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Case No: AC-2024-LON-000022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 October 2024

Before:

MR JUSTICE CHAMBERLAIN

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Between:

DANIEL FARMILOE	**Claimant**
- and -	
GAS AND ELECTRICITY MARKETS AUTHORITY	**Defendant**

- -
- -

Daniel Farmiloe (in person)
Stephen Kosmin (instructed by **the Gas and Electricity Markets Authority**) for the **Defendant**

Hearing dates: 16 and 17 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 11 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

1 Daniel Farmiloe, the claimant, lives with his family in a large, stone-built property in Oxfordshire. He once worked for the Gas and Electricity Markets Authority as part of its executive arm, the Office of Gas and Electricity Markets ("Ofgem") and was subsequently a director of Earth Source Energy Ltd, which undertook installation of renewable heating systems. This is the second judicial review claim he has brought against the Gas and Electricity Markets Authority.

2 Both claims arise from an application made by the claimant on 14 September 2017 for accreditation of a ground source heat pump ("GSHP") system under the Domestic Renewable Heat Incentive Scheme ("the Scheme"). Accreditation is a necessary step in claiming a subsidy under the Scheme. For reasons which I explain below, the claimant's application has not yet been approved. If it is, any applicable subsidy payments will be made retrospectively. The claimant's application is now the last remaining undetermined application under the Scheme, which has since been closed to new applicants.

3 On 17 November 2023, HHJ Brian Rawlings, sitting as a Judge of the High Court, granted the claimant permission to apply for judicial review on grounds A1 to A3 and C1 to C5, the claimant having abandoned grounds B1-B3. The substantive hearing was on 16 and 17 July 2024. Mr Farmiloe appeared in person. He prepared and presented his case, both in writing and orally, with conspicuous skill and clarity. Stephen Kosmin appeared for the Authority. I am grateful to them both for their helpful submissions.

Background

4 Applications for accreditation under the Scheme had to be accompanied by an Energy Performance Certificate ("EPC"). The EPC contains, among other things, an estimate of the annual heat demand for the property, in kilowatt hours ("kWh"). One of the factors on which this depends is the quality and quantity of the property's insulation; another is the responsiveness of the heating system. The annual heat demand is an important determinant of the amount of subsidy. The Scheme provides for subsidy payments over seven years.

5 In the spring of 2017, the claimant obtained an EPC, which stated the annual heat demand for the property as 229,413 kWh, and a quotation from an installer registered under the Microgeneration Certification Scheme ("MCS") for the installation of a GSHP system. He calculated that the subsidy payments over seven years would be £249,552.11 and that the overall cost of the installation would be slightly over £240,000. Judging that he would be better off by doing so, the claimant replaced his existing conventional electric storage heating system with the GSHP system. On 14 September 2017, he applied to Ofgem for accreditation of that system.

6 The claimant's application was diverted from the automatic accreditation system and flagged for manual review because of the potentially high subsidy it would attract. On 15 February 2018, Ofgem informed the claimant that a site audit was required. This was done on 13 March 2018 by Ricardo Energy and Environment ("Ricardo"), which

provides independent assessment services under a contract with Ofgem. The claimant arranged for his father to be present when Ricardo attended. He gave Ricardo access to all parts of the claimant's property.

7 On 21 August 2018, Ofgem informed the claimant that, as a result of the assessment undertaken at his property, it had concluded that "the heat demand specified in your EPC is overestimated". There was initially an error in setting out the annual heat demand figure estimated by Ricardo, but it is now agreed that it was 144,196 kWh, some 37% lower than stated in the original EPC. This meant that the subsidy over seven years would be £174,694, which was considerably less than the cost of installation of the system. The claimant requested a statutory review of the decision to require a new EPC. When that was unsuccessful, he sought judicial review. Part of the claim challenged the procedure by which the statutory review had been conducted. That part was conceded. The remainder of the claim was dismissed by Lang J on 7 November 2019: *R (Farmiloe) v Secretary of State for Business, Energy and Industrial Strategy* [2019] EWHC 2981 (Admin).

8 As a result of the concession that the statutory review had been conducted unlawfully, Ofgem had to conduct that review again. The result of this was notified to the claimant on 13 August 2021. The result was that Ofgem's request for a further EPC stood. There was then correspondence between the claimant and Ofgem. On 26 January 2022, the claimant obtained a new EPC, which stated the annual heat demand for the property as 234,797 kWh (i.e. slightly higher than the original one). The claimant supplied the new EPC to Ofgem on 27 January 2022. On 10 February 2022, Ofgem sent the claimant a letter saying that it wished to arrange another site inspection of the claimant's property, pursuant to regulation 18(2) of the Domestic Renewable Heat Incentive Scheme Regulations 2014 ("the 2014 Regulations": SI 2014/928), as amended. On 8 March 2022, the claimant made a request for statutory review of that decision. Having not received a decision in response to the request for a statutory review, this claim was filed on 10 May 2022, challenging the decision of 10 February 2022 to require a site inspection and the ongoing failure to accredit the claimant's plant.

The claimant's case

9 Under grounds A1-A3, the claimant challenges the decision of 10 February 2022 to require a site inspection. The decision is challenged as *ultra vires* Ofgem's statutory powers (ground A1), made for an improper purpose (ground A2) and as amounting to a disproportionate interference with the claimant's rights under Article 8 and Article 1 of Protocol 1 ("A1P1") to the European Convention on Human Rights ("ECHR"). Sensibly, the claimant gathered his submissions under these three grounds under one broad head. In his oral submissions, the claimant conceded that, if he did not succeed under grounds A1 and/or A2, he could not succeed under ground A3.

10 The essence of the claimant's challenge to the decision to require the site inspection is that Ofgem's power to require a site inspection under reg. 18(2) of the 2014 Regulations may only be exercised for the purpose specified in that paragraph, namely "to satisfy itself that the plant should be given accreditation". That means that the power may be exercised only for the purpose of checking whether the accreditation requirements in reg. 21(2) are met. Since Ofgem has confirmed that they are, no proper purpose is served by an inspection in this case. Even if there were such a purpose, the

degree of access requested (which goes beyond the plant itself and extends to all areas of the claimant's private home) is disproportionate. Ofgem's demand for a site inspection appears to be a fishing expedition and to go beyond what is genuinely required for the discharge of its statutory functions. It amounts to a disproportionate interference with the claimant's ECHR rights.

11 Under grounds C1-C5, the claimant challenges the ongoing failure to accredit his plant. Again, the challenge is advanced under several legal sub-headings: *ultra vires* (ground C1), failure to comply with mandatory procedural requirements under reg. 21 (ground C2), taking into account irrelevant considerations (ground C3), disproportionate interference with A1P1 (ground C4) and breach of legitimate expectations (ground C5). In the course of his written submissions, the claimant conceded that if he did not succeed under grounds C1, C2 and/or C3, he could not succeed under ground C4.

12 In essence, the claimant's case is that, under the statutory scheme, Ofgem "must" grant accreditation if the statutory requirements are met. This entails checking whether the application is properly made, which involves asking whether all the information and documents required by reg. 17(2) have been submitted. If not, it can reject the application under reg. 22(1)(a) or ask for further information under reg. 18(1). But if the required information and documents have been submitted, it must grant accreditation.

Ofgem's case

13 Ofgem notes that the "annual heat demand" for a property depends not only on the characteristics of the property (insulation, number, size and construction of windows etc.) but also on the responsiveness of the heating system (how quickly it heats up and cools down). All this was common ground before Lang J: see the Second Witness Statement of David Fletcher of 17 July (para. 7) and the Third Witness Statement of the claimant of 1 May 2019 (para. 11). A GSHP system would be expected to be more responsive than an electric storage system. So, it is surprising that the annual heat demand stated in the second EPC (which was produced after the GSHP system had been installed) was higher than that stated in the first EPC (which was produced when the previous electric storage system was in place). The fact that the second EPC stated a *higher* annual heat demand than the first, which was markedly out of line with the Ricardo estimate, was a sufficient basis on which to request a site visit. There is a known risk that EPC assessments can be "gamed": see Witness Statement of Joshua Leach of 15 January 2024 (para. 48).

14 As to ground A1, Ofgem says that the contention that its powers under reg. 18(2) do not permit it to request a site visit has already been determined against the claimant by Lang J at [69] of her judgment in the first claim. The contention that the site visit must be limited to the plant is not borne out by the words of reg. 18(2) and would not be consistent with the purpose of that regulation as described by Lang J. Grounds A2 and A3 are expressly parasitic on ground A1 and fall away if the latter fails.

15 Ofgem submits that grounds C1-C3 are contrary to Lang J's findings at [70] and moreover rest on a fundamental misunderstanding of the statutory scheme. The duties in reg. 21(1) arise only when Ofgem has made a rational and properly informed

decision as to whether to impose conditions under reg. 20. The duty in reg. 21 is in any event expressly subject to the duty in reg. 22(1)(d), which deals with failure to provide information required under reg. 18(1). As to ground C5, this is simply another way of putting the arguments under grounds C1-C3. In any event, there was no unequivocal representation that his interpretation of reg. 21 would be applied.

The statutory regime and Lang J's judgment

16 The relevant parts of the statutory regime, as in force when the application for accreditation was made on 14 September 2017, are set out in an Appendix to Lang J's judgment. There is no need to set them out here.

17 It is, however, necessary to explain the argument the claimant was advancing before Lang J, in particular under what was then ground 1. This was summarised at [43(i)] of Lang J's judgment as follows:

> "The 2014 Regulations did not confer any power to require the Claimant to provide a new EPC in the circumstances of his case and so Ofgem's decision was *ultra vires*."

18 As Lang J said at [60], the claimant had argued that Ofgem's power to request a further EPC was limited to the circumstances mentioned in reg. 18(1)(b) or (c) and that there was no residual power to request a further EPC pursuant to reg. 18(1)(d) and Part 2 of Sch. 4. That argument was rejected. Lang J said this:

> "61. In my judgment, the Claimant's interpretation of the 2014 Regulations was unduly narrow and constrained. The 2014 Regulations clearly confer powers enabling Ofgem to check the information provided in support of an application, and to seek further information where required, to ensure that the accreditation and the subsidy are consistent with the terms of the DRHI Scheme, and its objectives. In my view, this is unsurprising, given the complexity of the DRHI Scheme, the wide range of potential applications, and the large sums of money involved. All public bodies have a legal duty to ensure that taxpayers' money is spent properly and lawfully. As the Defendants rightly submitted, in construing the 2014 Regulations, it is appropriate to bear in mind that state aid is generally prohibited under EU law. The subsidies were only authorised by the European Commission for the DRHI Scheme on the basis that they would be limited to compensation for the additional costs of renewable heat, as compared to the cost of a conventional fossil fuel.
>
> 62. Part 2 of Schedule 4 to the 2014 Regulations is headed "Additional information which may be required from an applicant for accreditation". Read together with regulation 17(2)(b), it empowers Ofgem to require an applicant to provide additional information in support of his accreditation

application. Read together with regulation 18(1)(d), it empowers Ofgem, when considering an accreditation application, to request by notice that an "applicant provide such other information specified in Part 2 of Schedule 4 as the authority may require". Ofgem erroneously relied upon regulation 17(2)(b) in its decision and review letters as it did not in fact require the Claimant to provide a further EPC in support of his accreditation application. Ofgem only decided to ask the Claimant for a further EPC once the application had been submitted and was being considered for accreditation. Therefore, the relevant power was to be found in regulation 18(1)(d). However, the error made no difference to the decision in this case as the powers conferred by Part 2 of Schedule 4 apply under both regulation 17 and 18. Although regulation 18 is not mentioned in paragraph 2 of Part 2 of Schedule 4, it is referenced under the heading to Schedule 4.

63. Paragraph 2 of Part 2 of Schedule 4 sets out a long list of additional information which may be required from an applicant for accreditation. It includes, at sub-paragraph (h):

> "a copy of any Energy Performance Certificate for the property including, if applicable any Energy Performance Certificate issued on or after the RHI date for the plant".

64. In my view, the natural reading of sub-paragraph (h) is that Ofgem may require an applicant to provide Ofgem with a copy of an EPC which is already in existence. I consider that a requirement that an applicant obtain a new EPC is different in character. In my view, such a requirement is capable of coming within the broad residual power in sub-paragraph 2(m) which enables Ofgem to require that an applicant provides:

> "such other information as the Authority may require to enable it to consider the applicant's application for accreditation or to enable evaluation of the operation of the domestic RHI scheme".

In my view, an EPC is clearly "information" within the meaning of sub-paragraph 2(m).

65. The power in sub-paragraph 2(m) of Part 2 of Schedule 4 may be exercised by Ofgem when considering an accreditation application under regulation 18. Regulation 18(1) identified, in sub-paragraphs (b) and (c), two specific instances in which the maker of the 2014 Regulations anticipated that details of a further EPC could be required from an applicant, neither of which arose in this case. However, I could not accept the Claimant's submission that sub-paragraphs (b) and (c) are an exhaustive list of the circumstances in which a further EPC can be required. On an ordinary and natural construction, the broad

> residual power in sub-paragraph 1(d) caters for any other information which is not specified in the preceding sub-paragraphs of paragraph (1), including a further EPC for some reason other than those specified in sub-paragraphs (b) and (c). On the Claimant's construction, Ofgem would be powerless to request a further EPC even where, for example, irrefutable evidence emerged during the course of the accreditation assessment that the EPC provided with the application was based upon a flawed assessment. That would be a startling restriction on Ofgem's powers."

19 There was an argument about whether Ofgem had power to conduct a site visit in order to check the basis on which the EPC had been granted (rather than simply to inspect the plant). Lang J's answer was given at [69]:

> "…In my view, Ofgem was entitled to exercise the power conferred by paragraph (2) of regulation 18 (to arrange for a site inspection to satisfy itself that the plant should be given accreditation) in the circumstances of this case, in the light of the high subsidy claimed, and to check whether the EPC had been issued on the basis of an accurate assessment."

20 Finally, the claimant argued that Ofgem had no discretion to refuse the claimant's accreditation as reg. 21(1) imposed a duty to give accreditation where Ofgem was satisfied that the criteria in reg. 21(2) were met, i.e. where the application has been properly made and the plant meets the eligibility criteria. At [70], Lang J rejected this argument, saying this:

> "In my judgment, this interpretation could not be correct, since it did not take into account Ofgem's powers under regulation 18 to seek further information when considering an application for accreditation. Moreover, regulation 22(1)(d) provides that an accreditation application could be rejected if, inter alia, information requested by Ofgem is not provided within the time limit under regulation 19."

Discussion: Grounds A1 and A2

21 In essence, the claimant's case depends on a particular reading of the regulatory scheme and the role of the EPC within it. The claimant places great weight on the fact that an EPC must be prepared by a regulated professional and that those considering installation of a GSHP are entitled to rely on it in deciding whether such installation would be to their financial benefit. Thus, he argues that the regulatory scheme imposes important constraints on the power conferred by reg. 18(2) to arrange for a site inspection, which must be limited to an inspection of the plant, and do not encompass a wider enquiry into the annual heat demand figure stated in the original EPC.

22 The difficulty with this argument, attractively advanced though it was, is that the claimant's constrained interpretation of reg. 18(2) was considered and rejected in terms by Lang J in the excerpt from [69] of her judgment cited above. There are two reasons

why I consider that I should follow Lang J's reasoning, either of which would be a sufficient reason to do so. First, it is a conclusion reached in a final decision in proceedings between the same parties and thus gives rise to an issue estoppel. Second, and in any event, it is a decision by another High Court Judge, so I am bound to follow it unless convinced that it is wrong: *R v HM Coroner for Greater Manchester ex p. Tal* [1985] QB 67; and, far from being convinced that it is wrong, I find Lang J's reasoning persuasive and regard it as correct.

23 If I had been required to reach my own conclusion from first principles, I would have found – consistently with the thrust of the reasoning in Lang J's judgment – that, considering the Regulations as a whole, it is apparent that their purpose is to confer on Ofgem powers enabling it to check the information provided in support of an application and to seek further information where required. The subsidy scheme involves spending potentially large sums of taxpayers' money. It falls to be construed in the context of a prohibition on state aid (which applied as a matter of EU law at the time of the relevant application). Against that background, it makes sense to construe the powers conferred by the Regulations as broad enough to enable a comprehensive enquiry into the question whether the annual heat demand stated in the EPC is accurate, because this is likely to be a key determinant of the subsidy.

24 There is a further feature of the statutory regime upon which I would also rely. This is the power to impose conditions on accreditation under reg. 20. The existence of this power is, in my view, a strong indication that the accreditation decision is not the binary one the claimant suggests (i.e. accredit if the relevant application documents have been submitted and the plant itself meets the requirements or refuse if not). Rather, Ofgem has a range of options and, to properly inform itself as to which of those options it should choose, a broad reading should be given to the site inspection power.

25 Turning to the facts of the case, I accept Mr Kosmin's submission that the fact that the second EPC stated an annual heat demand greater than the first was, on the face of it, surprising, given that a GSHP system would be expected to be more responsive than an electric storage heater system and a property with a GSHP installed would therefore be expected to show a lower annual heat demand, other things being equal. This was a proper basis for concluding that a further site inspection was required for the purpose of examining the annual heat demand stated in the second EPC. Given that the power in reg. 18(2) extends to such an inspection, and that one was warranted here, Ofgem exercised its power under reg. 18(2) for a proper purpose, which was consistent with the regulatory regime.

26 I have borne in mind the claimant's points about the circumstances in which the Ricardo assessment was done. It may be, as the claimant says, that the agent who undertook it spent less time on the assessment than those who performed the first and second EPCs. It may be that that agent made unwarranted assumptions about the extent or quality of the insulation. These are not matters on which I am able to form any concluded view. The critical point for present purposes is that, on the facts as they were known to Ofgem on 10 February 2022, there was a proper basis for concluding that a further site inspection, not limited to the plant and its immediate environs, was required.

27 I have considered the claimant's argument that the powers available to Ofgem after accreditation cast some light on the scope of the powers available to it pre-accreditation. The power under reg. 56 to request entry may be exercised for any of the purposes specified in paragraphs (a)-(e) of that regulation. Those purposes are concerned with verifying compliance by the participant with all applicable ongoing obligations, verifying meter readings, taking samples and photographs or audio recordings and verifying compliance with conditions under reg. 51. In my judgment, these powers tell one nothing about the scope of the pre-accreditation powers. Certainly, there is nothing in reg. 56 which impliedly constrains the pre-accreditation powers.

28 Likewise, I note the claimant's reliance on the Northern Ireland scheme and the report of the Independent Public Inquiry into the Non-Domestic Renewable Heat Incentive Scheme, which was published on 13 March 2020. However, there are important structural differences between the Northern Ireland scheme, which was a wholly metered non-domestic scheme, and the scheme established by the Regulations. Once those differences are understood, it can be seen that nothing in the Inquiry's report bears materially on the issue I have to determine.

29 For these reasons, Grounds A1 and A2 fail. This means that, on the claimant's concession, ground A3 fails too. I add that I consider the concession to be correct. It is not necessary for me to determine whether the requirement for a site inspection gives rise to an interference with Article 8 and/or A1P1 ECHR, because, if it does, the interference is both in accordance with the law (for the purposes of Article 8) and subject to conditions provided for by law (A1P1) and, in both cases, proportionate. In short, no-one has to apply for a public subsidy; if an applicant chooses to do so, he must comply with the conditions imposed by law, or by the statutorily appointed regulator in the exercise of its powers conferred by law; and in this case, there was a proper basis for a further site inspection, not limited to the plant and immediate environs. That being so, any interference with the claimant's rights under Article 8 and/or A1P1 was proportionate to a legitimate aim, namely protecting the economic well-being of the country by ensuring that public subsidies are limited to those provided for by law.

Discussion: Grounds C1 to C3 and C5

30 The claimant's case under grounds C1 to C3 is, in my view, inconsistent with Lang J's conclusion at [70] of her judgment in the claimant's first claim for judicial review. The argument she was considering was materially the same as the one being advanced here. The claimant is bound by Lang J's rejection of that argument, which gives rise to an issue estoppel. In any event, I would be obliged to follow Lang J's reasoning unless convinced that it is wrong; and, again, I am not convinced that it is wrong and regard it as correct.

31 Again, I would have arrived at the same construction myself. I understand the policy arguments in favour of the claimant's argument: that the purpose was to incentivise investment in renewable heating technologies; that certainty for investors is essential; and that the EPC (which comes from a regulated professional) performs a vital role in this regard. All of this is perfectly coherent, but it fails to give sufficient weight to the importance of the power in reg. 20 to impose conditions on a grant of accreditation. The existence of that power seems to me to show that reg. 21 cannot be sensibly read as

imposing an absolute duty to grant accreditation if the application documents are in order and the plant passes muster. If Ofgem has power to grant accreditation subject to conditions, it must have power to gather the information it needs to decide whether such conditions are required or not; and if it has that power, it cannot be under a duty to accredit before it has made the decision.

32 As was pointed out by Stephen Kosmin for Ofgem, the upshot of the claimant's argument, if correct, would be that Ofgem was legally obliged to grant the application for accreditation as early as 28 March 2018. However, once it is accepted that a central purpose of the statutory scheme is to prevent public funds being expended when a subsidy is not justified, that there is power under reg. 18(1)(d) to seek a further EPC (as Lang J held in the first claim) and that in the light of the second EPC Ofgem has power to require a site inspection not limited in the way the claimant contends (as I have found in rejecting grounds A1 and A2, consistently with Lang J's reasoning), it would make little sense to say that Ofgem was required to accredit without having the opportunity to take any of these steps.

33 I accordingly conclude that reg. 21 imposed no obligation to accredit as at 2018. That disposes of ground C1. Grounds C2 and C3 are, in reality different ways of putting the same point. They fail for the same reasons. On the claimant's concession, that means that ground C4 also falls away. If I had had to decide that ground I would have rejected it for the same reasons as I have given in relation to ground A3.

34 Ground C5 alleges a legitimate expectation, but to found such an expectation, the claimant would need to show a representation made by or on behalf of Ofgem which was "clear, unambiguous and devoid of relevant qualification": see *R (Donald) v Secretary of State for the Home Department* [2024] EWHC 1492 (Admin), [108]-[122] and the cases cited there. Here, there is no representation supporting the claimant's interpretation of reg. 21. The claim fails for that reason. As under grounds A1-A3, I derive no assistance from an examination of the structurally different Northern Ireland scheme. It is simply not possible to extrapolate from things said about that regime, whether the public inquiry or by the courts, to the present context.

Conclusion

35 For these reasons, the claim is dismissed.