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Case No: CO/1360/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 16 June 2020

Before :

MR JUSTICE FORDHAM

Between:

(1) WOOD BOILERS LLP	<u>Claimants</u>
(2) GCP RHI BOILER 1 LTD	
- and -	
GAS AND ELECTRICITY MARKETS AUTHORITY	<u>Defendant</u>

Duncan Sinclair and **Katherine Barnes** (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the **claimants**

Alan Maclean QC (instructed by Office of the Gas and Electricity Markets Authority) for the **defendant**

Hearing date: 16 June 2020

Judgment as delivered in open court at the hearing

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Mode of hearing

1. This was a Skype conference hearing. It was a public hearing. As always, it and its start time were published in the cause list, with contact details available to anyone who wished to observe the hearing, as at least one member of the public has done. I heard oral submissions just as I would have done had we all been sitting in the court room. I am satisfied that this constituted a hearing in open court, that the open justice principle has been secured, that no party has been prejudiced, and that insofar as there has been any restriction on a right or interest it is justified as necessary and proportionate.

Rolled-up hearing

2. I am going to say immediately what I am going to do in this case. I am going to order a ‘rolled-up’ hearing in this claim for judicial review. I will explain why I have arrived at that conclusion. But I am going to be asking the parties to liaise as to appropriate directions for that rolled-up hearing. It is possible we may be able to progress that when I have finished giving my reasons. But the alternative will be for them to consider the matter immediately after this hearing and submit directions, agreed to the extent that is possible. I am satisfied that there is an arguable claim for judicial review. The reason for directing the rolled-up hearing is because there are serious delay issues that have been raised in these proceedings. I think it right that all of the delay points should be canvassed at a hearing at which the substance can be considered. I am particularly anxious that Mr Maclean and Ofgem should not be shut out in relation to any aspect of delay. One of the authorities in the joint bundle is the case of Maharaj v National Energy Corp of Trinidad and Tobago [2019] UKPC 5, where the rolled-up hearing option is described at paragraph 41, in order to secure that all delay issues that can be advanced – issues relating to extension of time, prejudice, detriment and everything else – are given full consideration on the basis of evidence from the parties.
3. In this case, the delay issue involves analysing what was happening throughout 2019 including from March 2019 and in particular the two dates emphasised by Mr Maclean: May 2019 and then August 2019. It is going to be necessary to consider in some detail what had happened and what was happening, and the reasonableness of what was being done to address and resolve the problem that had arisen. In my judgment, it is also going to be necessary and appropriate to consider any delay issue in the light of what had been happening vis-à-vis the homeowners, so that the court is in an informed position relating to implications of any delay. I also think it is a case where it is possible that, if the court concluded that there was delay, that may have a consequence for remedy. All of that should be considered, in my judgment, as a factual evaluation. Both parties, in their submissions in relation to delay, have linked the delay issues to the legal merits. Mr Sinclair says it is relevant that he has an arguable case; Mr Maclean says it is relevant that Mr Sinclair has an unarguable case. In my judgment, it is appropriate that all of the issues relating to legal merits and delay and remedy should be open to a court able to consider all of that with nothing foreclosed. This way of addressing this danger of foreclosure is discussed in the recent case of Inclusion Housing Community Interest Co v Regulator of Social Housing [2020] EWHC 346 (Admin) at paragraph 66. The problem, recognised by both counsel when I put it to them, is that if permission is granted, certain delay points can be regarded as shut out, under a line of authorities that includes R (Lichfield Securities) v Lichfield District Council [2001] EWCA Civ 7304.

Arguability

4. I am satisfied, as I have already said, that the case is properly arguable as to its underlying substance. I reach that conclusion notwithstanding the powerful and elegant submissions of Mr Maclean which, through the summary grounds, had persuaded Nicol J to refuse permission on the papers. I am going to give some reasons as to why I have reached the conclusion I have, as to arguability. I do so only because I am addressing and explaining to the parties what I made, at this permission stage, of their submissions. It goes without saying, but I will say it anyway, that nothing that I say in giving them my reasons, as I wish to do, is in any way seeking to influence or affect the position which a substantive court will take when it has heard all of the arguments. I am necessarily only considering the low threshold of arguability.

What the case is about

5. This case concerns the Domestic Renewable Heat Incentive Scheme Regulations 2014 (SI 2014/928) as they stood prior to their 2018 amendment. The purpose of those regulations is to encourage domestic renewable heat generation through subsidies paid to eligible heating system owners (that description comes from the Explanatory Memorandum). The mechanism for encouraging that generation, through those subsidies, involves accreditation and then payments over the course of 7 years. In order to comply with the scheme a boiler will need to be installed and there will need to be ongoing substantive compliance.
6. This case is about a model for delivering uptake in relation to that domestic renewable heat generation. The WBL (Wood Boilers) 'model' involved a number of companies including: A Shade Greener Ltd; GCP RHI Boiler 1 Ltd; and Street UK. The homeowner would pay £100 and become the accredited participant in the statutory scheme. As I understand it, WBL really took care of everything else. WBL would undertake, through its partner companies, the installation at an outlay of some £13,000 per boiler. It would deal with the paperwork and ensure ongoing substantive compliance. The position so far as property is concerned is that the homeowner owned the heated property, but WBL together with the homeowner jointly owned the boiler. Moreover, WBL became a lessee enabling access to the premises to be able to secure ongoing substantive compliance. So far as the subsidy was concerned, this was to be paid by Ofgem through the 7 year period to a 'custodian account', that account being supervised by Street UK. Through contractual arrangements, that subsidy was paid onward to WBL. Finally, a feature of the model was that WBL operated effectively as an 'intermediary' between Ofgem and the homeowner, setting the whole thing up and saving the homeowner from what I will call the 'hassle' of having to deal directly with the regulator, while securing ongoing substantive compliance with the terms of the scheme. The model was designed, as I see it, really to achieve three things. The first was uptake of homeowners undertaking the renewable heat generation which the regulations were seeking to encourage. The second was substantive compliance with the terms of the scheme on an ongoing basis. The third was compatibility with the terms of the regulations, so that the model could properly be the subject of subsidies paid under those regulations.
7. During 2019, 4 years into the 7 years of payments for those boilers accredited in 2015, Ofgem concluded that it had made a serious mistake of law. Its conclusion was that the payments being made to the 'custodian' bank account, controlled by Street UK, did not

satisfy the requirement in regulation 26: that the payments be made to the participant, the homeowner (since it was the homeowner alone and not WBL who owned the heated property). Ofgem's concern was that, because of the nature of the through-payment contractual obligation, there was not a homeowner-controlled bank account, so as to satisfy the wording and purpose of regulation 26. That is not in dispute between the parties: the claimant does not advance, as a ground for judicial review, that regulation 26 has been misunderstood. Mr Sinclair emphasises the broader aspects of the scheme and the broader aspects of the concerns raised in 2019 by Ofgem and the nature of the actions which Ofgem took. He complains, in essence, that one of the problems in this case is that it had always been fundamental to the model that WBL would operate as intermediary or agent and that Ofgem effectively declined to continue to respect that approved relationship, concluding in effect that WBL had no appropriate such ongoing role, with the consequence that Ofgem insisted on communicating direct with customers. I pause to repeat that I am making no findings, simply setting out the nature of the case and my reasoning so far as arguability is concerned.

8. The claimants' position, as I see it, comes to this. They say that, both in terms of Ofgem's actions in relation to the bank account arrangements, but also the broader aspects of Ofgem's conduct and conclusions, Ofgem has unjustifiably breached the legitimate expectation that had arisen. The claimants say that that has been extremely damaging from their perspective. By judicial review they seek one of two remedies. The first remedy is that they seek an order of the court restoring payments under the approved mechanism, that is to say to the 'custodian' account. The second and alternative remedy is that they seek damages by way of just satisfaction under the Human Rights Act, to put them in the position that they would have been in but for the breach of legitimate expectation.
9. The key components of that claim, as I see them, include the following. First, it appears to be common ground that the model put forward and implemented was successful so far as uptake was concerned. I have seen reference in the papers to some 757 homeowners as having accredited boilers. Next, it is not, as I understand it, said that the model implemented led to a default in relation to any question of substantive ongoing compliance with the scheme. That is to say, having WBL as intermediary under the arrangements that have been put forward, is not something said to have placed homeowners in breach of ongoing compliance obligations. Next, it is not being said that the accreditations have themselves become unlawful. On that point, it is of interest that there is a mandatory requirement (Sch 4 of the regulations) that an applicant for accreditation should identify a bank account in the applicant's name. Mr Maclean reserves his position on that but in any event submits that that provision is different in its structure and wording from the regulation 26 problem relating to payment to a participant. Next, it is not said that contractual arrangements for the onward payment of the subsidy from the participant homeowner to WBL is somehow inconsistent with the scheme.
10. Next, for the purposes of this permission hearing, Mr Maclean has accepted as arguable that the model was 'approved' by Ofgem and that its approval constituted the sort of 'clear and unambiguous representation' or 'settled practice' capable of engendering a legitimate expectation. It is enough to say this. The position relating to the bank accounts was spelled out in detail in a document that had been provided to Ofgem in October 2014. It was also a position spelled out in minutes of a meeting at Ofgem the

whole point of which was to discuss the model and its compatibility with the regulations. Those minutes were subsequently approved by Ofgem. They described the payment mechanism under the ‘custodian’ bank accounts including contractual arrangements by which the account was under the control of WBL and that payments were to be onward-made to WBL, something as to which Ofgem is recorded as having had “no concerns”. The email exchanges specifically describe the model as one which was “approved” and there was also a specific email on 13 November 2014 addressing the ‘custodian’ account and how it was to work. In outline, the model having been approved, accreditations were sought and granted. WBL borrowed £25 million and it and its partner companies undertook the expenditure necessary, purchased the boilers, installed them and undertook all of the arrangements. For 4 years Ofgem paid subsidy, through the approved mechanism, in relation to all of those accredited boilers, in the sum of some £13 million.

11. The consequences described by the claimants, from 2019 where Ofgem had changed its position, seem to me to come to this. WBL began defaulting on what was owed on the £25 million loan from GCP. The witness evidence describes some £1.6 million default in Q2-Q4 2019 and some £5.75 million as being due thereafter. WBL lost out on subsidy that would be paid, under the approved arrangements, direct through onward contractual transmission to it. And it incurred administrative costs, which are described as being in excess of £120,000, in seeking to contact the homeowners to address the problem, with continuing administrative cost put at £90,000 per annum; and a sum of £125,000 per annum needing to be paid to homeowners by WBL as further ‘incentives’ to keep them in the scheme. The evidence tells me that – what I take to be from the 757 homeowners who had signed up and become accredited – following communications in 2019, 634 have now switched to new bank accounts and, of those, 468 have forwarded to WBL the subsidy payments received from Ofgem.
12. Stepping back and considering the justification, and leaving aside for a moment the wording of regulation 26, Ofgem says ‘the law is the law’ and it can ‘only pay under that provision’. It also emphasises that the regulations had needed and obtained state aid approval, and that this is the payment of public money. The claimants emphasise that there is no link here to any substantive ongoing non-compliance by any party, nor is it suggested that the accreditations have become unlawful. So far as the policy position is concerned, the 2018 amendments to the 2014 regulations specifically support third-party arrangements as lawful and benign, but do so only prospectively.

Ground one

13. There are two grounds for judicial review but they are closely interlinked and indeed, at one point, in the pleaded grounds the first appears to necessarily borrow from the second. The first ground is that there is here an unjustified and unfair departure from a substantive legitimate expectation, in its narrowest sense as to the very payment mechanism subsequently concluded to be contrary to regulation 26, and in its broadest sense an expectation that the agency or intermediary arrangement was acceptable to Ofgem. The first ground relies on common law. Ground two relies on Human Rights Act 1998 (HRA) Article 1 Protocol 1 (A1P1), but rests on exactly the same root, namely that that legitimate expectation becomes protected as a property right or interest.
14. Mr Maclean’s ‘knockout blow’ in relation to the common law ground involves invoking a strong body of authority. He emphasised, in particular, the Court of Appeal decision

in the case of Rowland v Environment Agency [2003] EWCA Civ 1885 and the Court of Appeal decision in R (Albert Court Residents' Association) v Westminster City Council [2011] EWCA Civ 430. He submits that it is very clear in domestic law that there cannot be a 'legitimate' expectation which can lead to a court ordering that it be honoured where what is involved is an ultra vires act. There is a very strong body of authority in support of that proposition. I very much doubt whether an argument to the contrary, at least in the context of primary legislation, could succeed below the Supreme Court. It is worth noting, though, that the passage in De Smith dealing with this aspect, paragraph 12-065, describes the proposition in more qualified terms: it says it is 'doubtful' whether the expectation that the body will exceed its powers can be legitimate. It is also right to say that in Rowland itself it was recognised that the position could properly be described as 'unjust': see paragraph 100 in the judgment of May LJ and, viewed in Strasbourg terms which I will come to because that is ground two, it has been characterised as 'disproportionate': see Rowland paragraph 139. It is also the case that there is academic commentary suggesting a qualified approach can be justified: see Rowland itself paragraph 115-120.

15. I am not going to shut out the first ground (by refusing permission on that ground and only allowing ground two to go through to the rolled-up hearing), for these reasons. First of all, the legitimate expectation point in relation to the HRA to which I will come is independently properly arguable in my judgment. Secondly, the two arguments share the same root and source so far as identifying the legitimate expectation itself is concerned. Thirdly, depending on what altitude this case ultimately arrives at, it may be that the point will be open and could flourish. I do not therefore think it appropriate to refuse permission on this ground when I think ground two is arguable. That is so, even on the basis of taking Rowland and Albert Court on their face and as the high watermark.
16. But finally, so far as this point is concerned, in my judgment there may be a legal relevance to the fact that we are here concerned with a statutory instrument rather than with primary legislation. The key passage in Albert Court resonates at paragraphs 34 to 36 with the fact that public authorities, through legitimate expectation, should not be required or ordered to act in a way that interferes with the performance of their 'statutory duties', emphasising the principle of 'legislative supremacy'. Both Albert Court and Rowland were cases about primary legislation and a clear incompatibility with that primary legislation. Mr Maclean may well be right when he submits that there is no relevant distinction between a duty in primary legislation and a duty in secondary legislation. He may be right when he submits that the terms of regulation 26 might just as well have been embodied in primary legislation. But, in my judgment, there is an arguable point arising in relation to secondary legislation, in circumstances where the premise would be this: that a legitimate expectation arose, from a clear promise or representation or established practice, which in fairness the public authority would otherwise be required to honour. The fact that, leaving any legitimate expectation to one side, a payment other than strictly to participants would be ultra vires regulation 26, does not in my judgment necessarily support the same conclusion, beyond argument, were the court satisfied that there was a legitimate expectation and therefore a duty in public law in substantive fairness to pay in an alternative way which the public authority had specifically and knowingly approved through an agreement.

17. It is for all those reasons that I do not shut out the first ground from my conclusion in relation to arguability and I direct the rolled-up hearing in relation to both grounds. I merely footnote at this point that one of the advantages to the fact that I am ordering a rolled-up hearing is that I am not dealing with permission. Of course, it will be a matter for the court dealing with the substantive hearing to consider whether or not permission should be granted in relation to ground one. That court may or may not wish to take it as a discrete point, at the start of the rolled-up hearing. I have however thought it right to be transparent with the parties about the fact that I would have granted permission on both grounds, leaving aside the question of delay, and that it is the question of delay that has led me to take the course of the rolled-up hearing.

Ground two

18. Turning to ground two, it is clear from the authorities and vividly illustrated by Stretch v United Kingdom 38 EHHR 196 that a vires problem from the perspective of domestic public law does not necessarily provide the answer from the perspective of A1P1. Put another way, legitimate expectation – at least when linked to a property interest – even though it would be blocked on the basis of ‘vires’ can constitute a protected possession or interest in property for the purposes of A1P1. The parties put the Stretch case in the bundle of agreed authorities. All I say about it is that it involved an agreed option relating to a lease, which the public authority successfully persuaded the domestic court was ultra vires. The analysis in Strasbourg was that the operation of the ultra vires principle, in those circumstances of a clear legitimate expectation relating to property, led to a disproportionate outcome. The result was not that the option was ordered to be honoured, but rather that ‘just satisfaction’ was payable.
19. In this case, one has to start by identifying the appropriate premise. Mr Maclean accepts it to a point, but he says ultimately that it is flawed, or he would say ‘dodgy’. In my judgment, it is at least arguably correct. The premise is that, where there is a legitimate expectation that the subsidies would be paid through the approved model including the ‘custodian’ bank account, but where those payments could not lawfully continue to be made because of the restriction in regulation 26, there is an A1P1 protected interest through the legitimate expectation which is being breached. I repeat that he would not accept that analysis. He may be right not to accept that analysis, but the point in my judgment is plainly arguable.
20. Once that premise is established, it seems to me, at least arguably, that Mr Maclean’s ‘knockout points’ fall away so far as A1P1 is concerned. He relies on the Rowland case in particular. First, paragraph 102 which dealt with whether the claimant could have, recognised by the court, a right relating to a waterway when it was inconsistent with the primary legislation. The Court of Appeal concluded that the HRA could not compel that conclusion. In other words, a right could not be recognised which was inconsistent with primary legislation. Secondly, so far as just satisfaction is concerned, Mr Maclean relies on paragraph 152 in the Rowland case where there was a discussion as to compensation, against the state, there being no such claim advanced in the Rowland case itself. Mr Maclean says, in essence, this. Once it is recognised that regulation 26 is in effect the same as a statutory duty in primary legislation, it is ‘impossible’ to read into it any caveat or proviso, and so the money cannot be ordered to be paid by Ofgem any more than the authority in Rowland could be ordered to recognise the right of way in relation to the waterway. He says, if he is right about that, that is also fatal for just satisfaction. That is for this reason. This case is about money and whether money should

be paid. If Ofgem has no power to pay the money, and the court could not order it to make the payment of money, then the HRA cannot require through the backdoor of 'just satisfaction' a payment of compensation to reflect the losses in subsidy which have been incurred by WBL. Those are the arguments and, I repeat, Mr Maclean may well be right about them. But for the purposes of today I am quite satisfied that all of this is properly arguable.

21. Once the premise is adopted, the consequence is that Ofgem as a public authority would, as it seems to me, have a section 6 HRA duty not unjustifiably to disrespect the legitimate expectation it has engendered. Once regulation 26 is put alongside that HRA section 6 duty, it can powerfully be argued that the restriction in regulation 26 cannot 'cut down' the obligation owed under the HRA as primary legislation. Another way of putting the same point is that an HRA-compatible interpretation of the regulations would 'read in' a proviso: 'save as necessary to avoid the violation of a Convention right'. That would not only empower but oblige Ofgem to make the payments to the participants in the way that it specifically agreed and approved back in 2014. Even if all of that is wrong it is, in my judgment, properly arguable that it in no way undermines the analysis of the statutory scheme for a remedy of 'just satisfaction' to be awarded, any more than it did so in Stretch v UK where the statutory scheme precluded the option being recognised and yet 'just satisfaction' was payable. It is at least arguable that the fact that a public authority does not have vires to make a payment does not mean the court has no jurisdiction to order it to make 'just satisfaction'. It is also, in my judgment, properly arguable that that is so even in a case where the matter being complained about is the non-payment of monies, because that act is said to be ultra vires.
22. A final footnote so far as ground two is concerned is this. One possible analysis is that 'just satisfaction' in this case will focus on the administrative costs incurred by the claimants, in seeking to address the situation which arose by way of Ofgem's change of position. I have no doubt that, so far as any remedial analysis is concerned in this case, the court would need to look closely at the realities of what has happened on the ground, the question of what homeowners' current position is, and issues as to what steps can and cannot appropriately be expected so far as unravelling or unwinding existing arrangements is concerned.

Delay

23. I come finally to the issue of delay. In fairness, again, to the submissions that I have read and heard, I record the positions. Ofgem's position is that this is a very clear cut case of a distinct and damaging lack of promptness, for which no good reason has been shown. Ofgem says that the writing was on the wall so far as the vires problem was concerned from around March 2019 but that the position crystallised at the latest on 31 May 2019 in communications between it and the claimants. Mr Maclean says that was the time that judicial review 'at the latest' needed to be commenced, so far as an impugned decision or action by his clients is concerned. His fall-back position is that 'at the very latest' it was 8 August of 2019. He says that the letter impugned in these proceedings dated 30 December 2019 was not in any sense a decision letter, but simply the latest in a line of communications in which his clients had adopted a consistent position. He also points to the fact that, even taking 30 December 2019, the claimants filed their judicial review at the very last minute in the 3 month period. Also, Ofgem does not accept the characterisation put forward that the claimant was 'seeking to solve the problem' and 'avoid the last resort of judicial review'. Mr Maclean's submission

was that the claimants, instead, could be seen to ‘dig in’ and dispute the substance of the position adopted by Ofgem.

24. I am sufficiently satisfied that there is a factual analysis required, relating to what happened and characterising its reasonableness and linking it to the substance of the legal merits, that it would not be appropriate for me to deal with delay issues on this freestanding basis at this oral renewed permission hearing. I therefore simply record that the claimants’ position, as I understood it, is really as follows. A problem had arisen and Ofgem had adopted a position including in relation to the payment mechanism. However, that was expressed as a concern that was being investigated and the language in Ofgem’s communications was all about needing ‘to be satisfied’ and expressing what it saw as the ‘likely’ position. Insofar as there was a crystallised position, relating to a problem under the regulations, there was nevertheless a dynamic position so far as seeking to solve that problem was concerned. And matters were complicated by the way in which the claimants say that Ofgem treated them, so far as concerns no longer being recognised as agents or intermediaries. The claimants say that they acted reasonably in the circumstances, in seeking to address and resolve the problem at hand, and that any prejudice has really been suffered by them through the lapse of time.
25. I repeat that nothing I have said forecloses, in any way, what the parties can submit at the substantive hearing. However, I have reached the conclusions: that a clear and careful analysis is needed, in relation to all aspects of delay; that all aspects of delay should be considered together; and that they should be considered alongside an analysis of the legal merits; and alongside remedy – what a court could and could not appropriately do – even if persuaded that the claim is well-founded. I was therefore not persuaded that Ofgem’s position on delay is so strong as to warrant knocking out this case, on the basis of delay as a freestanding objection, independent of the legal merits of the claim, and without the careful and integrated analysis of the court at a rolled-up hearing can give all aspects of the case. I therefore concluded that this is a perfect case that exemplifies why courts in judicial review may choose to have a rolled-up hearing, so that all the issues can be considered. What happens in relation to all of the issues is a matter for the court dealing with the substantive hearing but I have thought it appropriate to tell the parties what I made of the case, for the purposes of the decision that I had to make, and also so that the court at the substantive stage knows the view that I took in relation to the arguability of the grounds, for what that is worth.

16 June 2020