IN THE UPPER TRIBUNAL **UT ref: UA-2023-001136-GEPN**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 345 (AAC)**

On appeal from First-tier Tribunal (General Regulatory Chamber)

Between:

GDFC Assets Limited

Appellant

- v –

Carol Heaney

First Respondent

Secretary of State for Energy Security and Net Zero

Second Respondent

Before: Upper Tribunal Judge Wright

Decision date: 6 November 2024
Decided after an oral hearing in Edinburgh on 30 and 31 July 2024

Appellant:	Kate Urell and Sabrina Goodchild of counsel.
First Respondent:	Jonathan Barne KC and Jonathan Deans, advocates (acting pro bono).
Second respondent:	Charles Streeten and Brendan Brett of counsel.

DECISION

The decision of the Upper Tribunal is to allow GDFC Assets Limited's appeal.

The decisions of the First-tier Tribunal made on 29 December 2021 and 5 July 2023 under case number NV/2020/0030 were made in error of law and are set aside.

The Upper Tribunal gives the decision the First-tier Tribunal ought to have given.

The Upper Tribunal's decision is to dismiss Ms Heaney's appeal from the Secretary of State's sanction decision of 6 October 2020.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This appeal is a test case about what are termed 'green deal plans'. It is the first case concerning the relevant statutory provisions which has come before the Upper Tribunal. A number of cases are stayed before the First-tier Tribunal to await the decision in this appeal.

2. The appeal concerns a sanction of reduction imposed in the first instance by the Secretary of State on the basis that a 'green deal plan' had been mis-sold to an energy consumer (Ms Heaney). On appeal, the First-tier Tribunal changed that sanction to one of cancellation of the green deal plan. The issue before me is whether the First-tier Tribunal erred in law in making that cancellation decision.

The statutory scheme

3. The relevant statutory provisions are contained in the Energy Act 2011 and the regulations made under it. It is necessary to set these out first in order to frame the relevant background and the issues arising on this appeal.

4. Section 1 of the Energy Act 2011 provides, so far is relevant, a follows:

> "**Green deal plans**
> 1:- (1) This section applies for the purposes of this Chapter.
> (2) An energy plan is an arrangement made by the occupier or owner of a property for a person to make energy efficiency improvements to the property.
> (3) An energy plan is a green deal plan if—
> (a) the energy efficiency improvements are to be paid for wholly or partly in instalments, and
> (b) all of the requirements listed in paragraphs (a) to (e) of subsection (4) are met in relation to the plan at the time when it is made.
> (4) The requirements are—
> (a) the property is an eligible property,
> (b) the energy efficiency improvements fall within a description specified in an order made by the Secretary of State ("qualifying energy improvements"),
> (c) the conditions mentioned in section 4 as to assessment of the property and other matters have been met,
> (d) the conditions mentioned in section 5 as to the terms of the plan and other matters are met, and
> (e) a relevant energy supplier supplies, or is to supply, energy to the property."

5. Section 3 of the Energy Act 2011 requires the Secretary of State to make regulations implementing green deal plans, as follows (insofar as is relevant):

> "**Framework regulations**
> 3:-(1) The Secretary of State must by regulations establish a scheme making provision for the Secretary of State—

> (a) to authorise persons to act as green deal assessors, green deal providers or green deal installers in connection with green deal plans (either individually or through membership of a body specified in, or authorised under, the scheme);
> (b) to regulate the conduct of those assessors, providers or installers ("green deal participants").
> (2) Regulations under subsection (1) are referred to in this Chapter as "the framework regulations".
> (3) The scheme established by the framework regulations may, in particular, make provision….
> (d) for the issuing, revision or revocation of a code of practice;
> (e) requiring green deal participants to comply with the code of practice as a condition of their authorisation;…
> (h) for securing compliance with any condition or any other requirement of the scheme, code or agreement;
> (i) as to the consequences of non-compliance with any such condition or requirement…..
> (8) The provision made for the purposes of subsection (3)(h) or (i) may, in particular, include provision enabling the Secretary of State to….
> (b) require a green deal provider to suspend or cancel the liability of a bill payer to make payments under a green deal plan;…
> (d) require a green deal participant to pay compensation or a financial penalty;…."

6. Sections 4 and 5 of the Energy Act 2011 provide, insofar as is relevant as follows:

> " **Assessment of property etc**
> 4:-(1) For the purposes of section 1(4)(c) the conditions as to assessment of the property and other matters are—
> (a) the conditions set out in subsections (2) to (9), and
> (b) such other conditions (whether relating to the green deal assessor, the green deal provider, the improver or any other person) as are specified in the framework regulations.
> (2) The first condition is that a qualifying assessment of the property has been carried out by a person authorised by virtue of the framework regulations to act as a green deal assessor.
> (3) The second condition is that the green deal assessor has recommended the energy efficiency improvements.
> (4) The third condition is that the green deal provider has given an estimate, on the basis specified in the framework regulations, of the savings likely to be made on the energy bills for the property if the improvements are carried out.
> (5) The fourth condition is that the green deal provider has given an estimate, on the basis specified in the framework regulations, of the period over which the savings mentioned in subsection (4) are likely to be made.
> (6) The fifth condition is that the green deal provider is authorised by virtue of the framework regulations to act as a green deal provider.
> (7) The sixth condition is that the green deal provider has offered to carry out the improvements on the basis that the whole or part of the cost will be

repaid in instalments over a period after the improvements have been made.
(8) The seventh condition is that the green deal provider meets any requirement specified in the framework regulations as to the relationship between—
(a) the estimated total of the proposed instalments, and
(b) the estimate mentioned in subsection (4).
(9) The eighth condition is that the green deal provider meets any requirement specified in the framework regulations as to the relationship between—
(a) the period for which the instalments are proposed to be paid, and
(b) the period estimated under subsection (5).

"**Terms of plan etc**
5:- (1) For the purposes of section 1(4)(d), the conditions as to the terms of the plan and other matters are—
(a) the conditions set out in subsections (2) to (4), and
(b) such other conditions as are specified in the framework regulations.
(2) The first condition is that the plan includes the following terms—
(a) a term in which the improver agrees to—
(i) the amounts of the payments in instalments and the intervals at which, and period for which, they are payable;
(ii) such other matters as are specified in the regulations;
(b) a term in which the improver confirms that any necessary permissions or consents have been obtained in respect of the improvements;
(c) a term providing that the green deal provider may not take a charge over any person's property by way of security for payments;
(d) a term providing that the green deal plan does not prevent the bill payer from changing the intervals at which energy bills are to be paid.
(3) The second condition is that the plan does not include any of the following terms—
(a) a term making a person liable to make any payments under the green deal plan otherwise than in respect of the period for which the person is the bill payer in relation to the property;
(b) a term requiring the bill payer to make in any circumstances an early repayment of the whole or part of the amount outstanding under the green deal plan (except in accordance with the framework regulations or regulations under section 34, or provision made under them);
(c) a term providing for money to be advanced to the improver (except in accordance with the framework regulations or provision made under them).
(4) The third condition is that the agreements mentioned in paragraph (a) of subsection (2) and the permissions and consents mentioned in paragraph (b) of that subsection have not been withdrawn before the end of the period of 14 days beginning with the last day on which they were given.
(5) The conditions which may be specified in the framework regulations by virtue of subsection (1)(b) include, in particular—
(a) a condition that the plan includes a term so specified enabling the early repayment of the whole or part of the amount outstanding under the plan

> and making provision as to the calculation of the amount payable and any fee,
> (b) a condition that the plan includes a term so specified guaranteeing the improvements and making provision as to who is to benefit from the guarantee,
> (c) a condition that the plan includes a term so specified as to how any problems with the improvements installed, or arising in connection with the installation of them, are to be dealt with, and
> (d) a condition requiring the agreements mentioned in subsection (2)(a) to be in the form specified in the framework regulations."

7. Section 35 of the same Act deals with appeals and provides, so far as is relevant, as follows:

> "**Appeals**
> 35:-(1)This section applies if provision is included in a scheme or regulations by virtue of any of the following—
> (a) section 3(3)(h) or (i)…;
> (2) The Secretary of State must by regulations provide for a right of appeal to a court or tribunal against any sanction imposed, or other action taken, by the Secretary of State or a specified public body under the provision mentioned in subsection (1).
> (3) Regulations under subsection (2) may, in particular, include provision —
> (a) as to the jurisdiction of the court or tribunal to which an appeal may be made;
> (b) as to the persons who may make an appeal;
> (c) as to the grounds on which an appeal may be made;
> (d) as to the procedure for making an appeal (including any fee which may be payable);
> (e) suspending the effect of a sanction or other action being appealed against, pending determination of the appeal;
> (f) as to the powers of the court or tribunal to which an appeal is made;
> (g) as to how any sum payable in pursuance of a decision of the court or tribunal is to be recoverable.
> (4) The provision referred to in subsection (3)(f) includes provision conferring on the court or tribunal to which an appeal is made power—
> (a) to confirm the sanction imposed or action taken;
> (b) to withdraw the sanction or action;
> (c) to impose a different sanction or take different action;
> (d) to remit the decision whether to confirm the sanction or other action, or any matter relating to that decision, to the person who imposed the sanction or took the action;
> (e) to award costs or, in Scotland, expenses."

8. The key detail of the legislative scheme made under section 3 of the Energy Act 2011 is found in the Green Deal Framework (Disclosure, Acknowledgement, Redress etc) Regulations 2012 ("the Framework Regs").

9. The following are the key aspects of the Framework Regs.

> "**Notices**
>
> **3**. A notice under these Regulations—
> (a) must be in writing; and
> (b) may be transmitted by electronic means unless the recipient has indicated unwillingness to accept notices in that way.
>
> **Conditions to be met for energy plans to be green deal plans**
> **29.** An energy plan is not a green deal plan unless the conditions in regulations 30 to 36 are met.
>
> **Instalments not to exceed savings**
> **30.**—(1) The first year instalments must not exceed the estimated first year savings.
> (2) The payment period must not exceed the savings period.
> (3) The green deal provider must, before the plan is entered into, notify the improver of—
> (a) the improvement-specific first year savings;
> (b) the improvement-specific savings period;
> (c) the amount of the first year instalments attributable to each improvement (the "improvement-specific instalments"); and
> (d) the period over which instalments are to be payable for each improvement (an "improvement-specific payment period").
> (4) The improvement-specific instalments must not exceed the improvement-specific first year savings.
> (5) The improvement-specific payment period must not exceed the improvement-specific savings period.
> (6) In this regulation "first year instalments" means the estimated total of instalments that are proposed to be payable in the first year of the plan.
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> **Payment period not to exceed savings period**
> **31.** The energy plan must not provide for the payment period to end after the date on which the savings period is expected to end.
>
> **Domestic properties – fixed interest rate**
> **32.** The rate of interest charged under an energy plan for a domestic property must be fixed for the whole of the payment period.
>
> **Improvement-specific instalments – exceptions to fixed amount**
> **33.** The energy plan must not provide for the amount of improvement-specific instalments to increase during the payment period, except—
> (a) where the plan applies to a non-domestic property and the increase is due to a change in the rate of interest charged under the plan; or
> (b) where the rate of interest charged is fixed for the payment period and the increase does not exceed 2 per cent per year (including any component of the instalment that represents interest).

No restriction on change of gas or electricity supplier
34. The energy plan must not restrict a bill payer from changing gas or electricity supplier.

Guarantees to be given by green deal providers
35.—(1) The green deal provider must agree in the energy plan to guarantee the functioning of the improvements and to repair damage to the property which is caused by the improvements (the "guarantee").
(2) The guarantee must include the requirements set out in Schedule 3 (guarantees)

Condition as to other matters – confirmation from bill payer and owners
36.—(1) Before an energy plan is entered into, the improver must obtain the confirmation described in paragraph ("confirmation") from—
(a) each person (if any) who will be—
(i) the relevant first bill payer; or
(ii) subject to paragraph, the relevant subsequent bill payer; and
(b) subject to paragraph, each person (if any) who, at the time the confirmation is sought, is the owner of the property.
(2) The green deal provider must ensure that the confirmation or a copy of it is attached to the plan at the time it is entered into.
(3) The confirmation to be obtained from a person ("A") under paragraph (1) must be in writing and contain—
(a) consent by A to—
(i) the amount of the payments in instalments to be made under the plan;
(ii) the intervals at which they are payable; and
(iii) the period for which they are payable; and
(b) an acknowledgment by A that if the plan is entered into and A becomes the bill payer—
(i) A must pay instalments under the plan for such time as A is the bill payer, and
(ii) the other terms of the plan which bind a bill payer will bind A.
(4) Paragraph (1)(a)(ii) does not apply to a relevant subsequent bill payer who, at the time a plan is to be entered into, will be the improver.
(5) Paragraph (1)(b) does not apply to a person who, at the time a plan is to be entered into, will be—
(a) the improver; or
(b) a person to whom paragraph (1)(a) applies.

Sanctions for breaches of the relevant requirements by green deal providers
67.—(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 substantive loss, the Secretary of State may, in addition to any sanction imposed under paragraph (2), impose cancellation or reduction on the relevant person.

Requirement to give an intention notice before imposing a sanction
72.—(1) This regulation applies where under this Part—
(a) cancellation or compensation must or may be imposed;
(b) the following may be imposed—
(i) reduction;
(ii) a financial penalty;
(iii) suspension;
(iv) withdrawal.
(2) Before imposing a sanction, the Secretary of State must give notice (an "intention notice") to any person other than the relevant energy supplier whom the Secretary of State considers to be an affected person, specifying—
(a) that the Secretary of State intends to impose the sanction;
(b) that affected persons may make written representations and the time limits for such representations;
(c) where the Secretary of State intends to suspend or withdraw the authorisation of a green deal certification body, that the relevant members of the certification body may make representations concerning a deferral in accordance with regulation 81; and
(d) subject to paragraph (3), those matters which the Secretary of State would be required to include in a sanctions notice, if the sanction is imposed.
(3) Where the Secretary of State intends to impose a financial penalty, the intention notice need not include—
(a) how payment may be made; and
(b) details of the early payment discounts.
(4) Where after consideration of any representations the Secretary of State decides to impose the sanction, the Secretary of State must give a sanctions notice in accordance with regulation 78.
(5) For the purposes of this regulation, "affected person" means any person whose interests will be directly affected by the imposition of the sanction.

Financial penalties
75.—(1) This regulation applies where a financial penalty may be imposed.

(2) In determining the amount of a financial penalty, the Secretary of State must have regard to the annual turnover and the number of employees of the person on whom the Secretary of State intends to impose the penalty.

(3) For each breach, the maximum financial penalty is £50,000. Sanctions notices
78.—(1) A sanctions notice must be given to—

(a) any person to whom the Secretary of State is required to give a notice under regulation 72(2); and
(b) where cancellation or reduction is imposed—
(i) the relevant energy supplier; and
(ii) the complainant, if that person is not the bill payer.
(2) A sanctions notice must include—
(a) the sanction imposed;
(b) the person on whom the sanction is imposed;
(c) the reason for imposing the sanction; and
(d) information on appeals which may be made under regulation 87.
(3) A sanctions notice containing cancellation, reduction, suspension or withdrawal must include the date on which the sanction has effect.
(4) A sanctions notice containing reduction must include—
(a) the total amount of the reduction;
(b) how the reduction has been calculated; and
(c) the revised amount due under the energy plan.
(5) A sanctions notice containing a financial penalty must include—
(a) the amount of the penalty;
(b) the period within which payment must be made;
(c) how payment may be made;
(d) details of the early payment discounts; and
(e) the consequences of non-payment.
(6) A sanctions notice containing suspension must include the date on which the suspension ceases to have effect.

Proportionality requirement
79. Any sanction imposed under this chapter must be proportionate to the breach in relation to which it is imposed

Appeal to First Tier Tribunal
87.—(1) Subject to paragraph (5), any person directly affected by a decision of the Secretary of State—
(a) to refuse an application for authorisation under Part 3 to act as a green deal assessor certification body or a green deal installer certification body;
(b) to impose or not to impose a sanction under Part 8,
may appeal to the First Tier Tribunal.
(2) The Tribunal must determine the standard of proof in any case.
(3) The Tribunal may suspend a decision pending determination of the appeal.
(4) The Tribunal may—
(a) in relation to a decision under Part 3 or 8—
(i) withdraw, confirm or vary the decision;
(ii) remit the decision to the Secretary of State;
(b) in relation to a decision whether to impose a sanction under Part 8, impose a different sanction or take different action.
(5) A relevant energy supplier may not appeal under this regulation unless it is affected by a decision for a reason which is not connected with its collection of payments under a plan."

Relevant factual background

10. I have gratefully borrowed much of this background from the decisions of the First-tier Tribunal.

11. Energy efficiency improvements to residential properties, like insulation and solar panels, reduce carbon emissions and save money on energy bills. However, a significant barrier to the installation of such improvements is the initial cost. Homeowners may be unable or unwilling to spend thousands of pounds on those improvements when they may not achieve an overall saving for a number of years. The Energy Act 2011 created the 'green deal plan', which was a new way of financing that cost.

12. Like conventional finance, under a green deal plan the initial cost of purchase and installation of the energy efficiency improvements is met by way of an interest-bearing loan made to the homeowner by the provider or a finance company, repayable in instalments. However, unlike conventional finance, those instalments are paid by an additional charge taken direct from the property's energy bills. This is effected by a homeowner paying an extra amount each month to their energy provider, or being subject to additional deductions from a pre-payment meter, until the loan under the green deal plan is repaid. Each time the home is sold, then subject to notification and consent the balance of the loan and the liability to make repayments transfers to the new owner

13. Turning to the facts of this particular case, Ms Heaney owns her home in Kilmarnock in Scotland. In 2014 she entered into what purported to be a 'green deal plan' with Home Energy and Lifestyle Management Limited ('HELMS'). The improvements under the plan to Ms Heaney's home included the installation of solar panels, a gas boiler, external wall insulation and under-floor insulation. The improvements were paid for by two means. Only the first is of direct relevance.

14. First, Ms Heaney entered into what purported to be a "green deal finance" arrangement with HELMS. HELMS then assigned the benefit of Ms Heaney's loan repayments under that arrangement to another company in return for a lump sum. That other company was the Green Deal Finance Company ('GDFC'). The appellant in these Upper Tribunal proceedings is a subsidiary of GDFC and is the company to which the loan repayments were due.

15. Secondly, Ms Heaney entered into an arrangement, known as a "FIT transfer option", with PV Solar Investments Ltd ('PVSI'). By that arrangement, Ms Heaney agreed to transfer her 'Feed-in-Tariff' to PVSI in return for PVSI paying the balance of the cost of installation of her solar panels. The Feed-in-Tariff (or FIT) required electricity suppliers to make payments to homeowner for the electricity generated by the homeowner and the electricity exported to the electricity grid. This FIT scheme has been closed to new entrants since 31 March 2019.

16. The sanction decision under appeal to the First-tier Tribunal related solely to Ms Heaney's agreement with HELMS. GDFC Assets Ltd, the appellant in these Upper Tribunal proceedings, was the 'relevant person' for the purposes of the sanction decision, pursuant to regulations 51 and 67(3) of the Framework Regs. This is because it, rather than HELMS, was the payee under the purported green deal finance arrangement.

17. Regulation 67 of the Framework Regs empowers the Secretary of State to impose certain sanctions if, inter alia, there has been a breach of the relevant requirements by a 'green deal provider'. Under regulation 67(3), where the Secretary

of State is satisfied that the bill payer has suffered substantive loss, the Secretary of State may impose an additional sanction of cancellation or reduction of the green deal plan. A 'reduction' sanction is a requirement to reduce the liability of the bill payer (here, Ms Heaney) from the date of the complaint and to refund any payments already made since the complaint was made. A 'cancellation' sanction requires the cancellation of the bill payer's liability (and any subsequent bill payer) to make any payment at all after the date of the complaint and to refund any payments made since the complaint was made: see regulation 51 of the Framework Regs.

18. Ms Heaney's position before the First-tier Tribunal was, in essence, that she had been mis-sold the green deal plan by HELMS because she was not made aware that by entering into the agreement she was taking out a loan.

19. Ms Heaney had firstly complained to GDFC Assets Ltd, in November 2018, with the assistance of the Citizens Advice Bureau. Her complaint was based on her having been told that she would face no cost other than the initial £1,000 to a government scheme, that she would see significant reductions in her energy bills and she would make extra money under the FIT scheme. However, by contrast, she had signed up to a loan where instalments were taken from her energy bills for over 24 years, she saw no income from the FIT because it had been assigned and her electricity bills had not come down. She also complained that she had been pressured by the door-to-door agent when 'sold' the energy plan agreement in 2014. To meet this complaint, GDFC Assets Ltd offered to reduce the loan, but this was not accepted by Ms Heaney.

20. Ms Heaney then complained on 19 March 2019 to the Secretary of State. Pursuant to section 32 of the Energy Act 2011 the Secretary of State had delegated the initial review of green deal alleged mis-selling complaints to the Financial Ombudsman Service ("the FOS"). Having investigated the complaint, the FOS upheld it and recommended a penalty of reduction be imposed. That recommendation (and the complaint) was then referred by the FOS to the Secretary of State (pursuant to regulations 59 and 51 of the Framework Regs), it would seem (per regulation 59(1)(b)) because the complaint had not been resolved to Ms Heaney's satisfaction.

21. The Secretary of State, having considered the complaint and the FOS's 'report', then set out his provisional views on the complaint, and sought Ms Heaney's and GDFC Assets Ltd's representations on those views. GDFC Assets Ltd did not respond. Ms Heaney did and argued for cancellation of the green deal plan.

22. On 6 October 2020, the Secretary of State issued the sanction decision. This imposed a sanction of reduction on GDFC Assets Ltd. This sanction decision was based on HELMS having breached a number of the provisions in the Code of Practice (regulation 24(1) of the Framework Regs requiring that green deal providers comply with that Code). The effect of these breaches were, so the Secretary of State found, that Ms Heaney was mis-sold the green deal plan and had she properly understood that plan she would not have entered into it. The sanction of reduction was also founded on the green deal plan having been based on inflated savings figures and previous findings about HELMS (e.g., a 2014 audit had found HELMS was either not compliant or only partially compliant with 27 requirements of the Code of Practice).

23. As for whether Ms Heaney suffered "substantive loss" (per regulation 67(3) of the Framework Regs) because of the breaches of regulation 24 of the Framework Regs, the Secretary of State concluded that she had. This was because Ms Heaney

had "suffered financial harm in consequence of the breach of regulation 24 by becoming liable for loan repayments which were greater than the actual saving she received under the Plan as a result of HELMS' mis-selling of the Plan".

24. The Secretary of State's sanctions decision then turned to the proportionality analysis required by regulation 79 of the Framework Regs. This analysis, in which a reduction of £4,698.13 in Ms Heaney's green deal was imposed, is worth setting out in full:

> "Proportionality Analysis
>
> 32. As discussed above, the Secretary of State has found that HELMS breached regulation 24 of the Framework Regulations by failing to inform Ms Heaney that the measures installed under the Plan were funded by a loan and that the measures installed may not generate the savings necessary to cover her green deal repayments.
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> 33. The Secretary of State has also found that Ms Heaney has suffered or will suffer substantive loss in consequence of that breach. As such, it is open to the Secretary of State to impose either reduction or cancellation.
>
> 34. The Guidance [on Green Deal Sanctions and Appeals dated 7 February 2013] states that where there is a choice of sanctions for a particular breach, the Secretary of State will take a "stepped" approach, imposing a less severe sanction for a less serious breach, and a more severe sanction for a more serious breach, or a case where there have been repeated breaches.
>
> 35. In relation to breaches of the relevant requirements by a Green Deal Provider, the Guidance repeats the criteria set down in regulation 67 of the Framework Regulations under which, where there has been substantive loss, the Secretary of State may impose cancellation or reduction if the breach is severe or if there have been other breaches of the relevant requirements by the Green Deal Provider or Installer in respect of the property or other properties.
>
> 36. In this case, the breach is considered to be severe. This is because, rather than being a technical or administrative breach of the CoP, there has been a deliberate misrepresentation made to Ms Heaney. It is also relevant that making the extra payments via her meter to fund the Green Deal loan has caused Ms Heaney financial difficulty and distress. It is also part of a pattern of behaviour on the part of HELMS which has been noted in other cases. It is thus one of a series of repeated breaches.
>
> 37. As such, the Secretary of State considers that either reduction or cancellation could be justified in this case. Of these two options, the Secretary of State considers reduction to be the more proportionate for the reasons given below.
>
> 38. The solar panels and other measures continue to be installed at Ms Heaney's property and so she is receiving some benefit from having the measures installed despite having transferred the right to receive FIT payments.

39. The Secretary of State has also considered the impact of the sanction on GDFC Assets and notes the need to ensure that GDFC Assets is not disproportionately penalised for HELMS' mis-selling.

40. Although the Secretary of State has imposed sanctions in relation to other breaches of the Framework Regulations by HELMS, and although the breaches identified above are undoubtedly severe, the Secretary of State does not consider the nature of the breaches identified in this case, and their impact on Ms Heaney, are at the highest level of severity. This is for the reasons, also set out above, including that Ms Heaney: (a) did intend to enter into the Plan, (b) has benefitted from having the measures installed, and (c) is continuing to benefit from these measures. In this respect, Ms Heaney has not, in the Secretary of State's view, suffered a greater detriment than other cases involving mis-selling by HELMS where the sanction of reduction (and not cancellation) has been imposed. This is not, therefore, a case in which the sanction of cancellation is required as a result of the severity of the breaches identified.

41. The Secretary of State also considers, taking into account all of the circumstances of the case as outlined above, that the sanction of reduction corresponds more closely with the objectives of imposing a sanction, namely, to discourage breaches of the regulations and to provide redress to Ms Heaney by putting her in the position she would have been in had the breach not occurred.

42. The Secretary of State therefore considers that a reduction of the Plan is the most proportionate remedy as it will remedy the mis-selling which the Secretary of State has found, on the balance of probabilities, took place and put Ms Heaney in the position closest to that which she would have been in if she had not been mis-led by HELMS, given that she is still receiving a benefit from having the measures installed. The level of the reduction should put Ms Heaney in the position that she ought to have been in when she signed up to the Plan, in that her repayments should not be greater than her savings.

43. The level of the proposed reduction is set out below. The Secretary of State has considered whether the intended sanction should include an element attributable to the cost of maintaining the measures. As the owner of the measures and the party that receives some benefit from them, the Secretary of State considers it reasonable for Ms Heaney to be responsible for the ongoing maintenance of her solar panels, gas boiler, external wall insulation and underfloor insulation.

44. For these reasons, the Secretary of State does not consider that it would be proportionate to impose a greater level of reduction on GDFC Assets to reflect any potential liability for maintenance.

45. The Secretary of State has also considered whether a lower level of reduction would be appropriate in this case. The Secretary of State notes that the Plan was sold on the basis of an overinflated estimated saving figure and therefore considers that a lower level of reduction would be disproportionate to the harm suffered by Ms Heaney as it would mean that her energy bills would continue to be higher as a result of the Plan.

> 46. The Secretary of State has also considered whether no remedy should be imposed. However, given that there has been a breach of regulation 24 leading to Ms Heaney suffering substantive loss, it is considered appropriate to impose a remedy in this case. Neither a lower level of reduction, nor imposing no remedy, would adequately remediate the substantive loss Ms Heaney has suffered.
>
> 47. The objective of the reduction is to remedy the breach identified by the Secretary of State and put Ms Heaney in the position that she would have been in had the Plan operated as she was led to believe it would. Neither a lower level of reduction, nor imposing no remedy, would achieve that objective. Thus the level of reduction identified is the sanction most closely rationally connected with the objective of imposing a sanction.
>
> 48. Therefore, having considered all the evidence available, the Secretary of State shall impose the sanction of reduction on GDFC Assets at a level which will mean that Ms Heaney's repayments under the Plan match her assumed savings. The reduction calculation is set out below.
>
> 49. The Secretary of State considers that this will put Ms Heaney closest to the position she would have been in had the Plan not been mis-sold. The Secretary of State considers that the proposed sanction reflects the seriousness of HELMS' breaches of the CoP and is proportionate to the harm suffered by Ms Heaney as a result.
>
> 50. The Secretary of State estimates that reducing Ms Heaney's Plan by £4,698.13 is proportionate to the harm suffered by Ms Heaney as a result of her having been misled by HELMS, given that she is still receiving a benefit from having the solar panels, condensing boiler, external wall insulation and underfloor insulation installed. This is based on the average saving figures from the Energy Saving Trust (the "EST") and the National Household Model for the other measures installed."

The decisions of the First-tier Tribunal

25. The First-tier Tribunal ("the FTT") made two (effective) decisions: a preliminary decision on 29 December 2021 and a substantive decision on 5 July 2023.

26. (The First-tier Tribunal had made an earlier substantive decision on 16 November 2022 but that decision had been set aside and replaced by the substantive decision of 5 July 2023, pursuant to rules 43 and 44 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the GRC Rules") and sections 9(4)(c) and 9(5)(a) of the Tribunals, Courts and Enforcement Act 2007. Nothing turns on this.)

Preliminary decision

27. The FTT's preliminary decision was seemingly made under rule 5(3)(e) of the GRC Rules[1] and was binding on the parties to the appeal. I was told, and proceed on the basis that, the FTT had given a direction pursuant to rule 42(2A) of the GRC Rules the effect of which was that time did not begin to run for challenging the FTT's

[1] The FTT stated it was making the preliminary decision under rule 5(3)(b)) of the GRC Rules. However, that would seem to be inapplicable as it was not deciding any other appeals at the same time nor was it treating Ms Heaney's appeal as a lead case.

preliminary decision until it had also made the substantive decision. The preliminary decision made rulings on a number of matters, two of which remain of relevance.

28. First, the FTT addressed what made an 'energy plan' a 'green deal plan'. The FTT ruled that to be a green deal plan the energy plan had to meet what it termed the 'legislative requirements' set out in sections 1(3) and (4)(a) to (e) of the Energy Act 2011, read with sections 4 and 5 of the same Act, and regulations 30-36 read with regulation 29 of the Framework Regulations. In the FTT's view, for the energy plan to be a green energy plan it had also to meet all the conditions set out in sections 4 and 5 of the Energy Act 2011 and the requirements of regulations 27 and 28 of the Framework Regulations. However, the FTT did not accept that sections 1(3) and (4)(a) to (e) of the Energy Act had to be read with section 2 or regulations 7b and 26 of the Framework Regulations. The FTT concluded on this issue that an energy plan that failed to meet these 'legislative requirements' would "by necessity, remain an energy plan rather than a green deal plan". It further concluded that a dispute as to whether the individual aspects of the 'legislative requirements' were met, and thus whether a green deal had been put in place, was largely a factual enquiry and could only be made on a case by case basis.

29. Second, the FTT in its preliminary decision considered the correct approach to determining the appropriate sanction if a green deal provider had breached its obligations. This included consideration of the correct approach to determining whether a sanction was proportionate to the breach. The FTT found that six steps were to be followed when determining the appropriate sanction. It expressed those six steps as follows (at paragraph 76 of the preliminary decision):

> "i) Identify whether there has been a breach of a relevant requirement.
>
> ii) Decide whether the breach is sufficiently severe to warrant a sanction being imposed, or whether there has been a series of breaches by the green deal provider either at the same property or at different properties;
>
> iii) Assess the seriousness of the breach(es) overall, and decide whether the sanctions of a compliance notice, financial penalty or withdrawal are appropriate, by deciding whether the severity of these sanctions are proportionate to the seriousness of the breach.
>
> iv) Decide whether the bill payer has, or is likely to suffer substantive loss by considering whether they have suffered harm.
>
> v) Assess both the level of the harm suffered and the impact of the harm.
>
> vi) Decide whether the sanctions of cancellation or reduction are proportionate, by reference to both the severity of the breach and the harm caused to the bill payer.

30. Implicit in the sixth step is a point the FTT then made explicit in its consideration of the proportionality test found in regulation 79 of the Framework Regs, namely that the impact on the green deal provider was not relevant to the sanction decision. In so doing the FTT ruled, inter alia, that the identification of a windfall benefit (here to Ms Heaney) was also relevant to the sanction decision as such a benefit "will inevitably go to the level and impact of any harm suffered". The FTT continued on this specific point:

> "However, a windfall benefit ought not to operate as an effective bar to a sanction of cancellation, since it can only be one of several potentially

> relevant factors. In some cases, for example, that the bill payer may have suffered harm of a different nature which may be assessed as outweighing the windfall benefit, or it may be that the seriousness of the breach(es) justify the imposition of a severe sanction, windfall benefit notwithstanding.

31. The FTT's key reasoning for why it concluded that the effect on the green deal provider was generally to be ignored under the proportionality test in regulation 79 of the Framework Regs was as follows.

> "82 I am not persuaded by [GDFC's] submissions that the test for proportionality in this context requires a determination of fairness *inter partes*. I am satisfied that the impact of the sanction upon the green deal provider and/or the relevant person will only be relevant considerations in exceptional circumstances, notwithstanding subsisting A1P1 rights
>
> i) M[y] starting position is that the Court of Appeal decided in *Breyer Group Plc v Dept of Energy and Climate Change* [2015] EWCA Civ 408 (a case relating to the rates payable under a FIT arrangement) that an existing, enforceable contract forms part of the marketable goodwill of a business and is a possession for the purposes of [Article 1 of the First Protocol of the European Convention on Human Rights] A1P1….
>
> iii) The fact that the terms of Ms Heaney's agreement may not have complied with regulatory requirements of the green deal scheme does not deprive GDFC Asset Ltd of its A1P1 rights. This was considered by the Court of Appeal in *Wilson v First County Trust Ltd* [2001] EWCA Civ 633.
>
> iv) However, a person's right to the peaceful enjoyment of their property is not absolute. They may be deprived of their possessions by the state where, to paraphrase the language of the Convention, it is in the public interest to do so or where a legitimate aim is being pursued, and where any action taken complies with conditions provided for in law.
>
> v) I find that, although a relevant person's A1P1 rights will be engaged in the context of a sanction of reduction or cancellation, the issue of whether the deprivation is proportionate must be considered from the perspective of the legislation as a whole, rather than through the lens of the exercise of the Secretary of State's discretion in each individual case. In reaching this conclusion I have adopted a number of relevant principles identified by Henderson J in *Whitter v HMRC* [2016] EWCA Civ 1160, which was approved by Lord Carnwath when the same matter was considered by the Supreme Court ([2018] UKSC 31 at paragraph [22]).
>
> vi) The first relevant principle is that that any statutory discretion has to be exercised consistently with the object and scope of the statutory scheme
>
> viii) In the context of the Green Deal Scheme, the object and scope of the legislation is the regulation of the installation of energy efficiency improvements and ensuring regulatory compliance by green deal assessors, providers and installers. That is the purpose for which the Secretary of State's enforcement powers are provided and I am satisfied that the financial circumstances of a relevant person are extraneous to the exercise of this discretion. Given my considerations above, I conclude that the legislative scheme and Guidance provides sufficient 'content' to the Secretary of State's powers: in broad terms he is directed to exercise his

> discretion by considering the seriousness of the breach and any harm it may have caused. Although a tax regime necessarily gives rise to some unique considerations, I am satisfied that the green deal legislation is a similarly 'tightly constructed statutory scheme' that provides no legislative basis for reading in a generalised proportionality requirement.
>
> ix) The second relevant principle identified by Henderson J, at paragraphs 68 – 71, is the potential existence of a common law principle of proportionality where this forms part of the legislative background. However, he concluded that the legislative regime before him was clearly proportionate in terms of the balance between struck between ends and means, noting in addition the existence of procedural safeguards…
>
> x) I am similarly satisfied that the 'ends and means' of the green deal scheme are balanced and proportionate, supported by the provision of additional procedural safeguards as identified by Mr Wilcox. Any proportionality-based appeal against the imposition of a sanction in this context would be against severity of the sanction when assessed against the seriousness of the breach. There is, again, no basis upon which to conclude that the 'ends and means' of the green deal regime requires consideration of the impact of the sanction decision upon the green deal provider/relevant person for the purpose of this proportionality assessment.
>
> xi) The third relevant principle identified by Henderson J is that, in the context of an assessment of proportionality for the purposes of A1P1 rights, other than in the most exceptional cases, the assessment should be confined to the statutory regime as a whole rather than the exercise of a statutory function by a public body
>
> xii) I therefore conclude that, as a matter of domestic and international law, the relevant question is whether any interference with A1P1 rights by the scheme as a whole is in the public interest or is in pursuit of a legitimate aim and accords with conditions provided for in law. For reasons already given I am satisfied that the green deal enforcement provisions meet this requirement."

Substantive decision

32. The substantive decision of the FTT was made on 5 July 2023 following hearings on 31 March and 1 April 2022 (see paragraph 26 above for first substantive decision made following these hearings, on 16 November 2022, which was then set aside and remade as the 5 July 2023 substantive decision).

33. The FTT in the substantive decision imposed a sanction of cancellation of Ms Heaney's energy plan with effect from 19 March 2019.

34. The substantive decision is lengthy but the FTT helpfully provided a summary of its conclusions at the start of the decision. That summary reads as follows, and I have highlighted in bold the key aspects of it as far as this further appeal to the Upper Tribunal is concerned:

> "1a. The Secretary of State was correct to find that HELMS, when providing Ms Heaney with an energy plan, was in breach of paragraph 2.7, and paragraphs 18, 47A and 54 of Annex B, of the Code of Practice.

b. **Certain statutory requirements are 'qualifying conditions'. If any qualifying condition is not met, then an energy plan will not be a Green Deal plan**. In this case:

i. A subsequent registered EPC does not invalidate an earlier EPC. A qualifying assessment was undertaken.

ii. The term 'improvements' at s.4(3) of the Energy Act 2011 refers to the generic improvements listed at Schedule 1 of the Green Deal (Qualifying Energy Improvements) Order 2012/2105. A change in the configuration of solar panels prior to installation did not breach a qualifying condition.

iii. **The Tribunal finds that HELMS did not comply with the obligation under regulation 30(3) to notify Ms Heaney in writing of the amount of the first year instalments attributable to each improvement. The Framework Regulations, at regulation 3, requires any notice to be given in writing. Nor, the Tribunal finds, was such notice given orally. This was a breach of a qualifying condition and Ms Heaney's energy plan is not a Green Deal plan**.

iv. The restriction of a bill payer to an electricity supplier that takes part in the Green Deal does not breach regulation 34.

v. Where the Framework Regulations refer to improvement-specific instalments or improvement-specific savings, this does not include separate finance charges and interest.

vi. There is no requirement for the improvement-specific savings period for solar panels to be capped at the period for which FIT payments will be received.

c. **The appropriate sanction should be decided according to the principles set out by Judge Macmillan in her preliminary issues ruling issued on 29 December 2021 ("the Preliminary Decision"), and in this decision**.

d. **Breach of a qualifying condition does not automatically lead to cancellation. The adverse consequences for the bill payer are nonetheless so serious that cases where a lesser sanction is proportionate are likely to be rare. Each case must be considered on its facts. In Ms Heaney's case, the Tribunal considers cancellation to be the appropriate sanction**.

e. The effective date from which a sanction can be effective is, in cases where HELMS was the provider and GDFC Assets Ltd is now the payee, the date of complaint to the Secretary of State. Here, that date is 19 March 2019.

f. If the Tribunal had not found that a qualifying condition was breached, then the decision on the 30% reduction imposed by the Secretary of State would have been as follows:

i. 'Substantive loss' and harm need not be pecuniary.

> ii. The Secretary of State is not required to produce a[n] overly-precise or forensic calculation of the exact financial loss claimed by a complainant, and is entitled to take a balanced approach to evidence and fact-finding.
>
> iii. In each case recognition should be given to other types of harm, the public interest factors engaged in cases of non-compliance, and deterrence. The Secretary of State is entitled to apply a percentage figure reduction to achieve this outcome on a broad brush basis.
>
> iv. **The Tribunal previously decided as a preliminary issue that the effect of a sanction on the relevant person is only relevant to proportionality in exceptional circumstances, and that any 'windfall' benefit to the bill payer is only relevant to the level of harm suffered and redress. By reason alone of that ruling, the Secretary of State placed undue weight on irrelevant factors when deciding on the appropriate sanction. We would have allowed the appeal and remitted the decision to the Secretary of State. Had the Secretary of State not erred in placing the weight he did on those factors, we would have dismissed the appeal and confirmed his decision**.

35. I will return, as necessary, to where aspects of this summary were unpacked by the FTT.

The FTT's grant of permission to appeal

36. The FTT gave GDFC Assets Limited permission to appeal to the Upper Tribunal on 5 July 2023, when it also reviewed and set aside its (substantive) decision of 16 November 2022 and remade that decision. Permission was granted on all grounds advanced and was not limited.

The grounds of appeal

37. GDFC Assets Limited advances seven grounds of appeal. The first four grounds concern notification under regulation 30(3) of the Framework Regs and whether the consequence of a breach of regulation 30(3)(c) of those regulations is that the energy plan is not a green deal plan. The fifth and sixth grounds of appeal are about the FTT's approach to sanction and proportionality on the basis that there was a green deal plan in place. The final, and seventh, ground of appeal argues that the FT's decision to cancel the plan was wrong on proportionality and sanction even if Mrs Heaney's plan was not a green deal plan.

38. I will take each ground in turn under my discussion of the grounds.

39. However, before I do so I should record that the Secretary of State's primary interest in this appeal to the Upper Tribunal, which is seen as a lead case on green deal plans and the legislation underpinning them, is to obtain a clear interpretation of the relevant legal provisions and guidance about the making of sanction decisions.

Discussion and conclusion

Ground 1 – had the FTT made a final ruling during the oral hearing that breach of regulation 30(3)(c) was not an issue on the appeal?

40. The first ground of appeal is not one GDFC Assets Limited (from now on "GDFC") ran before the FTT when seeking permission to appeal to the Upper

Tribunal from that tribunal. It is said that the ground could not have been advanced before the FTT until a transcript of the appeal hearing before the FTT on the substantive hearing had been obtained.

41. GDFC seek permission to appeal to argue this ground, but that is not necessary as the FTT did not limit its grant of permission to appeal. And no issue of fairness arises in terms of this ground being taken because both respondents have had sufficient notice of it.

42. The first ground is that in the course of the substantive appeal hearing GDFC say that the FTT had made a clear oral ruling that it would not address regulation 30(3)(c) of the Framework Regs in its substantive written decision because no sufficient case for breach of regulation 30(3)(c) had been made out on the evidence. It was therefore: (a) wrong in law for the FTT to (re)decide whether regulation 30(3)(c) had been breached in its substantive decision (because it had already decided in its oral determination that it had not); and (b) unfair for the FTT to have done so in circumstances where it had told the parties it would not be doing so and where, therefore, the parties had not had a full opportunity to address the FTT on the issue.

43. The basis for GDFC's argument that the FTT made an oral ruling or decision on regulation 30(3)(c) is the following passage in the transcript of the hearing before the FTT at the end of the second day of the hearing:

> "We have discussed the issues, and broken them down into sort of two sides.
>
> First, you know, whether or not there is notification-- breach of notification requirements of regulation 30(3). We are satisfied there is no arguable case to be made there, so we will not require any further submissions on that, and it will not form part of the issues we decide.
>
> As to Regulation 30(4) and (5), we would benefit from some further submissions…..
>
> > "The intervener may provide written representations on whether the energy plan is a green deal plan, restricted to the insulation improvements, the finance servicing charge and their relevance to the requirements of Regulation 30(4) and (5). Those representations to be provided by 12 noon, Friday 8 April. In default the Tribunal will not consider the issue.
> >
> > The other parties may provide written representations in response by 12 noon on 15 April".

44. Much time and effort was taken up by the parties on this first ground of appeal. Arguably, too much time.

45. The oral statement of the FTT that 'breach of notification requirements of regulation 30(3) of the Framework Regulations was not a matter it would decide', taken on its own might support an argument that it was not deciding any matter under regulation 30(3). And, for what it is worth, both Ms Urell and Mr Streeten, who were present at the FTT hearing when these remarks were made, took them to mean this and were surprised therefore when the FTT did decide issues under regulation 30(3)(c) of the Framework Regs.

46. On the other hand, the discussion which immediately preceded these remarks of the FTT was not obviously about regulation 30(3)(c) and the concern of the FTT appeared to be about whether any of the parties needed more time to respond to some of the points made by the representative of the Energy Consumers Association (who appeared before the FTT but not before the Upper Tribunal) the previous morning. It is worth noting in this respect that in seeking submissions from the parties towards the end of day two of the substantive hearing, the FTT said (transcript internal page 48 at letter E):

> "Thank you. So, well, that brings to an end the parties' submissions on the substantive issues which are being discussed at this hearing. That may or may not be an end to things because we did (inaudible) the end whether or not the parties considered-- any of the parties considered that they needed more directions or time or evidence, or anything of that nature, to respond to some of the points made by Mr Wilcox [the Energy Consumers Association's representative] when he started off yesterday morning. I think the parties with the main concern about that were the two respondents."

The FTT then heard from the parties on those 'day one points' of Mr Wilcox before it made the remarks set out in paragraph 40 above.

47. The Energy Consumers Association's representative's submissions on the morning of day one of the hearing ranged over various matters, some of which arguably fell outside the scope of the appeal to the FTT. Those matters included compliance with regulation 30(3)(c), but seemingly in the context of the cost of insulation measures as against the savings brought about by those measures and not regulation 30(3)(c) more generally. It would appear that the FTT may have seen that particular argument about regulation 30(3)(c) as a "new argument" (see (internal) page 29 at letter A, page 30 at letter B and page 32 at letters C-F of the day one transcript of the substantive FTT proceedings), and its remarks set out above at the end of day two may need to be read in that context. That is, that there was no arguable case on the new argument (about insulation costs versus savings) under regulation 30(3)(c) and so the FTT was stripping <u>that</u> (cost of insulation) issue out of what it would decide on regulation 30(3)(c). Furthermore, the FTT plainly did not think it was precluded from deciding whether regulation 30(3)(c) of the Framework Regulations had been breached, and the consequence of breach of, inter alia, regulation 30(3)(c) was a matter the parties had asked the FTT to decide in its preliminary decision.

48. I do not consider I need to carry this forensic enquiry any further, although I incline to the view that the FTT was not by the its oral remarks at the end of day two ruling out consideration of all notification issues under regulation 30(3)(c) of the Framework Regulations. I do not carry the enquiry any further because I am quite clear on what is before me that the FTT did not promulgate a decision on 1 April 2022 on Ms Heaney's appeal that regulation 30(3)(c) of the Framework Regulations had not been breached. Its remarks do not and cannot in my judgement amount to a positive and dispositive oral decision that regulation 30(3)(c) was not breached in any and all relevant respects. I say this based primarily on the remarks themselves. They are not a substantive decision. At highest, the remarks are no more than the FTT stating it was *not* going to decide whether regulation 30(3) was breached in certain respects, but those respects are not wholly clear. That is not the same thing as the

FTT positively deciding that regulation 30(3)(c) was not breached. Moreover, if this was an oral decision, on the face of rule 38(2)(b) of the GRC Rules the FTT was required to give written reasons for that decision, which did not occur.

49. I am, accordingly, satisfied that the FTT did not err in law in its substantive decision of 5 July 2023 by deciding whether regulation 30(3)(c) of the Framework Regs had been breached and the consequences if it had. This is because it had not already decided that issue on 1 April 2021 (at the end of day two of the oral hearing) and so was not redeciding those issues on 5 July 2023.

50. At most, the remarks of the FTT *might* have meant that one or more of the parties were denied an opportunity to make submissions, or further submissions, on whether regulation 30(3)(c) had been breached, because they took it that the FTT was not going to decide this issue. I need not decide this issue either, and I note that the remarks were made at the end of the two day hearing when all issues might have been expected to have been addressed. The reason I do need to decide this issue is because, even assuming the FTT erred in law in acting in breach of the rules of natural justice in shutting out any of the parties from making submissions on a matter which was in issue on the appeal, it cannot (as was accepted before me) amount to a material error of law because all substantive issues concerning whether the FTT erred in law in its application of regulation 30(3)(c) in its substantive decision have been argued out fully before me. I turn therefore to those issues.

Grounds 2-4 – legal effect of non-compliance with regulation 30(3)(c) and whether written or oral notification is required by that regulation.

51. I will deal first, and so out of sequence from the order in which these arguments were developed before me, with the ground concerning whether compliance with regulation 30(3)(c) is a condition of an energy plan being a green deal plan. It seems to me sensible and necessary to deal with this question first because it frames what effect the other grounds under regulation 30(3)(c) may have.

52. There was some debate before me about whether the FTT in its preliminary decision had decided that as a matter of law compliance with regulation 30(3)(c) was a necessary condition to an energy plan being a green deal plan. The real question, however, is whether either or both FTT's proceeded on a wrong legal basis that regulation 30(3)(c) is such a necessary legal condition. That is a question of statutory interpretation based on the wording of the enabling powers and the relevant parts of the Framework Regulations.

53. Before addressing that issue of statutory interpretation, I will deal first with what the FTTs said about it.

54. I have summarised above what the preliminary decision of the FTT had to say on this issue. The material parts of its decision read as follows:

> "**D) What is a green deal plan?**
>
> 16) The Parties describe this issue as being largely uncontroversial. They agree that a green deal plan is defined in the legislation as an energy plan that meets the requirements of s.1(3) &(4)(a)-(e), which must be read with ss. 4 & 5, and with the requirements of regulations 30 – 36 when read with regulation 29….
>
> 31) Having considered these submissions and the relevant legislative provisions I conclude as follows:

i) For an energy plan to be classified a green deal plan it must meet the requirements set out in s.1(3) & (4)(a)-(e) of the Act, which must be read with ss. 4 & 5, and with regulations 30 – 36 read with regulation 29. For reasons of clarity I will refer to these requirements collectively as 'legislative requirements' and individually as 'qualifying conditions'.

ii) Accordingly, there are a number of qualifying conditions that an energy plan must meet.

(a) It must relate to qualifying energy efficiency improvements that are made to a property, which are to be paid for wholly or in part by instalments (s.1(3)(a)).

(b) It must also, at the time it is made, meet all of the requirements of s.1(4)(a) – (e). The view that all requirements must be met is supported both by the unambiguous language of s. 1(3)(b), and by the analogous decision of Morgan J in *Southampton City Council* [*v Hallyard Ltd* [2008] EWHC 916].

(c) The language of ss. 1(4)(c) & (d) makes clear that the energy plan must also meet all the conditions set out in ss. 4 & 5.

(d) Further, since s. 1(4)(c) refers to a requirement that the "*conditions mentioned in section 4 as to assessment of the property and other matters*" (emphasis added) are met then, pursuant to s. 4(1)(b), this requirement also extends to "*such other conditions… as are specified in the framework regulations*."

(e) Regulation 29 specifies additional ('other') conditions as being those set out in regulations 30 – 36.

iii) I further conclude that an energy plan must also meet the requirements of regulations 27 & 28 in order to be classified as a green deal plan….

Conclusion

32) An energy plan that fails to meet the legislative requirements of a green deal plan will, by necessity, remain an energy plan rather than a green deal plan. The applicable legal framework thereafter would fall to be determined, and would be a matter in relation to which this Tribunal would have no jurisdiction.

33) The extent to which the Regulations or the Code of Practice will continue to apply to an energy plan that is not a green deal plan is an issue requiring further submissions in the context of a substantive case. However, the following passage from the 2013 Guidance on Green Deal Sanctions and Appeals ('the Guidance') is noted:

"*Where the Green Deal Provider has failed to ensure that the statutory conditions for the establishment of a Green Deal Plan have been satisfied, the Green Deal Provider is in breach of regulation 26 of the Framework Regulations, which is a relevant requirement, and the Secretary of State is able to cancel the plan. The plan is, technically, an Energy Plan – because the conditions required to establish a Green Deal Plan were not met*"

34) Where there is a dispute as to whether an energy plan should be classified as a green deal plan, this should be determined by establishing

whether each of the qualifying conditions for a green deal plan have been met. Such a determination is likely to be a largely factual, and can only be made on a case by case basis."

55. The FTT in the substantive decision dealt materially with this issue as follows (the quoted passage also covers issues germane to the other grounds of appeal concerning regulation 30(3)(c)):

"**Issue 1 – Does Ms Heaney have a 'Green Deal plan'?**

39. The Preliminary Decision sets out the 'qualifying conditions' for a Green Deal plan. Unless all of them are met, an energy plan is not a Green Deal plan….

C. Were the notification requirements met?

55. Regulation 30(3) provides as follows:

> (3) The Green Deal provider must, before the plan is entered into, notify the improver of—
>
> (a) the improvement-specific first year savings;
>
> (b) the improvement-specific savings period;
>
> (c) the amount of the first year instalments attributable to each improvement (the "improvement-specific instalments"); and
>
> (d) the period over which instalments are to be payable for each improvement (an "improvement-specific payment period").

56. The parties agree that compliance with this qualifying condition is in issue before the Tribunal. The Tribunal begins with some points concerning interpretation. First, the Tribunal agrees that "first year instalments" means the "estimated total of instalments that are proposed to be payable in the 12 months commencing on the date with effect from which instalments are to be included in electricity bills for the property. The second point is that "improvement-specific" is defined by reference to the "improvement" in question. Regulation 2 defines "improvement" as "an energy efficiency improvement in respect of a property", the same term already discussed in relation to section 4(3). Arguments such as the configuration of solar panels must be approached accordingly.

57. The Sanctions Notice found that while the necessary information had been given on paper, the final sentence of (the related) paragraph 47A of the Code of Practice had still been breached because the information had still not been properly explained. This position has shifted somewhat, both respondents' Amended Responses now putting Ms Heaney to proof that notification was never given. Neither refers to any documents that contain the required notification. The only document containing any first year improvement-specific payment figures is the Occupancy Assessment under the heading "Expected Green Deal repayment in year 1". These are 'expected' figures and must be subject to the wide range of estimated costs in the first column of figures. The Tribunal cannot see that this meets regulation 30(3)(c), as the final products installed did not match those

listed – the Tribunal has already accepted the respondents' separate point that the precise products are determined at a later stage, but nor do the types match nor are reasonable estimates given. The GDAR and November EPC do not contain the information, nor does any of the documentation surrounding the loan despite containing the total amounts payable. In his submissions on regulation 30(4), Mr Wilcox engaged the Tribunal in elaborate reverse engineering of what some of the figures might have been. The Tribunal accepts Ms Urell's post-hearing submission that those figures cannot be calculated with any confidence. The first annual statement from GDFC contains daily rate figures broken down by improvement, but that is both insufficient and too late.

58. Mr Streeten confirmed that there are no documents available to the parties that contain the required notification. He told the Tribunal that his client's experience was instead "that salespeople do provide explanations orally" and that he had encountered these in other cases on telephone recordings. Ms Heaney had not denied being provided with the information, saying that she could not recollect having been provided it. Ultimately, he submitted, whether she had been given the information was an evidential question for the Tribunal, but Ms Heaney's lack of a positive denial meant she could not meet her burden of proof. Ms Urell agreed, pointing out that events took place some 8 years ago and that it was no surprise that Ms Heaney could not remember now.

Consideration

59. Contrary to the respondents' submissions, regulation 30(3) cannot be satisfied by oral notification. Regulation 3 provides as follows:

> 3. Notices
>
> A notice under these Regulations:
>
> (a) must be in writing; and
>
> (b) may be transmitted by electronic means unless the recipient has indicated unwillingness to accept notices in that way.

60. Notification is synonymous with 'give notice', absent clear statutory intention. There is no reasonable basis upon which to consider that these regulations draw such a distinction, not only would it be contrary to the scheme's objects but it would be fanciful to suggest that some of their other notification obligations could be satisfied by telephone. Moreover, Ms Heaney's position is less equivocal than the respondents suggest. The relevance of her assertion that there is "no evidence" of notification being given is first to confirm that she has no undisclosed relevant documents. Second, her complaint has always been accepted on the factual basis that she was required to sign some documents by the agent without being able to read them, and that the agent took at least some of them straight back. She has never in any position to put forward a positive evidential case that no documents ever gave her the required notification, and that situation has arisen from the mis-selling itself.

61. Regard must also be had to the facts of Ms Heaney's complaint – she has always claimed that she never knew the plan involved borrowing or

repayment at all. The facts of her complaint are consistent with those cited in the Citizens Advice Scotland report, were believed by FOS, and then in turn by the Secretary of State…

63. Notwithstanding the careful attention given to this case by Ms Heaney, the CAB, the Secretary of State, GDFC and the ECC no documents have emerged that give the notification required by regulation 30(3). Importantly, nor does the evidence suggest when such notification might have been given. The Tribunal has all the usual jigsaw pieces of a Green Deal plan: the EPC, GDAR, GDIP and the credit agreement with its explanatory documents. No suggestion has been made that any documents are missing that would usually be encountered, and it would have been straightforward for either respondent to tell the Tribunal that it is missing a particular expected document. Indeed, the Tribunal was told that the Secretary of State's experience is that notification would be given verbally.

64. Considering the evidence therefore, the Tribunal finds that the written notification required by regulation 30(3) was not given. This is not simply due to an absence of evidence to the contrary, but is the proper conclusion to draw after having assessed the wider evidential picture.

65. Insofar as it might remain relevant, was notification given orally? The Secretary of State's experience gives weight to it not having been done in writing, but does not establish that the telephone script was followed on every occasion. It certainly falls well short of being evidence that can undermine the fundamental basis upon which the sanction was issued, being that HELMS never discussed with Ms Heaney that she was taking out a loan at all. The Tribunal therefore takes the findings in the Sanction Notice as answering whether the required information was verbally communicated on this occasion. For the avoidance of doubt, the Tribunal would reach the same finding itself on the evidence. Ms Heaney has always claimed to have never been told that she would be required to pay anything apart from an initial £1,000, let alone what she could expect to pay in her first year in respect of each individual improvement. Her account has been believed by the FOS, the Secretary of State and, now, the Tribunal. In this case there is the added feature of the unusual circumstances surrounding the 2013 defective credit agreement and December EPC. There is reason to think that even the usual procedures might have gone awry on this occasion.

66. The Tribunal presumes that the tension between Mr Streeten's present instructions and the Sanctions Notice arose from concerns that the latter might be forced by formal operation of the burden of proof to yield to Ms Heaney's present lack of precise recollection. Such concerns would be misplaced. The Tribunal will also only resort to the burden of proof when unable to resolve an issue of fact by simply evaluating and examining the evidence, including the wider context – Re B [2008] UKHL 35 at [32], [72]; Verlander v Devon Waste Management [2007] EWCA Civ 835 at [18]-[19].

67. The Tribunal finds that HELMS did not comply with the obligation under regulation 30(3) to notify Ms Heaney of the amount of the first year instalments attributable to each improvement. This being a qualifying

> condition, the plan is not a Green Deal plan. To the extent that other issues in the appeal therefore fall away, the Tribunal nonetheless considers them in the alternative."

56. GDFC argue that regulation 30(3)(c) is not legal requirement for an energy plan to be a green deal plan, and the FTTs were wrong to decide otherwise. The Secretary of State and Mrs Heaney disagree, as do I.

57. The most useful starting point, in my judgement, is regulations 29 and 30 of the Framework Regs. Regulation 29's terms are clear and emphatic, "[a]n energy plan is not a green deal plan unless the conditions in regulations 30 to 36 are met". On its face, regulation 29 clearly means what it says: if the conditions in regulations 30 to 36 are not met, the energy plan is not a green deal plan. The only issue in terms of the Framework Regs would therefore appear to be whether regulation 30(3)(c) itself contains a condition.

58. In my judgement, regulation 30(3)(c) does contain a condition. The terms of the regulation have been set out already but are worth repeating. It provides (with my underlining for emphasis) that "[t]he green deal provider must, before the plan is entered into, notify the improver of…(c) the amount of the first year instalments attributable to each improvement". As a matter of ordinary language, this is plainly imposing a legal obligation on the green deal provider to do something before the plan is entered into. I struggle to understand how that does not amount to a condition in regulation 30.

59. Staying within the regulations, I was not persuaded by GDFC's argument based on footnotes to the Framework Regs. The argument was based on regulation 30 being set out thus:

> "**30.**—(1) The first year instalments must not exceed the estimated first year savings (**1**).
> (2) The payment period must not exceed the savings period (**2**).
> (3) The green deal provider must, before the plan is entered into, notify the improver of—
> (a) the improvement-specific first year savings;
> (b) the improvement-specific savings period;
> (c) the amount of the first year instalments attributable to each improvement (the "improvement-specific instalments"); and
> (d) the period over which instalments are to be payable for each improvement (an "improvement-specific payment period").
> (4) The improvement-specific instalments must not exceed the improvement-specific first year savings.
> (5) The improvement-specific payment period must not exceed the improvement-specific savings period.
> (6) In this regulation "first year instalments" means the estimated total of instalments that are proposed to be payable in the first year of the plan.
> (**1**) This is the seventh condition for the purpose of section 4(8) of the Act.
> (**2**) This is the eighth condition for the purpose of section 4(9) of the Act.

60. GDFC's argument was that the absence of a footnote to regulation 30(3)(c) supported its argument that it was not creating a condition for the purposes of regulation 29 or under the Energy Act 2011.

61. There are a number of persuasive answers to this argument.

62. First, this is a tail wagging dog approach to statutory interpretation. The Upper Tribunal's function is to construe the words of the legislation in their statutory context: see paragraphs [29]-[31] of the Supreme Court's decision in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255.

63. At highest, the footnotes are no more than guidance or the view of the drafter of the Framework Regulations. As Lord Hodge put it in paragraph [30] of *R(O)* (with my underling added for emphasis):

> "External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."

64. I should perhaps add at this point that I do not consider reading regulation 30(3)(c) as a condition of a green energy plan produces a legislatively absurd result such that Parliament cannot have intended the matters in regulation 30(3)(c) to be a condition of a green deal plan, even assuming that the presumption against absurdity applies in respect of delegated legislation. The matters provided for in regulation 30(3)(c) are plainly an important aspect of ensuring the plan is entered into by the householder on a properly informed basis. If it is shown that this was not the case, it is not absurd that what was entered into was not a green deal plan. Moreover, it is important to have in mind that legislative absurdity is not necessarily the same as a statutory provision being felt to act unfairly in some cases. As was pointed out by Lords Sales in paragraph [43] of *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] WLR 2594 (again with my underlining for emphasis):

> "….The width of the concept is acceptable, since the presumption against absurdity does not apply mechanistically but rather, as [*Bennion* points] out in section 13.1(2), "[t]he strength of the presumption … depends on the degree to which a particular construction produces an unreasonable result". I would add that the courts have to be careful to ensure that they do not rely on the presumption against absurdity in order to substitute their view of what is reasonable for the policy chosen by the legislature, which may be reasonable in its own estimation. The constitutional position that legislative choice is for Parliament cannot be undermined under the guise of the presumption against absurdity."

65. Second, the absence of a footnote referring to other empowering provisions in the Energy Act 2011 (for example, sections 1(4)(c) and 4(1)(b)) does not show those empowering provisions did not apply.

66. Third, as Ms Heaney points out, if the footnotes (or absence thereof) are a key, or important, diviner of statutory intent, this would mean that nothing in regulations 31 to 36 of the Framework Regulations could be a condition for the purposes of regulation 29, which would both be absurd and render otiose most of regulation 29's wording.

67. Nor does regulation 30(3)(c) containing a condition sit oddly with, or indeed lie outwith (*ultra vires*), the enabling powers of the parent Act under which it was made. Section 1(3)(b) of the Energy Act 2011 sets out that an energy plan is a green deal plan if "all of the requirements listed in paragraphs (a) to (e) of subsection (4) are met in relation to the plan at the time when it is made". Those requirements include, per section 1(4)(c) and (4)(d) that the conditions mentioned in, respectively, section 4 as to assessment of the property and section 5 as to the terms of the plan, have been met. Crucially, however, the conditions, and thus the requirements, which need to be met in section 1(4)(c) and (d) involve in addition the "other matters" mentioned in sections 4 and 5. Pausing at this point, and with the focus just on section 1(3) and (4) of the Energy Act 2011, in my judgement the phrase "in relation to the plan at the time when it is made" must have a broader compass than the date on which the plan is made. This is because the assessment of the property will include matters that fall before when the plan is actually entered into. The use of "in relation to the plan" provides this broader scope. This is supported by the fact that both sections 4 and 5 of the Energy Act 2011 fall under a heading "*Green deal plan*" which indicates that both relate to the green deal plan.

68. Section 4 itself has the heading "**Assessment of property etc**". Such headings can be taken into account in interpreting the statutory provisions over which they sit: see *R v Montila* [2004] UKHL 50; [2004] 1 WLR 3141 at paragraphs [34]-[36]. The use of "etc" is an unusual drafting device and may be thought to be too broad to be a useful indicator as to the meaning of section 4. However, reading it with the long title/introduction to the Energy Act 2011 (which includes that the Act is to "make provision for the arrangement and financing of energy efficiency improvements to be made to properties by owners and occupiers"), and what I have said above about the requirements relating to the plan at the time it is made, I do not see this as doing anything other than indicating that section 4 covers matters in relation to a green deal plan in addition to those strictly relating to the assessment process. Section 4(1)(b) then provides that under section 1(4)(c) the conditions as to <u>other matters</u> (in addition to assessment of the property) are "such other conditions (whether relating to the green deal assessor, the green deal provider, the improver or any other person) as are specified in the framework regulations". This wording, including the range of actors provided for within the brackets and their differing roles outside the assessment of the property, are broad enough to cover regulation 30(3)(c) of the Framework Regs. That is particularly so, in my judgement, when the "other matters" relate to the conditions in section 4(8)(a) and 4(9)(a) and their focus on the estimated total of the proposed instalment and the period over which they are to be paid. All regulation 30(3)(c) (read with regulation 30(6)) of the Framework Regs is doing is focusing those conditions on the first year of the plan. I might add that no argument was made before me that regulation 30(3)(c) is *ultra vires* (that is, not enabled by the powers in) the Energy Act 2011.

69. Even if there is doubt about the scope of section 4, similar considerations apply in relation to section 5 of the Energy Act 2011. It, too, has an "etc" in its heading - "**Terms of plan etc**", and also includes that the conditions under section 1(4)(d) as

the terms of the plan and other matters are, per section 5(1)(b) "such other conditions as are specified in the framework regulations". Whilst the specific conditions as to the terms of the plan laid out elsewhere in section 5 are what must be in the plan as when it is entered into, the pre-plan step required by regulation 30(3)(c) of the Framework Regs may be said to be another condition which relates to the green deal plan.

70. Neither FTT therefore erred in law when deciding that satisfaction of regulation 30(3(c) of the Framework Regs was a condition or requirement of an energy plan being a green deal plan.

71. The other grounds of appeal concerning regulation 30(3)(c) are about whether then FTT erred in law in its substantive decision in deciding that regulation 30(3)(c) had not in fact been satisfied.

72. The first argument about satisfaction of regulation 30(3)(c) concerns whether the duty to 'notify' in the regulation requires written notification, and if it does whether the FTT erred in law in deciding that no such written notification had been provided to Ms Heaney.

73. The FTT founded its decision on the need for written notification on regulation 3 of the Framework Regulations. This provides that:

> "**Notices**
> 3. A notice under these Regulations—
> (a) must be in writing; and
> (b) may be transmitted by electronic means unless the recipient has indicated unwillingness to accept notices in that way."

74. GDFC and the Secretary of State argue this was wrong as a matter of law as properly construed regulation 3 is only about a notice which is to be given under the regulations and this differs from any duty in the Framework Regs to *notify* a person of something.

75. The arguments here necessarily ranged over a short area. Although I can see some force in Ms Heaney's arguments based on the importance of the regulation 30(3)(c) information and the need to demonstrate that that regulation has been complied with, these points (one of which is about an evidential requirement, which would need also to be met if oral notification suffices) cannot subvert the meaning of the statutory words if that meaning is clear.

76. In my judgement, the words 'notify' and 'a notice' in the Framework Regulations are being used differently and the FTT erred in law in holding otherwise. The duty to *notify* found in regulation 30(3)(c) does not need to be carried out in writing. It can be met by the information being provided orally, in writing or a combination of both. The dictionary definition of 'notify' is to inform someone of something or to let someone know something. Although this includes reporting something formally, and so might extend to doing so in writing, the important point is that the ordinary meaning of 'notify' does not need to be in writing. Just as importantly the word 'notify' has to be construed in its statutory context, starting with its ordinary meaning, and nothing in that statutory context, in my judgement, mandates 'notify' having anything other than its ordinary meaning. Crucially, the statutory context for regulation 30(3)(c) shows that the definition of 'a notice under these Regulations' in regulation 3 of the Framework Regs applies elsewhere in those regulation to notices which need to be

given: see, for example, regulations 72(2), 74 and 78 of the Framework Regs, all of which appear in Chapter 4 which is about "Notices, procedure and requirements". This therefore (i) provides a valuable content to use of 'notice', which must be a written notice per regulation 3, in the Framework Regs, and (ii) shows that the draughtsperson of the Framework Regulations could have used 'notice' in regulation 30(3)(c), thus requiring the notification to be in writing, but instead used the word 'notify'. As matter of statutory construction, the use of that different word must be deliberate and therefore denotes that 'notify' in regulation 30(3)(c) does not require the information mandated to be given in that regulation to be provided in writing.

77. Once this position is reached, it seems to me that all paragraph 47A and 90(a) of the Code of Practice and paragraph 2.1 on page 12 of the Green Deal Provider Guidance are doing is setting out a (correct and lawful) view of what regulation 30(3)(c)(c) means by 'notify. On their own they cannot reverse engineer a meaning for notify which is inconsistent with the plain meaning it has within the Framework Regs.

78. Although the FTT in its substantive decision erred in law in deciding that the regulation 30(3)(c) information had to be provided in writing, such an error may not be a material error of law if the FTT did not err in law in deciding that that information had not in fact been notified to Ms Heaney, whether that notification was in writing or orally, or a combination of the two.

79. I should interpolate at this stage that I do not accept Ms Heaney's argument that the FTT in its substantive decision had decided that other parts of regulation 30(3) of the Framework Regs had not been notified to Ms Heaney. It is true that in the passages addressing notification from the FTT's substantive decision which I have quoted above, the FTT does refer at times to notification under regulation 30(3). However, no other parts of the FTT's substantive decision find breaches of notification in respect of regulation 30(3)(a), (b) or (d), and its findings in paragraphs 1(b)(iii), 57 and 67 of the decision, although in places they do not identify regulation 30(3)(c) expressly, are plainly only about regulation 30(3)(c)'s terms.

80. Both GDFC and the Secretary of State argue that the FTT erred in law when it stated in paragraphs 57, 58 and 63 of its decision that there were no documents before it which show that regulation 30(3)(c) was complied with in writing. GDFC and the Secretary of State (all of whose counsel appeared before the FTT) argue that the issues around whether the FTT had made an oral ruling that breach of the notification requirements in regulation 30(3) was not made out, may have diverted attention from the evidence in the bundle which they argue shows that the information required by regulation 30(3)(c) had been provided to Ms Heaney in writing.

81. I have indicated above that I am not going to inquire further into what the FTT may have meant by its oral remarks quoted in paragraph 43 above. It seems to me that the acid test is whether the FTT's findings in paragraph 63 of its substantive decision, that *"*Notwithstanding the careful attention given to this case by Ms Heaney, the CAB, the Secretary of State, GDFC and the ECC no documents have emerged that give the notification required by regulation 30(3)" and "Importantly, nor does the evidence suggest when such notification *might* have been given" (the underlining is mine and has been added for emphasis), were properly made out on the evidence before the FTT.

82. I am satisfied that these were not findings which the FTT was entitled to make on the evidence before it. I say this for the following reasons.

83. First, the Secretary of State in his sanctions decision of 6 October 2020 had proceeded on the clear (and at that stage seemingly undisputed) basis that all the notification requirements in regulation 30(3) had been met. Moreover, and just as importantly, the FTT accepted this at the beginning of paragraph 57 of its substantive decision, noting that the sanctions notice had found the necessary information had been given on paper. However, nowhere did the FTT properly grapple with this important starting point when it made the findings set out above in paragraph 63 of its decision.

84. The FTT had earlier directed itself in paragraph 29 of its decision (the correctness and lawfulness of which self-direction was not disputed before me) that:

> "29…the Tribunal is not restricted to a review of the Secretary of State's decision, and reaches its own decision. This includes making any necessary findings of fact, according to the standard of the balance of probabilities and with the ability to have regard to evidence that was not before the Secretary of State when his decision was made. Yet the Tribunal does not simply start afresh and disregard the decision under appeal. As held in *R(Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31, at [45], and *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60 at [45]-[46], it pays careful attention to the reasons given by the Secretary of State, bearing in mind that the legislative scheme gives him primary decision-making responsibility to the Secretary of State, in an area where he is required to exercise his judgement according to his particular expertise and for which he bears democratic accountability. The weight to attach to the Secretary of State's reasoning is for the Tribunal to decide in light of its fullness and clarity, the nature of the issues and the facts as it finds them to be."

85. This is what I mean by the phrase 'important starting point' in paragraph 83 above. The finding of the FTT that no documents had emerged that gave the information required by regulation 30(3)(c) of the Framework Regs needed to grapple with why the Secretary of State had come to a different view, particularly where the FTT considered later in paragraph 63 of its substantive decision that no suggestion had been made that any relevant documents were missing. Likewise, the FTT's view or finding that there was *no* evidence to suggest when the regulation 30(3)(c) notification might have been given needed, in my judgement, to address and explain away the contrary view of the Secretary of State that he was entitled to issue a sanctions notice because, inter alia, that notification had already been given

86. Second, the FTT's reasoning in its substantive decision at paragraph 57 is in my judgement unclear as to why the written information which was before it did not satisfy regulation 30(3)(c). Perhaps most importantly, that paragraph does not address the "Green Deal Improvement Package" ("GDIP") document. Moreover, the FTT's focus or concern in paragraph 57 appears to be with "first year improvement-specific figures", which are 'expected' figures subject to a wide range of estimated costs, and with the lack of any reasonable estimates.

87. In giving permission to appeal, the FTT judge did address the GDIP but said that it was "impossible to understand from [the GDIP] what first year instalments would be payable in accordance with regulation 30(3)(c)" and that "a maximum is not the same thing as an estimate". It is problematic to read these observations as

supplemental reasons for the decision, not least because they do not appear in the remade substantive decision which the FTT gave on the same day as it granted permission to appeal. In any event, I do not consider that as a matter of law a maximum cannot equate with an estimate. Firstly, the legislation does not prescribe that a maximum cannot be an estimate. Secondly, as a matter of language a maximum can fall within an estimate, for example by estimating or stating that the costs will be "no more than £1,000". Thirdly, the statutory purpose of regulation 30(3)(c) is to inform consumers and to enable them to shop for different green deal plans. This purpose is met by giving the consumer a precautionary estimate based on a maximum: it thus provides them with the worst case estimate.

88. Third, all that regulation 30(3)(c) of the Framework Regs requires, when read with regulation 30(6), and it is noteworthy that the FTT seemingly failed to take account of regulation 30(6) in its first substantive decision (as that was why it set aside that decision) is that the notification breaks down by improvements the estimated total of instalments that are proposed to be payable in the first year of plan. This does not require a definitive figure to be notified. What must be notified is an estimate, which is necessarily contingent. Moreover, the estimate may be provided in a number of ways and, as have I accepted above, that may involve a maximum figure which it is judged the costs will not exceed.

89. Fourth, I am satisfied that, on the face of it, the regulation 30(3)(c) notification as I have explained immediately above was in fact given to Ms Heaney. This was set out in the Green Deal Improvement Package document, dated 27 May 2021, which set out the "maximum Green Deal repayments in year 1" for each of the improvements installed.

90. Some argument was made before me as to the basis on which the GDIP came to be before the FTT. Reference was made to Ms Heaney having been given many different documents to look at and the FTT's view (in paragraph 65 of its substantive decision) that she had never been told she would be required to pay anything other than the initial £1,000 let alone what she could expect to pay in the first year for each individual improvement. A difficulty with paragraph 65 of the FTT's substantive decision, and its statement that "[t]he Tribunal therefore takes the findings in the Sanction Notice as answering whether the required information was verbally communicated on this occasion" is how that perspective about the Secretary of State's Sanction Notice sits consistently with the FTT's earlier finding in paragraph 57 that the Sanction Notice had found that the necessary information had been given on paper. That apparent inconsistency is not resolved by the FTT. Further, a difficulty with this argument made on behalf of Ms Heaney is that the FTT's consideration of Ms Heaney's evidence was based on its wrong view that there was no document before it which gave the required 30(3)(c) notification and its failure to consider the GDIP document (which it was taken to in the course of the hearing).

91. I am mindful that there may have been a degree of confusion during the substantive appeal hearing as to whether compliance with regulation 30(3)(c) was in issue on the appeal. However, the FTT having at paragraph 56 considered the parties agreed it was in issue, the FTT had to address that issue properly on the evidence before it.

92. I am also mindful, as a matter of overall consideration that, as the Secretary of State pointed out to me, it seems reasonably clear that Ms Heaney's written arguments to the FTT were not about receipt of any of the relevant documents but

instead concerned the figures in them, and there was seemingly no suggestion in arguments before the FTT that Ms Heaney had not received the GDIP document.

93. In the circumstances, I conclude that the FTT erred in law, first, in its approach to whether regulation 30(3)(c) required written notification and, second, in its consideration of whether that written notification had in fact been given, and I find as a fact that such written notification was given.

94. Given my conclusions, I do not need to address the final ground of appeal under regulation 30(3)(c) concerning whether the FTT erred in law in its approach to whether oral notification had been given to Ms Heaney.

Grounds 5 and 6 – proportionality and approach to sanction

95. For the reasons given above, I am satisfied the FTT was wrong in its substantive decision to conclude that Ms Heaney's energy plan was not a green deal plan. However, both it and the FTT in the preliminary decision decided important other issues concerning the correct approach to sanction and proportionality (on the basis that a green deal plan was in place) and I turn to address those issues.

96. The issue of wider importance concerns the correct approach to the proportionality test found in regulation 79 of the Framework Regs. I deal with that issue first.

97. The FTT in its preliminary decision decided that, save for exceptional circumstances, the effect of any proposed sanction on the green deal provider was generally to be ignored, notwithstanding that provider's subsisting rights under Article 1 of the First Protocol ("A1P1") to the European Convention on Human Rights ("ECHR"). Furthermore, whether it is proportionate to deprive a green deal provider (here GDFC) of their A1P1 rights had "to be considered from the perspective of the legislation as a whole, rather than through the lens of the exercise of the Secretary of State's discretion in each individual case". On this last point the FTT relied in particular on *JP Whitter v HMRC* [2016] EWCA Civ 1160.

98. In my judgement, the FTT erred in law in so concluding. I have arrived at this conclusion for the following five reasons, which necessarily overlap.

99. First, the FTT's analysis fails to provide any adequate account for the terms of regulation 79 of the Framework Regs. Moreover, nothing in regulation 79 warrants either conclusion. Regulation 79 on its face imposes a duty on the decision maker, where the decision maker is exercising the power(s) in regulation 67 of the Framework Regs, to ensure that any sanction imposed is proportionate to the breach in relation to which the sanction is imposed. The effect of the FTT's preliminary decision is to render it difficult, if not impossible, to identify the useful content of the duty in regulation 79. The fact that the green deal plan scheme as a whole has provided a proportionate balance of competing rights under the ECHR was and is not in dispute, but this leaves unanswered the function and scope of the individual proportionality assessment which regulation 79 itself requires. It cannot as matter of law be the answer to regulation 79 that any decision on sanction would necessarily be a proportionate one because the scheme as a whole is proportionate. That would be to rob regulation 79 of any useful effect in individual cases, which cannot have been the intent.

100. Second, the imposition of a sanction (be it cancellation or reduction) will necessarily interfere with the green deal provider's (here GDFC's) A1P1 rights.

Moreover, the decision to impose a sanction, be it by the Secretary of State or the FTT (both are public authorities under sections 3 and 6 of the Human Rights Act 1998), would ordinarily (that is, without consideration of the terms of the statutory scheme) involve the decision maker undertaking a broad proportionality assessment which takes account of all relevant matters. This is because the interference with GDFC's A1P1 rights must be justified as proportionate in order for it to be lawful. Such a proportionality assessment is provided for on its face by regulation 79. Given the sanction decision will interfere with the green deal provider's A1P1 rights, it is very difficult to see how the real effect of that A1P1 interference can be ignored, and nothing in regulation 79 in my judgement warrants such a view of the reach of regulation.

101. Third, the words of regulation 79 are clear. The sanction must be proportionate to the breach in relation to which it is imposed. Although this focuses on the breach, I can see nothing in that language which excludes the effect of the sanction on the green deal provider or limits the effect of the sanction to the green energy deal recipient/consumer. All the word 'breach' is doing is identifying the act or omission from which the sanction, and the proportionality assessment in respect of that sanction, arises. The objective question to be answered under regulation 79 is whether the sanction for the breach is proportionate in its consequences. This is not, therefore, strictly speaking an exercise in determining fairness *inter partes*. It is an objective test, imposed in the first instance by the Secretary of State, that the sanction (on the green deal provider) must be proportionate to the breach. I can identify nothing in that wording that necessarily excludes consideration of the effect on the green deal provider of the sanction. That the type or level of sanction must be proportionate to the breach in relation to which it is imposed requires a relationship of proportionality between the breach and the sanction. In my judgement, that statutorily drawn relationship does not exclude consideration of the effects on the green deal provider of the proposed sanction as the same may plainly be relevant to the correct level or type of sanction.

102. Fourth, I do not accept Ms Heaney's argument that the rest of the Framework Regs necessarily imply any restriction in regulation 79's scope. Her argument was that regulation 79 excludes the effects of the sanction on GDFC as the rest of the statutory scheme gives consideration to GDFC's A1P1 rights. It was submitted that the wording of regulation 79 is limited to consideration of the breach when imposing a sanction. I have rejected the bare terms of that argument above. It was further argued that 'proportionality was hard-wired elsewhere into the scheme', that this (per *Whitter*) supported the FTT's decision that consideration of a green deal provider's A1P1 rights under regulation 79 was generally not needed, and that when the Framework Regs required consideration to be given to the effect on the sanctioned party this was stated. Reference was made in support of these submission to regulations 67, 72 and, in particular, regulation 75 of the Framework Regs. The argument, as I understood it, was that those regulations showed that when there was a need to focus on particular issue, such as whether the breach had been severe (per regulation 67(1)(a)), or on a particular party's interests, such as imposing a financial penalty on a party (per regulation 75), the Framework Regs set that issue out clearly. Accordingly, so Ms Heaney argued, had the Framework Regs intended that the proportionality assessment in regulation 79 should encompass interests of the green deal provider, they could and would have said so.

103. I am not persuaded by this argument. Firstly, in circumstances where it is accepted that GDFC's A1P1 rights were engaged by the sanction decision, in my judgement clear words would be needed, and words clearer than those used in regulation 79, to exclude those rights from consideration: see *R v SSHD ex parte Simms* [2000] 2 AC 115 and *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868 at paragraph [152] in particular. Secondly, none of the regulations relied on by Ms Heaney in this argument focus on green deal providers *per se*. The regulations relied upon are doing no more than identifying particular steps in the statutory regime with the language necessarily being crafted to those steps. Thirdly, the regulations as a whole do not evidence an obvious statutory intent to take into account a green deal providers A1P1 rights so as to exclude necessarily consideration of those rights under regulation 79. Particular reliance was placed by Ms Heaney on financial penalties under regulation 75, which amount to sanctions under regulations 67(2)(b) of the Framework Regs. However, regulation 75 does not cover, nor does it take into account, all A1P1 rights which a green deal provider may have, and it is but one form of sanction available under regulation 67. By way of relevant example, GDFC's loss of the windfall benefit plainly engaged its A1P1 rights (as too may its loss of reputation), but that right would not fall to be taken into account under regulation 75. On the other hand, regulation 75 shows that the impact of a financial penalty sanction on a green deal provider is relevant, and that particular sanction of a financial penalty must, per regulation 79, be proportionate to the breach in relation to which it is imposed. On this reading, but contrary to Ms Heaney's argument, the effect on the green deal provider is a relevant consideration in the proportionality assessment required by regulation 79. Nothing, however, in the Framework Regs, in my judgement, compels the conclusion that a green deal providers A1P1 rights are limited to those found in regulation 75. The different sanctions available against a green deal provider in regulation 67 point against such a conclusion as does the range of A1P1 rights which sit wider than a financial penalty. Regulation 75 is therefore not to the exclusion of any other potential impacts on a sanctioned body. Seen from this perspective, regulation 79 provides for a broader proportionality analysis than one limited regulation 75, and which may take into account wider impacts or effects, such as the loss of a windfall benefit.

104. Fifth, I do not consider that the analogy the FTT drew with *Whitter* was apt. The statutory scheme in issue in *Whitter* did not involve any express proportionality requirement, whereas regulation 79 of the Framework Regs does. It is true that *Whitter* did involve the exercise of a discretion, under section 66(1) of the Finance Act 2004, as does regulation 67(2) of the Framework Regs. However, the absence of an equivalent to regulation 79 of the Framework Regs in *Whitter* is, in my judgement, critical and decisive. Had such an express proportionality power or duty been contained in the Finance Act 2004 then: (i) I doubt very much whether the Court of Appeal would have reasoned as it did in paragraphs [60], [65] and [79] of *Whitter*; and (ii) it is difficult to see how the analysis in *Whitter* could have differed from the approach taken to proportionality in paragraphs [20] and [74] of *Bank Mellat v HM Treasury* (No.2) [2013] UKSC 39; [2014] 1 AC 700, given what was in issue in *Bank Mellat* was a proportionality test which was included expressly in the relevant statutory scheme (in paragraph 9(6) of Schedule 7 to the Counter-Terrorism Act 2008). This, moreover, was a distinction which the Court of Appeal found noteworthy in paragraph [77] of *Whitter*. Moreover, nothing in the Supreme Court's decision dismissing a further appeal in *Whitter* ([2018] UKSC 31; [2018] WLR 3117) affects this analysis. Indeed the comments of Lord Carnwath at paragraph [23] of *Whitter* in

the Supreme Court – "Once it is accepted that the statute does not in itself require the consideration of the impact on the individual taxpayer, there is nothing in A1/P1 which would justify the court in reading in such a requirement" – supports the view that it was wrong for the FTT to proceed by way of analogy with *Whitter*.

105. It is for all these reasons that I have concluded that the FTT erred in law in failing to take into account GDFC's interests when deciding the correct type and level of sanction to impose on it under regulations 67 and 79 of the Framework Regs.

106. The final ground which I need to address in substance does not raise an issue of importance beyond the facts of this case.

107. GDFC's argument is that in coming to its substantive decision the FTT misunderstood that which it was bound by in the preliminary decision when deciding the appropriate sanction if the energy plan was a green deal plan, and so misapplied the preliminary decision. Two parts of the FTT's substantive decision are crucial to the argument, and both must be considered together. They are found in paragraphs 1(f)(iv) and 136-138 of the substantive decision.

> "1f(iv). The Tribunal previously decided as a preliminary issue that the effect of a sanction on the relevant person is only relevant to proportionality in exceptional circumstances, and that any 'windfall' benefit to the bill payer is only relevant to the level of harm suffered and redress. By reason alone of that ruling, the Secretary of State placed undue weight on irrelevant factors when deciding on the appropriate sanction. We would have allowed the appeal and remitted the decision to the Secretary of State. Had the Secretary of State not erred in placing the weight he did on those factors, we would have dismissed the appeal and confirmed his decision.
>
> 136. On the continuing hypothetical basis, of course, that Ms Heaney's energy plan remains a Green Deal plan, the Tribunal takes all the circumstances into account to decide on sanction.
>
> 137. The Tribunal has given very careful thought as to whether cancellation would have been the only appropriate sanction. The Preliminary Decision held that intention to enter into a Green New deal was not a qualifying condition. But that legal point does not address the obvious harm suffered by a person who, like Ms Heaney, was subjected to high pressure sales tactics that tricked her into taking out a loan for improvements many times greater than the £1,000 she thought was the total price. The Secretary of State was certainly right to describe the breach as very severe. The harm suffered by Ms Heaney, financial and otherwise, has already been described.
>
> 138. There are only two countervailing factors. First is that the improvements are not going anywhere and Ms Heaney will continue to save energy from them – the 'windfall'. Following the Preliminary Decision, the Tribunal places little weight on this. Second is the weight to be attached to the Secretary of State's view on sanction. But the Secretary of State's decision in this case is vitiated by the reliance placed on both the effect of the sanction on GDFC in the absence of exceptional circumstances, and on the 'windfall' benefit that would accrue to Ms Heaney. The decision's assessment of proportionality cannot withstand

> Judge Macmillan's ruling on those preliminary issues. But for that, the Tribunal would have confirmed the Secretary of State's decision."

108. Given I have decided that the preliminary decision was wrong in any event about the correct approach to applying the proportionality test under regulation 79 of Framework Regs, it may be thought this further argument need not be explored. However, the aspect of the argument concerning the windfall benefit accruing to Ms Heaney is at least relevant to the decision the FTT would otherwise have made (under its 'but for' test in paragraph 138 of the substantive decision).

109. Reading paragraphs 1f(iv) and 136-138 of the substantive decision together, it is clear to me that the *that* in the "But for that' at the beginning of the final sentence in paragraph 138 is referring to the preliminary decision and what it had decided on windfall and proportionality. That is made plain, in my judgement, when account is taken of the wording "By reason alone of that ruling, the Secretary of State placed undue weight on irrelevant factors when deciding on the appropriate sanction" and "Had the Secretary of State not erred in placing the weight he did on those factors, we would have dismissed the appeal and confirmed his decision" in paragraph 1f(iv) (my underlining added for emphasis). The ruling being referred to is plainly the preliminary decision of the FTT and the reference to 'irrelevant factors' (plural) and 'two countervailing factors' and 'issues' (plural) in, respectively, paragraphs 1f(iv) and 138 is clearly about the preliminary decision's conclusions on windfall and proportionality.

110. That being so, I accept GDFC's and the Secretary of State's argument that the FTT in its substantive decision wrongly concluded that the preliminary decision compelled it to (i) find that the Secretary of State's decision had been vitiated by that decision having given weight to the windfall benefit accruing to Ms Heaney, and (ii) give limited weight to any windfall accruing to Ms Heaney.

111. What the FTT said in its preliminary decision on a windfall benefit is found in paragraph 80 of that decision and I can find nothing there which mandates that the FTT in its substantive decision either had to hold that the Secretary of State's sanction decision was vitiated because it had taken the windfall benefit accruing to Ms Heaney into account, or that it had to give minimal weight to the windfall accruing to Ms Heaney. I set out in full that paragraph 80:

> "80. I conclude that the identification of a windfall benefit must also be relevant sanction, since this will inevitably go to the level and impact of any harm suffered. However, a windfall benefit ought not to operate as an effective bar to a sanction of cancellation, since it can only be one of several potentially relevant factors. In some cases, for example, that the bill payer may have suffered harm of a different nature which may be assessed as outweighing the windfall benefit, or it may be that the seriousness of the breach(es) justify the imposition of a severe sanction, windfall benefit notwithstanding."

112. The opening sentence of paragraph 80 makes plain that a windfall benefit is always relevant to sanction, because it is part of the consideration of the level of the harm suffered. All the second sentence is ruling is that the mere fact of a windfall benefit cannot in all circumstances preclude a cancellation decision because all relevant factors (including any windfall benefit) must be considered.

113. Nor do I accept Ms Heaney's argument, if I understood it correctly, that as it was a requirement under regulation 67(3) of the Framework Regs for imposing a sanction in the first place (and thus considering the type and level of sanction) that Ms Heaney had suffered "substantive loss", the FTT was entitled to place little weight on the windfall benefit gained by Ms Heaney at the next stage of deciding whether and which sanction (reduction or cancellation) to impose. The weight to be attached to the windfall benefit was obviously a matter for the FTT to evaluate. However, even ignoring the FTT's erroneous approach in its substantive decision to the preliminary decision having vitiated the Secretary of State's sanction decision, at a minimum the FTT failed to reason out adequately why it *followed from the preliminary decision* that only minimum weight should be placed on Ms Heaney's windfall benefit when deciding that cancellation remained the correct sanction even assuming that what was in place was a green deal plan.

114. What has caused me more pause for thought is Ms Heaney's argument that paragraph 1(f)(iv) and 138 of the FTT's substantive decision cannot be read in isolation and needs to be read with paragraphs 110-135 of that decision and the discussion on windfall preceding it in paragraphs 104-109. It may be a product of the FTT having dealt with a number of issues in the alternative, however the difficulty I have in the end with this argument is that the earlier paragraphs which address windfall only do so in the context of Ms Heaney's energy plan *not* being a green deal plan. This is made most apparent from paragraph 107 of the FTT's substantive decision where the FTT set out:

> "107. While the [windfall] benefit to the bill payer arising from a sanction falls to be considered in every case, the Tribunal considers that it will carry less significance in most cases concerning a breach of a qualifying condition. As held by Judge Macmillan, it directly forms part of the calculation of loss. That may be an essential ingredient when calculating a reduction, but the loss in this case has already been established by the consequences of the energy plan no longer being a Green Deal plan. They both stand as "harm of a different nature" and establish the seriousness of breach.

115. The underlining in paragraph 107 of the substantive decision is mine and has been added to emphasise the different situations with which the FTT was concerned, namely breach of a qualifying condition that therefore rendered the energy plan *not* a green deal plan. All paragraph 107 on its face therefore establishes is the FTT's view that a windfall benefit accruing to the homeowner will carry less significance in most cases where the energy plan is not a green deal plan. That view and reasoning does not in my judgement have any obvious read across to where the plan ***is*** a green deal plan. Indeed, the reasoning in paragraph 107 and its reference to the preliminary decision (of Judge Macmillan) very arguably implies that a different approach to windfall ought to apply where the plan is a green deal plan. However, the 'less weight' attached by the FTT to the windfall benefit in paragraph 138 of the substantive decision in the context of the plan being a green deal plan would seem to draw an equivalence, which paragraph 107 suggests should not automatically be drawn, between green deal plans and plans which are not green deal plans.

116. For completeness, I should add that paragraphs 104-109 fall under the FTT's **Issue 3**, which is about whether cancellation is the only appropriate sanction if Ms Heaney's energy agreement was not a green deal plan. Paragraphs 110-115 then

fall under the FTT's **Issue 4**, which is about whether HELMS was in breach of its obligations under the Framework Regs or the Code of Practice if "there is a Green Deal plan" and paragraph 116 appears under the FTT's **Issue 5**, which is about the effective date of any sanction in Ms Heaney's case. Paragraphs 117-138 of the FTT's substantive decision then cover the FTT's **Issues 6, 7 and 8**, which are concerned, inter alia, with the application of the principles established by the FTT's preliminary decision to whether the Secretary of State's sanction decision of reduction was correct and, if it was not, what the correct level of sanction should be. The FTT does make it clear, in paragraph 117, that issues 6, 7 and 8 are being considered in the (alternative) context of Ms Heaney's plan being a green deal plan. Moreover, in fairness to the FTT, it says in paragraph 117 that it had already touched on many of the parties arguments under Issue 3. However, for the reasons I have already given in the immediately preceding paragraph, I remain unclear what the FTT's reasoning was for giving little weight to the windfall benefit in a context where the plan was a green deal plan.

Ground 7 – proportionality and sanction if not a green deal plan

117. The final ground of appeal concerns whether the FTT was wrong to find that the plan should be cancelled even if it was not a green deal plan.

118. Given the respects in which I have already found the FTT erred in law in deciding the energy plan was not a green deal plan and its erroneous approach to the proportionality test it had to apply and to sanction, and given I have found Ms Heaney has a green deal plan, I do not consider it would be appropriate for the Upper Tribunal to address this (now hypothetical) scenario afresh.

119. I may add that FTT in its preliminary decision seemed to consider that if the energy plan was not a green deal plan, that ended the FTT's adjudicative jurisdiction: see paragraph 32 of the preliminary decision. The FTT in its substantive decision appears to have taken a different view: see paragraph 81 of that decision. The view that the FTT's jurisdiction does not extend to a sanction decision where the energy plan is not a green deal plan may be borne out by section 35(1)(a) of the Energy Act 2011, which might be said to limit the right of appeal to the First-tier Tribunal (and thereon to the Upper Tribunal) to issues arising in respect what are green deal plans. The contrary argument might be that section 3(3)(i) of the Energy Act 2011 is broad enough to confer a right of appeal in respect of the consequences of non-compliance with any requirement, and thus the consequences of non-compliance with regulation 30(3)(c), of the Framework Regs. I have, however, heard no argument on this jurisdictional issue. It provides an additional reason why I do not address ground 7.

Disposal of appeal

120. The errors of law I have found the FTT made in its decisions of 29 December 2021 and 5 July 2023 were plainly material to its decision on Ms Heaney's appeal to it against the Secretary of State's sanction decision of 6 October 2020. I therefore set aside both FTT decisions under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

121. There was no serious argument before me that I should not remake the FTT's decision on Ms Heaney's appeal if the FTT decisions were set aside. I therefore remake the FTT decision on Ms Heaney's appeal under section 12(2)(b)(ii) and (4) of the Tribunals, Courts and Enforcement Act 2007.

122. In remaking the decision on Ms Heaney's appeal, I am satisfied, for the reasons I have already given, that regulation 30(3)(c) of the Framework Regs was in fact met. This was through the GDIP which had been provided to Ms Heaney. As a result, and as this was the only point of contention as to whether Ms Heaney in fact had a green deal plan, I find that the energy plan Ms Heaney had entered into with HELMS was a 'green deal plan'.

123. That then leaves me to decide the appropriate sanction. Consistently with the 'but for' position of the FTT in paragraph of 138 of its substantive decision, and my having found the FTT had erred in a law both in its approach to proportionality under regulation 79 of the framework Regs and in relation to what the FTT considered it was precluded by the FTT's preliminary decision from taking into account in deciding the appropriate sanction, and applying the (agreed) *Hope and Glory* legal approach, I can find no reason to disagree with the FTT's 'but for' view that the Secretary of State's sanction decision of reduction should be confirmed. The Secretary of State's sanction decision of 6 October 2020 is detailed and takes account of all relevant matters. I should add that no real argument was made to me by any party that a different result should obtain on my remaking the FTT's decision.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 6 November 2024