



**First-tier Tribunal
(General Regulatory Chamber)**

Reference: NV/2018/0016

Before

TRIBUNAL JUDGE SIMON BIRD QC

Between

CHRISTOPHER POWELL

Appellant

- v -

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

Respondent

DECISION

Introduction

1. By notice dated 6 September 2018 the Appellant appeals under regulation 87 of The Green Deal Framework (Disclosure, Acknowledgement, Redress etc.) Regulations 2012 (“the GDFR”) against the Respondent’s decision notified under regulation 77 of those same Regulations, not to impose a sanction for breach of relevant requirements by a green deal provider.
2. Under regulation 87(4) of the GDFR, the Tribunal may withdraw, confirm or vary the decision of the Respondent, remit the decision to him and, in relation to a decision whether to impose a sanction, it may impose a different sanction or take different action.

The Background to the Appeal

3. There is no apparent dispute over the relevant facts underlying the appeal. The Appellant signed a Green Deal in March 2014 through a provider known as Your Green Deal Provider (“YGDP”). A Green Deal is a means of financing energy efficiency and renewable energy improvements to homes introduced by the Energy Act 2011. Under the scheme, in broad summary, loans are made to consumers who want to improve the energy efficiency of their homes, with the loan repayments collected as part of the consumer’s energy bill and effectively funded by the monetary value of the energy saved by the improvements.
4. The Appellant’s Green Deal was worth £6,954 and related to improvements to his property at 60 Gwilym Road, Swansea SA9 2GN (“the Property”). These included a replacement boiler and the application of external wall insulation. Although there is no date before the Tribunal as to when the works were carried out to the Property, it appears that this was in or about 2014. The wall insulation work was carried out by a Green Deal Installer, Enwise, who initially installed an SPS insulation system, but not to the appropriate standard. In consequence, it had to be removed and it was then replaced with a Parex system. However, the Parex system is not Green Deal approved, its

installation did not follow the standard procedures and Parex advised that it could not issue a warranty in relation to it. There were also issues with the quality of the workmanship in relation to the replacement boiler and uncertainty as to whether it benefitted from a warranty.

5. The Appellant's complaints about the poor workmanship, defective works and a number of other issues were not resolved by YGDP to his satisfaction and, in consequence, he was obliged to refer the matters to the Green Deal Ombudsman. The Green Deal Ombudsman made its first decision on the Appellant's complaints by letter dated 28 April 2015. In the decision, the Ombudsman did not accept that the principal substance of the complaints was justified, but he did accept that there had been a shortfall in service on the part of YGDP. The Ombudsman required that YGDP should confirm the existence of the warranty for the boiler, or repair it to enable a warranty to be issued, that it should discuss with the Appellant damage to three windows which had occurred during the works and that it should make a goodwill payment of £75 and apologise for the shortfall in service.
6. The Appellant did not accept the findings of the Ombudsman and, as he was entitled to do, sought a review of the decision. The review decision was issued on 18 March 2018 and, in it, the Ombudsman found that the Parex system had been poorly fitted and concluded that the Appellant could not be left in the position whereby it would not qualify for a warranty. He revised the recommendations of the original report to include a requirement that YGDP re-visit the Property to replace the entire wall insulation system.
7. The Appellant remained dissatisfied and referred his complaint to the Respondent. On 5 April 2018, having considered the substance of the complaint, the Respondent concluded that only those aspects of it which related to improvements installed under the Appellant's Green Deal Plan could be considered i.e. those relating to the boiler and the wall insulation. In relation to the boiler, he agreed with the findings of the Ombudsman. In respect of the wall insulation, the Respondent also accepted the findings and recommendation of the Ombudsman but found in addition that, on the basis of

those findings, various breaches of the relevant Code of Practice were implied. These included the requirement that the Green Deal Provider must enter into a contract of insurance in respect of the required guarantee of the works, to ensure that the terms of the guarantee were fulfilled including in the event of insolvency.

8. The Respondent concluded that:

“Further, the Secretary of State is satisfied that remedying the breaches – putting Mr Powell in the position where he has functioning EWI which can be covered by an insurance-backed guarantee – requires the EWI to be removed and, following any necessary remediation work, appropriate replacement EWI installed. Based on the current cost assumptions for BEIS’s energy efficiency modelling, just installing EWI is likely to cost £7,000 to £9,000 (and it appears that the original EWI installation cost in excess of £9,000). The Secretary of State is therefore satisfied that the breaches were severe and that Mr Powell has suffered or is likely to suffer substantive loss. Indeed, the costs of the necessary works is more likely than not to exceed the amount financed by Mr Powell’s Green Deal Plan - £6,954 based on the papers we have seen”.

9. In February 2016, long before this decision, YGDP had placed itself into administration and, on 7 April 2016, its authorisation to act as a Green Deal Provider had been withdrawn. Under the Regulations, GDFC Assets Limited (which, in 2017, subsequently became GDFC Group Limited), which received the Appellant’s repayments under his Green Deal Plan, became the “relevant person” on whom the Respondent could impose sanctions under the Regulations. In his letter of 5 April 2018, the Respondent gave notice of his intention to cancel the Appellant’s Green Deal Plan as the appropriate sanction.
10. In May 2018, the Appellant made representations to the Respondent on this proposed sanction, including the argument that cancellation of his Green Deal Plan would not remedy his issue in full, because he would be left with ill-fitted insulation and no compensation to fund its replacement. However, at about the same time, GDFC Assets Limited cancelled the Appellant’s Green Deal

Plan and refunded all the repayments made by the Appellant under it. The Respondent was notified of this on 18 May 2018 and in his notice of decision on the Appellant's complaint dated 9 August 2018 he stated:

"5. Under the Green Deal Framework , the Secretary of State may impose a sanction of reduction or cancellation of a Green Deal Plan if he is satisfied that there has been a breach of the applicable regulations or code of practice. The cancellation or reduction of a Green Deal plan represents the full extent of the Secretary of State's power to provide redress for consumers in relation to the Green Deal scheme.

6. We note Mr Powell's representations received on 16 May. However, as the Green Deal Plan has already been cancelled and all repayments refunded, there are no further sanctions for redress available to the Secretary of State to impose under the Regulations".

11. It is against this decision that the Appellant appeals, arguing that he signed up to the Green Deal Plan believing that the Government backed scheme would benefit his home and that safeguards would be in place in the event that things went wrong. In addition to the cancellation of his Green Deal Plan, he argues that he should receive compensation proportionate to the remedial work that needs to be undertaken to rectify the ill-fitted wall insulation.

The Legal Framework

12. Under regulation 9 of the GDFR the Respondent is required to establish a register for each category of Green Deal participant, including Green Deal providers. Inclusion on the register is a requirement of authorisation as a Green Deal participant (regulation 8(1) and (2)).
13. Under Regulation 10(1) the Respondent must issue a code of practice for Green Deal participants and it is a requirement (Regulation 24(1)) that Green Deal providers comply with the provisions of the code of practice which applies to them. A failure by a Green Deal Provider to comply with the Code of Practice is a breach of "*a relevant requirement*" (Regulation 63(d)).

14. The powers to impose sanctions for the breach of a relevant requirement are contained in Chapter 3 of the Regulations. Regulation 67 deals with breaches of relevant requirements by Green Deal providers. It provides:

- (1) *This regulation applies where the Secretary of State is satisfied that there is a breach of the relevant requirements by a green deal provider and—*
 - (a) *the breach is severe; or*
 - (b) *there have been other breaches of the relevant requirements by the green deal provider in respect of the property or other properties.*
- (2) *The Secretary of State may impose on the green deal provider one or more of—*
 - (a) *a compliance notice;*
 - (b) *a financial penalty;*
 - (c) *withdrawal.*
- (3) *Where the Secretary of State is satisfied that the bill payer has suffered or is likely to suffer substantive loss, the Secretary of State may, in addition to any sanction imposed under paragraph (2), impose cancellation or reduction on the relevant person.*

15. “*Relevant person*” is defined (all relevant definitions are contained in regulation 51) as meaning:

- (a) *the green deal provider; or*
- (b) *where the authorisation of the provider is withdrawn, the payee.”*

16. “*Payee*” is defined as meaning:

“the person who is for the time being entitled under a plan to receive instalments under the plan”.

17. “*Cancellation*” means:

- “that the Secretary of State requires the relevant person—*
- (a) *to cancel the liability of the bill payer and any subsequent bill payer to make payments under an energy plan from the effective date; and*
 - (b) *to refund to the bill payer any instalments paid under the plan in respect of a period after that date.”*

18. “*Reduction*” means:

“that the Secretary of State requires—

- (a) *the relevant person to reduce the liability of the bill payer and any subsequent bill payer to make payments under an energy plan from the effective date; and*
 - (b) *the relevant person to refund to the bill payer any instalments paid under that plan in respect of a period after that date”*
- 19. Whilst one of the sanctions provided for by the Regulations under regulation 53 is compensation, it is available only in respect of “*cancellation*” and the sanction can be imposed only on “*an improver or a notifier*”.
- 20. “*An improver*” is the owner or occupier of the property who makes the arrangement for the energy efficient improvements to be made to it (section 1(2) and 2(2) of the Energy Act 2011.
- 21. “*Notifier*” is defined as meaning:
 - “(a) *the person required to provide the disclosure document to the recipient; or*
 - (b) *the person required to secure that the acknowledgment is—*
 - (i) *included in contracts to which section 14(2) applies; or*
 - (ii) *given in connection with transactions or arrangements to which chapter 2 of Part 7 applies.”*
- 22. Under sections 12 and 14 of the Energy Act 2011, various information in relation to a Green Deal Plan applying to a property must be disclosed by the seller, prospective landlord or a licensor to those who will assume liability under the relevant Green Deal Plan following a sale or letting to them. It is also a requirement that acknowledgement of their liability is contained in the relevant contract. Under Regulation 66, where a Green Deal Plan is cancelled by reason of a failure to disclose the required information or to secure the necessary acknowledgement, compensation may be payable to the green deal provider who would otherwise lose out through a default on the part of the improver or notifier.

23. There are no other circumstances under the GDFR in which the Respondent may impose a sanction in the form of compensation, nor is there any more general power to award compensation to improvers for loss attributable to the operation of the Green Deal Scheme.

Finding

24. There is no dispute that YGDP was in breach of the requirement to comply with the Code of Practice and, in consequence, was liable to the imposition of a sanction by the Respondent under regulation 67 of the GDFR. On 7 April 2006, the sanction which the Respondent chose to impose was withdrawal i.e. withdrawal of YGDP's authorisation to act as a Green Deal provider. In consequence it ceased to be a Green Deal provider for the purposes of the GDFR and the only scope for any further sanction to be imposed was under regulation 67(3).
25. There is equally no dispute that the Appellant suffered substantive loss, as a result of the breaches of the relevant requirements identified by the Respondent in his decision of 9 August 2018. In those circumstances, the Respondent had power to impose the sanction of cancellation or reduction on "the relevant person", but no power to impose any other sanction.
26. Following the withdrawal of YGDP's authorisation to act as a Green Deal Provider, any such sanction would have had to have been imposed on GDFC Assets Limited because they were the payee under the Appellant's Green Deal. The definition of "*relevant person*" provides that, in circumstances where the Green Deal Provider's authorisation is withdrawn (see regulation 51), the term means "*the payee*".
27. However, by letter dated 9 May 2018, GDFC Group Limited (GDFC Asset Limited's successor as "payee"), cancelled the Appellant's Green Deal Plan and refunded to him all the repayments he had made. It follows that on 9 May 2018 GDFC Group Limited ceased to be "the payee" as defined under the GDFR because it ceased to be the person who is "*for the time being entitled*

under a plan to receive instalments under that plan” (regulation 51). There was, at this point no longer a plan.

28. It follows that, by taking the step of unilaterally cancelling the Appellant’s Green Deal Plan on 9 May 2018, GDFC Group Limited effectively deprived the Respondent of any power to impose a further sanction in relation to the Appellant’s complaints.
29. However, even had GDFC Group Limited not cancelled the Green Deal Plan and refunded the Appellant’s repayments, the most the Respondent had power to achieve under the GDFR by way of remedy for the Appellant, would have been the very same cancellation and refund which GDFC Group Limited provided.
30. Whilst the Appellant seeks an award of compensation at a level sufficient to remedy of the failings of the YGDP in respect of the works undertaken to his property, the GDFR provide only a very limited power to award compensation as a sanction. As set out above, it is only a Green Deal provider who may benefit from such an award. There is no power under the statutory scheme to award compensation to “*an improver*” such as the Appellant. The appeal must therefore fail.
31. I should add that it is very regrettable that the Appellant now finds himself in a position which proper operation of the statutory scheme, in particular the guarantee requirements, was intended to prevent occurring. However, neither the Respondent nor the Tribunal has power under the statutory regime to award compensation in such circumstances and, I accept the submission made on behalf of the Respondent that, to the extent to which the Appellant has any remedy, it falls outside the scope of the GDFR and beyond the powers of this Tribunal.
32. In conclusion, I find that the Respondent made the only decision which was open to him in the circumstances and I confirm his decision of 9 August 2018.

Signed by Judge of the First Tier Tribunal
28th February 2019

Promulgation date 5th March 2019