compensation payment on her behalf. That will be a matter between her and them, and I cannot make any direction about that matter here.

38. For this reason, I now dismiss this appeal and confirm the Final Notice dated 24 April 2019.

(Signed)

**Judge Alison McKenna  
Chamber President**

**DATE: 20 April 2020**