First-tier Tribunal
(General Regulatory Chamber)

Tribunal Reference: NV/2017/0010

Before

TRIBUNAL JUDGE SIMON BIRD QC

Between

GEO SPECIALTY CHEMICALS UK LIMITED **Appellant**

- v -

ENVIRONMENT AGENCY **Respondent**

DECISION

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1. By its notice of appeal, the Appellant seeks to appeal against a target contained in a Climate Change Agreement (**"the CCA"**) to which it is a party. The relevant agreement is dated 24 April 2017 and is a voluntary agreement entered into by the Appellant as an individual operator within the chemical

industries sector. Pursuant to such agreements, operators in particular industries agree to improve their energy efficiency and reduce carbon emissions by reference to a target laid down in the agreement, in exchange for which they benefit from a reduction in the amount of Climate Change Levy (**"CCL"**) which they are required to pay on their non-domestic energy bills. Where an operator does not meet the target set by the CCA it must pay a buy-out fee to cover the shortfall between the target and the actual reductions achieved.

2. The Appellant contends that the Respondent, which is the administrator of the Climate Change Agreement regime, erred in law when deciding upon the target to be contained in the CCA by misinterpreting the scope of its powers. The Appellant argues that by reason of the error, the Respondent unlawfully fettered the exercise of its power to vary the CCA and further, that it was unreasonable to impose the target it did, because the varied target could not be complied with.

3. In response to the Appeal and by way of amendment to its original response, the Respondent contends that the Tribunal has no jurisdiction to entertain the appeal because, in agreeing the CCA with the Appellant, the Respondent made no decision capable of giving rise to a right of appeal under CCA. Further, it contends that, if any such decision had been made, there was nothing unreasonable in the target within the CCA.

4. The parties have helpfully supplied an agreed statement of facts upon which I rely in this decision. In the light of this agreed statement I concluded that there was no need for me to hear oral evidence at the hearing.

The Statutory Context

5. Under the provisions of the Finance Act 2000 (**"the 2000 Act"**), the Climate Change Agreements scheme ("**CCA Scheme**") was first introduced in 2001. It was originally administered directly by government departments, most

recently the Department of Energy and Climate Change ("**DECC**") (now the Department for Business, Energy and Industrial Strategy). The original scheme ran up until the end of March 2013. Following a series of public consultations, from April 2013, a successor scheme followed on immediately afterwards. This successor scheme is governed by the Climate Change Agreements (Administration) Regulations 2012 and the Climate Change Agreements (Eligible Facilities) Regulations 2012.

6. Under Schedule 6 to the 2000 Act ("**Schedule 6**") various fuel types, as a source of energy, are defined as a taxable commodity on which the CCL is generally payable at a specified rate. However, under paragraph 44 of Schedule 6 provision is made for reduced rate supplies where a facility is covered by a CCA and the supply of energy is made during the period of the CCA.

7. Schedule 6 provides for two kinds of CCA agreement. A single direct agreement with the administrator of the scheme (paragraph 47) or, alternatively, a combination of an umbrella agreement and an underlying agreement (paragraph 48). The CCA scheme has in fact been implemented through recourse to a combination of Umbrella ("**UmA"**) and Underlying Agreements.

8. It is a requirement of Schedule 6 that where the combination of two agreements is used then between them the agreements must:

   (a) Set or provide for the setting of targets for the facilities to which the Underlying Agreement applies;
   (b) Specify the certification periods for the facilities to which the Underlying Agreement applies; and
   (c) Provide for five yearly (or more frequent) reviews by the Secretary of State.

The CCA Scheme

9. The CCA Scheme covers a variety of diverse industry types. The Climate Change Agreements (Eligible Facilities) Regulations 2012 (as amended) establish a number of discrete sectors within the scheme, which are defined by the eligible activities undertaken by operators in those sectors. One such sector is the Chemical Industries sector.

10. Each sector is bound by the terms and rules outlined in its UmA. The terms and rules of the Scheme were established by DECC (now BEIS) who was also responsible for writing and publishing the *"Climate Change Agreements: Technical Annex March 2013"* as well as the statutory guidance also issued in March 2013.

11. The UmA is signed by the respective sector association and the Respondent acting as the scheme administrator on behalf of the Secretary of State. In relation to this appeal, the relevant sector association is the Chemicals Industry Associations' Broking and Trading Agency ("CIABATA").

12. In addition to the generic rules of the CCA scheme, the UmA includes a series of efficiency improvement targets for each target period which are collectively known as the *"sector commitment".* These sector commitments were negotiated and agreed by the Secretary of State with each of the individual sector associations in 2012 in advance of the CCA scheme commencing on 1 April 2013.

13. The values for the sector commitments were based upon either an original percentage target proposed by DECC or, where this was challenged by sector associations, the outputs of Evidence Templates agreed between the sector associations and DECC. DECC also set the rules to determine the trajectory to reach the sector commitments which defined the percentage values for each of the interim target periods (TP1-3) and the final commitment for TP4.

14. In determining sector commitments, the majority of sector associations chose to apply a fixed percentage improvement to all operators included in their UmA; a top down approach. This had the effect that all target units with the same base year in a given sector had an identical percentage improvement target regardless of their individual contributions to absolute energy savings. A target unit is a combination of one or more eligible facilities under the control of the same legal operator.

15. However, CIABATA adopted a bottom up approach to the setting of its sector target. The Appellant and others within the sector were requested to complete a Bottom Up Data Survey ("**BUDS**") which involved reviewing and completing an analysis of products along with all primary fuels combusted directly or indirectly to produce heat and/or power used at the site. The figures were fed into a spread-sheet provided by CIABATA and were used to derive the sector target.

16. The bottom up approach leads to the situation where individual operators within the sector may have percentage targets which are higher or lower than the sector target and, in some cases significantly so.

17. In terms of the percentage targets set within the underlying agreements, the negotiation, agreement and distribution of individual targets to operators in a sector was a matter between the sector association, the operators concerned and the Secretary of State. The Respondent was not a party to or responsible for any of these activities.

18. Participation in the CCA scheme is by application and voluntary. An operator of one or more eligible facilities can apply to join the CCA Scheme by submitting an application to the Respondent. An Underlying Agreement is produced for each target unit.

19. The CCA sets out the obligations of the operator, the sector association and the Respondent as the 'Administrator' of the CCA scheme. The CCA also documents the agreed target improvements for the specific target unit.

Joining the Scheme

20. In order to obtain a CCA, the operator must submit an application to the Respondent. The application must evidence the following:

    (a) eligible activities undertaken by the operator at each facility; and

    (b) cumulative data (energy/carbon and throughput) for all of the facilities during the baseline period.

21. Operators are required to provide their assent to the CCA prior to being able to claim a Climate Change Levy ("**CCL**") discount.

22. The agreed efficiency improvement targets, in combination with the baseline data determine the expected performance of the target unit for each applicable target period (each target period is two calendar years). The Respondent therefore requires the energy and throughput data of a target unit in order to establish the baseline performance of the target unit. Baseline data is provided in the operator's application and is used by the Respondent, together with any updates to the data in relevant variations, to calculate the target energy for each of the target periods.

23. The baseline data is fundamental to how an operator demonstrates performance against their targets and where such data exists, the baseline should be 12 months of data from 2008 or otherwise the nearest 12 month period to 2008.

Performance against targets

24. An operator's performance against their target is assessed in accordance with the requirements of paragraph 6 of the Technical annex, which states that the administrator:

    "*must assess the performance of the target unit by comparing*

its actual performance (expressed in the agreed units) with the target energy consumption or emissions derived from the percentage for each target period improvement set out in the underlying agreement against base year."

25. The difference between the actual energy consumed during the target period and the target energy determines the performance of the target unit. For those operators that fail to meet their target, a buy-out fee is levied; the value of which is proportional to the amount of carbon dioxide equivalent by which the target energy has been exceeded. The operator provides a report to the Respondent for the purposes of assessing performance in accordance with the above.

Variations to an existing CCA

26. The standard form CCA allows for variation of the agreement in a number of different circumstances. Whilst there is a dispute between the parties as to the circumstances in which the CCA allows for variation and the extent of variation which may be made where variation is permissible, there is no disagreement as to the provisions of the CCA which allow for at least some variation.

27. Under Clause 6 of the CCA, its terms may be varied at any time *"if agreed between the Administrator and the Operator".* That is an apparently broad power to vary a CCA consensually the scope of which I will return to.

28. Beyond clause 6, clause 4 of the CCA provides that the Rules which are set out in Schedule 1 to the CCA have effect and the operator agrees to comply with them. Under those rules, there are three circumstances provided for which would be likely to affect the performance of a target unit against its targets and which may result in a variation to the target. These are:

    (a) The inclusion of an additional facility (Rule 9);

    (b) The exclusion of a facility or facilities (Rule 10); and

(c) Structural changes or other changes to the target unit, errors in data for the base year or the removal of a product produced in the target unit which was produced in the base year (Rule 11).

29. In each case, the Rules provide that any variation which is made to the CCA must follow the principles, methodologies and calculations set out in the technical annex (see Rule 9.6, 10.2 and 11.1 respectively). Structural changes must be notified to the Respondent within 20 days of the operator becoming aware of it (Rule 3.1.2).

30. The technical annex specifies how the variation to the target unit target is to be made in the relation to inclusion or removal of facilities from the target unit (paragraphs 64 to 71). In the case of variations sought under Rule 11, including structural changes to the target unit, the annex provides:

> *"The Administrator may vary the target to take account of the circumstances in Rule 11.1.1, 11.1.2 and 11.1.3 by making an appropriate and proportionate adjustment to the base year data from which the target was derived, to take account of such circumstances, and recalculating the target on the basis of the revised base year data".*

31. The Respondent has its own Operations Manual on CCAs, version 7 of which is dated April 2017 and was current at the date of the Appellant's most recent CCA. Under the heading *"What cannot be changed by a variation",* paragraph 7.10 states:

> *"To maintain stability within the scheme, a number of areas of an agreement cannot be changed. Target unit (% value) unless there is a relevant variation*
>
> *An operator isn't allowed to amend the percentage target. However, the numerical value of the target may change if the baseline is amended following a variation.*
>
> *The only situation where a percentage target might change is where facilities leave or enter existing target units".*

32. The correctness of this guidance is directly at issue in this appeal.

Appeal

33. Rule 13 in Schedule 1 to the CCA provides for a right of appeal to this Tribunal where the Administrator decides to vary or not to vary the target for a target unit (Rule 13.1.3). It also provides that:

> *"In respect of an Operator which enters into an agreement after 2013, the Operator may appeal to the Tribunal against the target that has been set for the target unit by the Administrator".*
>
> *(Rule 13.2).*

34. The grounds upon which an operator may appeal are set out in Rule 13.4:

> *"13.4.1 that the decision was based on an error of fact;*
> *13.4.2 that the decision was wrong in law;*
> *13.4.3 that the decision was unreasonable;*
> *13.4.4 any other reason".*

35. On determining an appeal the Tribunal must either affirm the decision, quash or vary it (Rule 13.6).

The Appellant and the CCA scheme

36. The Appellant is a world leader in providing high quality, cost effective chemicals. It has five main production facilities at its site at Hythe namely (i) a Monomers Unit; (ii) a Multi-functional Monomers Unit; (iii) a PAGS unit producing longer chain alcohols; (iv) a Capper unit using longer chain alcohols to make a Methyl Capped material; and (v) a Contact Lens Unit. GEO is a producer of chemicals. These five main production facilities are supported by various plant. Steam is a critical requirement for the businesses production at the site.

Appellant's Entry into CCA in 2013

37. The Appellant has been involved with the CCA Scheme since its introduction in 2001.

38. As part of the application process for entry to the successor scheme, CIABATA requested that the Appellant (along with other sector participants) complete the BUDS. Guidance was provided to the Appellant outlining how to do so. For the purpose of the BUDS, 2008 was used as the Base Year.

39. In 2008 the Appellant's steam supply changed from wholly on-site boilers to wholly Combined Heat and Power ("**CHP**") provided by RWE npower's CHP plant at Hythe (which is adjacent to the Appellant's site). This meant that the Appellant's Baseline Energy for the 2013 CCA was set using base line data that included energy from 6 months of use of boilers and 6 months of use of CHP. The Appellant's Baseline Energy was set at 265,828.167 Gigajoule ("**GJ**").

40. As part of the BUDS, the Appellant was required to complete an analysis and enter figures into a spread-sheet which was provided by CIABATA. Based on the data entered, this spread-sheet automatically created the percentage (%) target(s) in the CCA ("**the % Target(s)**"). The Appellant sent the result of the analysis (including the % Targets automatically generated) to CIABATA. It was not anticipated by the Appellant that the CHP plant would not be operating for the full life of the CCA period as it had a contract with nPower which ran to 2018 with a view to an extension beyond.

41. After submission of the initial data, CIABATA contacted the Appellant by email, asking for amendments to their data , in particular exclusion of EU Emissions Trading Scheme ("**EU ETS**") energy. The Appellant completed an updated BUDS and submitted this to CIABATA by email on 22 October 2012. For the 2013 CCA, the following targets were generated:

(i) A 44.7% reduction from the 2008 base year for Target Period 1 (1 January 2013 - 31 December 2014), Target Period 2 (1 January 2015 – 31 December 2016) and Target Period 3 (1 January 2017 to 31 December 2018); and

(ii) A reduction of 44.8% from the 2008 base for Target Period 4 (1 January 2019 to 31 December 2020).

42. By comparison, the Sector Target agreed between CIABATA and the Secretary of State was 11.3%. The Appellant's percentage target was therefore a challenging one.

43. The Appellant entered into a CCA on 1 April 2013.

Notification of change and entry into CCA in 2015

44. At the end of April 2014, RWE npower confirmed that on 1 July 2014 they would cease supply to the Appellant with steam.

45. On 11 March 2014, the Appellant emailed CIABATA notifying them that the Appellant would have to rent boilers to account for the loss of steam from RWE npower's supply.

46. On 17 March 2014 CIABATA emailed the Appellant noting that a structural change might give rise to a variation to the target.

47. The Appellant notified the Respondent of its new boiler arrangement via the Minor Operational Change procedure for environmental permitting on 24 June 2014.

48. On 13 February 2015, CIABATA emailed the Appellant to notify the Appellant that it would not be able to change the % Target. The Appellant was informed that this was the Respondent's opinion. It was advised by CIABATA that the baseline energy could be changed. The Appellant did not challenge this at the

time because it believed that the percentage target would be reviewed under a government review of targets that was anticipated to be completed at the end of 2016.

49. A new CCA was issued on 9 March 2015 in accordance with the Respondent's practice of effecting variations by issuing a new CCA. The Baseline Energy figure contained in schedule 6 of the 2013 CCA was revised from 265,828.167 to 314,975.654GJ.

Entry into CCA in 2017

50. In March 2015 the Appellant received a Notice of Buy-Out fee from the Respondent for TP1 (1 January 2013 to 31 December 2014). This fee was paid in full.

51. On 4 March 2016, CIABATA emailed the Appellant noting that the CHP steam credit lay at the heart of the compliance issue. This credit had been applied to npower's CHP plant during the base year, and the Respondent accepted that this meant that the Appellant's baseline data was not wholly representative of their then current situation and had the effect of increasing the likelihood that GEO would not be able to meets its TP2 target.

52. In March 2016, CIABATA emailed the Appellant and stated that the Government review of targets would be starting in 2016.

53. On 10 June 2016, CIABATA emailed the Appellant confirming that the Respondent had agreed the Baseline Energy would be changed and could apply to TP3 and TP4.

54. On 6 September 2016, the Appellant emailed CIABATA and requested a target change for 2015/16.

55. On 28 September 2016, CIABATA emailed the Appellant confirming that the Government did not propose to vary targets and that the only change it proposed to make related to the buy-out price for the third and fourth periods of the Scheme.

56. On 25 November 2016, CIABATA emailed the Appellant suggesting that it propose revisions to the CCA to the Respondent.

57. On 28 November 2016, the Appellant emailed CIABATA requesting that CIABATA progress this immediately.

58. The Appellant and Respondent gave consideration to whether a CHP plant could or should be installed on the site to generate steam. The Respondent's position was that it felt that the Appellant should reconsider its decision not to invest in CHP's decision but that, given the absence of any clear policy steer at the commencement of the Scheme to support such a requirement, it could be regarded as unreasonable to require this of the Appellant. From the Appellant's perspective, the installation of its own CHP plant would not have been viable.

59. However, the Respondent accepted the proposal that the baseline energy should be varied by applying the steam generation efficiency used during the first half of 2008 to the whole of the 2008 baseline period.

60. On 10 March 2017, CIABATA emailed the Appellant to confirm that the Respondent had agreed to the new CCA.

61. Throughout this period both the Appellant and the Respondent proceeded on the mutual understanding that the Respondent could not vary the % Target.

62. A CCA was issued to the Appellant dated 24 April 2017. The new CCA changed the baseline energy from 314,975.654GJ to 365,640.964GJ. The % Target remained unchanged.

The Terms of the 2017 CCA

63. Clause 1 of the CCA is its interpretation clause. It defines terms used elsewhere within the CCA *"unless the context otherwise requires".*

64. Of principal relevance to this appeal is the definition of *"target"* which is defined as meaning:

> *"the percentage improvement in energy efficiency or carbon efficiency from the base year applicable to the target unit, set out in Schedule 6 to this Agreement, as varied from time to time."*

65. Under clause 3, the "*target"* is that which is set out in Schedule 6 to the Agreement *"as varied from time to time".* Such variations may be effected either to take account of a review carried out by the Secretary of State (in accordance with Rule 12 contained in Schedule 1 (Clause 3.3)) or in accordance with Rules 6, 9, 10 and 11 (clause 3.4).

66. Rule 12 sets out a detailed procedure for how a change in the sector target following a review by the Secretary of State is to be translated to a change in the target for individual target units including dispute resolution through an adjudicator.

67. In terms of the duration of the CCA, Clause 5.1 provides that it comes into force on 1 April 2013 or the date on which it is made, if later, and ends on 31 March 2023. This is identical to clause 5.1 in the Appellant's 2013 CCA. Under clause 5.2, the Appellant has the right to terminate the CCA on giving at least 20 days' notice.

68. The Rules and right of appeal are in the standard form as set out above (paragraphs 33 and 34).

New Plant

69. At the time that the April 2017 CCA was entered into, the Appellant's premises included new manufacturing plant which had been constructed at the site to manufacture a new product. The purpose of this plant is the manufacture of speciality silicon based monomers and their pre-cursors. It was accepted by the Appellant at the hearing that the Respondent had not been asked to vary the % Target based on this change to the target unit at the date of the issue of the 2017 CCA.

The Burges Salmon Letter

70. On 9 May 2017, Burges Salmon LLP wrote to the Respondent requesting a variation to the % Target in the CCA. There had been no previous request to the Respondent for the % Target to be varied.

71. On 17 May 2017, the Respondent wrote to Burges Salmon LLP stating that they could not agree to change the % Target contending that if it was to alter one operator's percentage, then there would be a knock on effect on the overall sector commitment which is the combination of all the individual operator's targets.

72. The Appellant appealed to the First-tier Tribunal on 22 May 2017.

Submissions

The Appellant

73. Two principal issues arise for determination in this case:

(i) Did the EA have power to amend the % Target in the CCA in the circumstances of this case? And

(ii) Does an appeal lie against the failure to amend the % Target or its decision on the target in the April 2017 CCA?

74. The factual background demonstrates that the Respondent approached the Appellant's request to vary the % Target on the basis that it had no power to do so. If it had a power to vary, then its approach was erroneous in law in that it would amount to a fettering of its discretion and a failure to address its mind to the question of what the % Target might be varied to.

75. It follows from the definition of "target" in the CCA that where the CCA refers to a power to vary the target, that power must include a power to vary the relevant percentage. The Appellant does not argue that this excludes variations to the Baseline Energy but in all instances it must include a power to vary the % Target. This is consistent with the definition of "target" in paragraph 49(7) of Schedule 6 to the 2000 Act.

76. Where the Respondent considers that it has power to vary the target by varying the baseline energy, it must also have the power in principle to vary the percentage figure in the target. The CCA as a whole is drafted consistently with the proposition that the target means the percentage; see for example Rule 6.1.

77. Whilst the Respondent varied the target in the CCA entered into in April 2017 by varying the Baseline Energy figure for TP2, TP3 and TP4 when compared to the earlier CCA, it claims that it had no power to vary the percentage figure, only the Baseline Energy. Put simply, once the Respondent accepted that it had the power to vary the target by varying the Baseline Energy, it must follow from the definition of "target" that it had power to vary the target by varying the percentage as well.

78. Paragraph 71 of the Technical Annex refers to recalculating the target on the basis of the revised base year data and that is consistent with a power to vary the % Target. It should not be implied from the absence of a specified methodology within the Technical Annex for indentifying the revised percentage that there is no power to vary the % Target and the Respondent has power under Rule 11.2 to request such information from the Sector Association as would allow it to identify a revised percentage.

79. The Manual on which the Respondent relies to support its contention that it had no power in the circumstances of this case to vary the percentage is guidance and cannot trump the clear and express terms of the CCA itself.

80. Further, the Respondent accepts that it can change the % Target in certain circumstances where its power to vary the target under the CCA is engaged. For example, it accepts that it can vary the percentage target where the facilities leave or enter existing target units. The Technical Annex which is referred to in the CCA provides further guidance on the circumstances in which the Respondent can vary the % Target.

81. It is not clear on what lawful basis the Respondent distinguishes between circumstances where its power to vary applies only to the Baseline Energy and those in which it embraces the % Target. It is illogical to give a different meaning to "target" under the different rules and the Respondent's failure to provide a lawful basis for distinguishing between the circumstances where it can, and those when it cannot, vary the % Target is irrational and unlawful.

82. In relation to the jurisdictional issue, there are several bases on which the Tribunal has jurisdiction to hear this appeal. Firstly, the CCA was entered into after 1 April 2013 and so a right of appeal against the target within it arises under Rule 13.2. The CCA is a standalone agreement and a right of appeal arises within the plain words of the Rule. The target was "set" by the Respondent in that its belief that it had no power to vary the percentage resulted in the perpetuation of the same rate as before. Whilst the percentage may not have been varied, the target was to the extent that the Baseline Energy was changed which suffices for the purposes of giving rise to a right of appeal. The target may have been set by agreement but that is a partial truth. The agreement was reached in circumstances where the Appellant was told by the Respondent that it had no power to vary the percentage to that extent the "agreement" was constrained and tainted by the Respondent's misdirection.

83. Secondly, the Respondent varied the target for the 2017 CCA and an appeal lies against such a decision under Rule 13.1.3.

84. Thirdly, the Appellant's operations had changed by the time the 2017 CCA was made with a new facility entering the target unit. The new manufacturing plant was a new facility because it fell within paragraph 50(1) and (2) of Schedule 6 to the Finance Act 2000 and an installation falling within paragraph 51(1) of Schedule 6, being a Part A installation regulated under the Environmental Permitting (England and Wales) Regulations 2010. It thus fell within the Table referred to in paragraph 51(1) of Schedule 6. In circumstances where a new facility has entered the target unit, the Respondent accepts that it had the power to vary the percentage.

85. The Tribunal should quash the decision not to vary the percentage target which would allow the Respondent to reconsider the target in the current CCA in the light of the Tribunal's reasons. The Tribunal is not invited to decide itself what the target percentage should be.

The Respondent's Submissions

86. In terms of jurisdiction, the Tribunal has no power to hear any appeal which relates to the targets (percentage or otherwise) in the CCA.

87. The Respondent was obliged to consider whether to vary the targets in the CCA when it was notified of a structural change and it was required to decide that issue in accordance with the Technical Annex. In this case, the Respondent was notified of a putative structural change in 2014 and it accepted that that was a structural change which should lead to a variation of the CCA to give effect to the new baseline and hence a numerical target. That decision was given effect to by version 2 of the CCA which took effect in March 2015. That decision was favourable to the Appellant but it would nevertheless have been entitled to appeal under Rule 13.1.3 if had wished to contend for a yet more favourable target.

88. No appeal was brought and the Appellant has not notified the Respondent of any other subsequent structural change. Accordingly, there has been no other notification engaging Rule 11 or which obliged the Respondent to take any further decision under that rule or to notify of any new decision under Rule 11.3. Nor is there any suggestion that the Respondent has been notified of anything which would engage Rules 9 or 10.

89. Whilst the Appellant's primary basis for its appeal is that it is appealing a refusal to vary the target dated 24 April 2017, the Respondent made no relevant decision on 24 April 2017, nor indeed any other date around that time or since March 2015 to vary any target in the CCA.

90. Rule 13.1.3 permits an appeal against a decision "*to vary or not to vary the target for the target unit"* and this is plainly a reference to Rules 9, 10 or 11 which are the only mechanisms by which the Agency may unilaterally vary a target in a climate change agreement. No such decision was made in this case and the Respondent was under no obligation (and indeed had no power) to make any such decision in 2017 in the absence of notification relevant to those rules. Accordingly, there was no right of appeal under Rule 13.1.3 and the Tribunal has no jurisdiction to hear any appeal relating to that.

91. This is not altered by the agreement to enter into version 3 of the CCA on 24 April 2017. Version 3 gave effect to a further variation of the baseline by mutual agreement pursuant to Clause 6 of the CCA. There was no decision to vary or not to vary the target under any of Rules 9 to 12, none of which were engaged. There was no obligation on the Respondent to give effect to the change under Clause 6 but it did so in the exercise of its discretion in recognition of the difficulties which the Appellant faced. The Appellant, which agreed to this variation which was favourable to it, cannot arguably rely upon it to found an appeal under Rule 13.1.3. If there is any remedy it lies in a claim for judicial review.

92. The alternative basis for the appeal is under Rule 13.2. However, its purpose it to permit an appeal against a target set by the Respondent in the case of new entrants to the CCA Scheme. Such new entrants were not party to the process of target setting between the sector associations and the Secretary of State, which is why the Respondent has unilaterally to impose a target. The % Target which is what the Appellant seeks to appeal is not set by the Respondent as administrator of the Scheme but rather by the Appellant, the Secretary of State and the sector association; a process in which the Respondent had no involvement.

93. In these circumstances, Rule 13.2 is not engaged and there is no decision to which a right of appeal can attach under the Rules. The appeal must be dismissed on the basis alone.

94. Separately, albeit related to it, the Appellant relies on the structural change which occurred and was notified to the Respondent in 2014. However, the Respondent considered that structural change then in accordance with Rule 11 and the Technical Annex and it believes correctly. The Appellant cannot in this appeal seek to rely on the same structural change to argue for a quite different variation from that which has already been allowed. Further, the request to vary the %Target was not made until after the date of the CCA. Therefore, apart from the jurisdictional issue, there is no matter of substance to which the appeal relates to which effect has not already been given by way of an earlier decision.

95. Further, the structural change notified to the Respondent had to be given effect by an alteration to the baseline by virtue of Rule 11 and the Technical Annex. It did not give rise to a change to the % Target. There is no other rule or mechanism, nor any other basis apart from the inclusion of a new facility within a target unit which required the Respondent to alter the Percentage Target.

96. The CCA does define "*target*" as meaning the % Target rather than the Baseline Energy or the numerical target derived from applying the Percentage

Target to the Baseline Energy which indicates some looseness in the drafting, but read as a whole the CCA hangs together reasonably well. The general must yield to the specific and Rule 11 is quite explicit that any variations must be done in accordance with the Technical Annex which, in turn, is explicit that structural change may require a change to the Baseline but not to the % Target. That is consistent with the guidance on the Respondent's Manual which is a legitimate aid to construction. Further, as is clear from Rule 11.1.2 the word "target" has to extend to include the Baseline Energy.

97. The reasonableness of the % Targets cannot be assessed by reference to the ability of the Appellant to meet them now given that they were agreed in 2013. The basic scheme of CCA agreements is that that are entered into voluntarily by operators who receive considerable benefit from doing so. Here, even if one focuses only on the period from the middle of 2014 onwards, after which the Appellant became liable to buy-out fees, the benefit from reduced CCL continues to exceed even now the buy-out fees imposed.

98. An operator who enters into a climate change agreement takes on a degree of risk as to its ability to meet its targets in light of unforeseen events. It is not required to adjust the % Targets if it receives a windfall and there is no reason why it should receive an adjustment just because it is unfortunate.

99. An alteration to the % Target for the Appellant, without any corresponding change to the sector commitment or to % Targets for other operators would, in effect, give rise to a departure from the sector commitment. It is neither unreasonable nor unfair that the Appellant be required to continue with the % Target it agreed in 2013. The mere fact (which the Respondent accepts) that subsequent events mean that that target is harder to meet than the Appellant anticipated, does not alter this.

100. In relation to the new facility now also relied upon to support the claim that a variation to the % Target was justified, the first the Respondent heard of this was on receipt of the Appellant's evidence. It would be open to the Appellant to invite the Respondent to treat this change as engaging Rule 9.7 but to

employ the methodology of the Technical Annex would require a year's worth of operational data which the Respondent has never been supplied with. Given that the Respondent was not asked to vary the % Target on this basis it has no relevance to the appeal.

101. There is a further problem with the Appellant's case in that it has failed to identify any basis or methodology pursuant to which either the Respondent or the Tribunal could reassess the % Target in its case. The % Target was set by a methodology over which the Respondent had no control and detail of which it was not privy to. The matter cannot simply be "at large" to be assessed on some broad brush concept of fairness.

Decision and Reasons

102. The jurisdictional and substantive issues raised by this appeal turn on the proper construction and effect of the CCA when properly construed. Those issues are related and although strictly separate, I deal with them together.

103. As is clear from recital D to the CCA, it is not intended to give rise to contractual obligations between the parties. Its principal function as an underlying agreement for the purposes of the 2000 Act is to form one element of a combination of agreements which entitle the Appellant to a reduced rate Climate Change Levy. The CCA also effectively provides the means by which the extent of any reduction in the Levy for a target unit may be calculated through the setting of a target for the relevant target unit and, if that target is not met, through the buy-out mechanism. If the effect of a CCA on a target unit ceases to be advantageous to the operator it can serve at least 20 days notice and cease to participate in the Scheme.

104. The fact that the CCA is one element of a combination of agreements, umbrella and underlying, forms an important part of the context within which its terms fall to be construed. The sector commitment is set out in the umbrella agreement agreed between the Secretary of State and the relevant sector associations, in this case CIABATA, and, as is clear from clause 3.3 of

the CCA, any review of that sector commitment is a matter for Secretary of State, with the role of the Respondent effectively limited to administering the process of distributing the revised sector commitment between each target unit under the umbrella agreement. The Respondent, as is the case with the initial setting of the sector commitment, is not involved in the substantive decision on what any varied sector commitment should be or how it should be identified.

105. The structure of the scheme is therefore a top down one in the sense that the Secretary of State agrees the sector commitment with the sector association which must then be distributed between the relevant target units. That distribution may also be a top down process, or it may be a more refined bottom up process, as was the case with the chemical industries sector through the means of CIABATA's BUDS.

106. Whether top down or bottom up, as is clear from Rule 2, it is the sector association which is responsible for the distribution of the sector commitment between each target unit (subject only to possible challenge to the distribution from the Respondent under Rule 12(5)). Again, the role of the Respondent is effectively one of the administrator of a Scheme which operates to targets fixed by others according to methodologies which it has had no involvement in devising or, in the first instance, applying.

107. This is the broader context within which the Appellant's argument that the Respondent had power to vary the % Percentage under the CCA in the circumstances of this case falls to be considered.

108. There is a simplicity and superficial attraction in the submission that the combined effect of the definition of "target" within clause 1.1 of the CCA and the wording of Rule 13 which provides the right of appeal against decisions of the Respondent to set, vary or not to vary "the target", together lead to the conclusion that the Respondent must have the power to vary the % Percentage in an existing agreement (under Rule 13.1.3) or alternatively set a new lower % Target in a subsequent agreement which varies the original

(under rule 13.2); powers which it did not recognise and failed to exercise when concluding the CCA.

109. However, to construe the CCA in this manner fails to reflect the content of the agreement as a whole and would, in my view, be inconsistent with the statutory scheme for Climate Change Agreements.

110. Clauses 3.3 and 3.4 of the CCA indentify the circumstances in which the target set out in schedule 6 may be varied. The "targets" are expressed by reference to energy unit, Baseline Energy and percentage reduction from the base year. The Schedule 6 target is, when seen in this context, an energy target rather than simply the % Target.

111. Variation to the target has to accord with Rules 6, 9, 10, 11 or 12 contained in schedule 1 to the CCA. As would be expected in a Scheme which has the effect of granting relief from a Government imposed levy, in relation to Rules 6, 9, 10 and 11 the nature and extent of any variation is prescribed, with the relevant rule in each case stating that the Respondent may vary the target *"following the principles, methodologies and calculations set out in the technical annex".*

112. The framework of the Scheme thus assumes a known sector commitment set by the umbrella agreement, a known distribution of that sector commitment in the form of a % Target for each target unit and a known process and methodology administered by the Respondent for varying the target for any relevant target unit or for setting targets for facilities which are added to an Agreement. It is clear from the wording of Rule 11.1.2, that "target" in the context of variations to which this Rule applies must include the Baseline Energy. The principal issue raised by this appeal is whether it always extends to include the % Target. The answer to that depends on the context and, importantly on the content of the Technical Annex.

113. In the context of any structural change or other change to the target unit which must be notified to the Respondent by the operator under Rule 3.1.2, the Technical Annex states that:

> "*The Administrator may vary the target to take account of the circumstances .....by making appropriate adjustment to the base year data from which the target was derived, to take account of such circumstances and recalculating the target on the basis of the revised base year data".*

114. There is therefore specific procedural and substantive provision made for variation of the target to address structural change within the CCA and/or the Technical Annex and, as is clear from the Technical Annex, the variation in such circumstances is to be to the base year data to enable the target to be recalculated, rather than to the Target Percentage. Target in this context must mean the energy target in Schedule 6 to the CCA. Whilst the % Target will be relevant in assessing the new energy target once the baseline is adjusted, there is nothing in Technical Annex which supports the contention that the Respondent has the power under this Rule to vary the % Target itself.

115. It follows that, in so far as structural change is concerned, references to varying the target under Rule 11 must mean variation to the base year data and not to the Target Percentage itself. The extent of any such variation should be comparatively easily identified having regard to the way in which the Baseline Energy is calculated and, if there is any dispute, the Tribunal on appeal would have a relatively straightforward function involving matters of fact and the correctness of any adjustment.

116. In contrast, where facilities leave or enter the unit, there is potential for the percentage target to change but only in accordance with the very precisely articulated principles, methodologies and calculations set out in the Technical Annex. The Rules read together with the Technical Annex thus provide the basis for the distinction between those cases where the Respondent has the power to vary the % Target and those where it does not.

117. The structure of the CCA which prescribes the circumstances in which the target may be varied (clause 3), and the cross referencing in each case (save Rule 12 which is self contained) to the Technical Annex, sets the context within which Rule 13 which provides the right of appeal falls to be construed.

118. I agree with the Respondent that the reference in Rule 13.1.3 to a decision to vary or not to vary must be a reference to a decision made under Rules 6,9,10, or 11. In relation to any such appeal, the Tribunal would be able to decide whether the prescribed procedure, principles and methodology had been correctly applied and the calculations correctly undertaken. A failure under any of these heads would fall squarely within the broad grounds of appeal which are available to an appellant under Rule 13.4 and the Tribunal would have a clear and identifiable remit. In this context the powers of the Tribunal under Rule 13.6 which include varying the decision, as well as affirming or quashing it, are readily understandable.

119. In contrast, the Appellant's argument that a decision to vary or not to vary the target which falls outside of the scope of clause 3 and Rules 6, 9, 10 or 11 to the CCA nevertheless gives rise to a right of appeal under Schedule 1, leaves the Tribunal with almost no assistance as to how to judge the correctness of the Respondent's decision and, in an appropriate case, how it should vary the CCA. In my view, that is simply not consistent with the CCA read as a whole. It follows that the agreement of 24 April 2017 was not a relevant decision for the purposes of Rule 13.1.3.

120. Similarly, I reject the Appellant's argument founded on Rule 13.2. Whilst on a strict interpretation it can be argued that the Appellant entered into a new agreement after 1 April 2013, the right of appeal is carefully worded. It applies only in those circumstances where *"the target has been set for the target unit by the Administrator".* The only circumstance in which a target is "*set*" by the Respondent in the sense anticipated by this Rule is in relation to new entrants to the Scheme i.e. those joining this iteration of the Scheme, which commenced with initial agreements dated 1 April 2013, after that date. In such circumstances, the issues on appeal will be clearly defined i.e. the

correctness of the Baseline Energy and whether the correct sector target has been applied. The role of the Tribunal would not extend to establishing a target unit specific % Target.

121. In the case of the Appellant's CCA the target was *set* by negotiation between the Appellant, CIABATA and the Secretary of State in the first version of the CCA. In my view, Rule 13.2 was not intended to have any applicability to those target units which are already within the Scheme but where the underlying agreement is replaced by a subsequent agreement simply to reflect a duly made variation.

122. In essence, the Appellant's primary case reduces to a contention that the Respondent's decision to make a discretionary consensual variation under Clause 6 of the CCA entitles it to pursue a potentially wide ranging appeal under Rule 13 untrammelled by the principles, methodologies and calculations set out in the Technical Annex. Leaving aside the difficulties that would present to the Tribunal which I have touched on above, to interpret Clause 6 as providing the Respondent with a wide discretion to agree a variation to the % Percentage or indeed the Baseline Energy untrammelled by the Technical Annex would be wholly inconsistent with the statutory scheme which focuses heavily on a sector commitment set in the umbrella agreement which will be varied only by the Secretary of State on review.

123. For the Respondent to have a discretion to vary the % Percentage or the Baseline Energy at will and without regard to the Technical Annex would, if routinely exercised, risk undermining the integrity of the Scheme. I also accept the Respondent's argument that the Scheme could be seriously undermined if operators were entitled to a change to the Percentage Target just because the projections they had made when the target was agreed were later proved to be incorrect.

124. Whilst I acknowledge that the Respondent did exercise its discretion under Clause 6.1 in this case, it did so by varying the Baseline Energy in order to address a deficiency in the earlier variation. The later variation can fairly be

described as a correction and therefore one accords with the objectives of the Scheme and which the CCA would not otherwise make provision for. This step does not in my view support an argument that the Appellant can, on appeal to this Tribunal, open up the reasonableness of the % Percentage set in 2013 and rolled forward on the later versions of the CCA.

125. The Appellant's subsidiary argument that a new facility had entered the target unit and therefore the Respondent had power to vary the target (under Rule 9) to reflect this which it should have exercised was not seriously pursued before the Tribunal. There is no evidence that the Respondent was notified of the change in accordance with Rule 9.7 before the CCA was agreed or, more importantly, invited to vary the % Percentage on this basis prior to 24 April 2017 and therefore no relevant error can have been made by it.

126. For all these reasons I have concluded that the Tribunal does not have jurisdiction to determine the Appellant's appeal which must therefore be dismissed. The approach of the Respondent to the variation involved no error of law. By the variation the Respondent gave the Appellant what it had requested and its conclusion that it had no power in the circumstances of this case to vary the Target Percentage involved no error of law.

127. The appeal must therefore be dismissed.

Judge Simon Bird QC

12 January 2018