Neutral Citation Number: [2019] EWHC 2981 (Admin)

Case No: CO/4651/2018

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

Birmingham Civil Justice Centre
33 Bull St, Birmingham, B4 6DS

Date: 7 November 2019

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN **Claimant**

on the application of

DANIEL JUSTIN FARMILOE
- and -
(1) SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY

(2) THE GAS AND ELECTRICITY MARKETS AUTHORITY **Defendants**

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Sarah Clover (instructed by **Shakespeare Martineau LLP**) for the **Claimant**
Jason Coppel QC and Stephen Kosmin (instructed by the **Government Legal Department**) for the **First Defendant** and (instructed by **Ofgem Office of the General Counsel**) for the **Second Defendant**

Hearing dates: 29 & 30 July 2019, 3 October 2019

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Approved Judgment

Mrs Justice Lang :

1. On 14 September 2017 the Claimant made an application to the Office of Gas and Electricity Markets ("Ofgem") for accreditation under the Domestic Renewable Heat Incentive Scheme ("the DRHI Scheme") in order to obtain a subsidy, pursuant to the Domestic Renewable Heat Incentive Scheme Regulations 2014, as amended, ("the 2014 Regulations"), in respect of the newly installed renewable heating system at his home.

2. In this claim, the Claimant challenged Ofgem's decision, dated 21 August 2018, and confirmed after a review on 27 September 2018, whereby he was requested to provide a new Energy Performance Certificate ("EPC") in support of his application, on the ground that the heat demand specified in the EPC which he had submitted was overestimated.

3. Ofgem operates as the executive arm of the Second Defendant and has no independent legal personality. The Second Defendant ("GEMA") is a body corporate established under section 1 of the Utilities Act 2000. It is the independent regulator of the gas and electricity markets in Great Britain and in that role it has defined statutory duties and powers. Amongst other matters, it has functions relating to the administration of a number of energy efficient and "green energy" (i.e. non-fossil fuel) schemes, including the DRHI Scheme, which it delivers on behalf of the First Defendant.

4. The DRHI Scheme was established by the 2014 Regulations, which were made by the First Defendant, pursuant to section 100 of the Energy Act 2008. It allows domestic property owners to apply for subsidy payments if they install an eligible renewable heating system which meets the criteria set out in the 2014 Regulations. The Second Defendant is responsible for the operation and administration of the DRHI Scheme.

5. The application for permission to apply for judicial review was not opposed by the Defendants. Permission was granted on 14 February 2019 by Andrews J.

History

6. At all material times, the Claimant resided with his family in a large, traditional stone-built house in Oxfordshire ("the Property"). Prior to September 2017, space heating at the Property was primarily by means of electric storage heaters, with room heaters and log fires as secondary heating. Hot water at the property was heated by electricity.

7. The Claimant had knowledge of the DRHI Scheme, both through his own research, and in his capacity as a director of a company called Earth Source Energy Limited, which undertook installation of renewable heating systems. Under the 2014 Regulations, eligible plants for renewable heating systems are biomass plants, heat pumps or solar thermal plants. Traditional forms of heating systems, powered by gas, electricity, oil and coal, are not renewable, and so are not eligible for a subsidy.

8. The Claimant investigated the installation of a new ground source heat pump system in his property, to provide space and water heating. A ground source heat pump is defined in regulation 2 of the 2014 Regulations as a plant which generates heat by absorbing energy stored in the form of heat from the ground. The capital cost of installation was

high (in excess of £240,000) which the Claimant had to finance with a substantial loan**.** Therefore, in order to decide whether the installation was financially viable for him, the Claimant sought to calculate in advance how much subsidy he would receive under the DRHI scheme. In doing so, he was able to draw on his experience of similar installations on behalf of clients of Earth Source Energy Limited.

9. The DRHI Scheme estimates the energy required to heat a property, either by metering or by "deeming" i.e. estimating. The Claimant correctly concluded that his proposed system would not be metered by Ofgem under the DRHI Scheme, and so his application would be considering under the "deeming" provisions in the 2014 Regulations.

10. Under regulation 29 of the 2014 Regulations, a plant's deemed annual heat generation is calculated by a formula which utilises the heat demand specified in an EPC and the seasonal performance factor ("SPF"), as defined in regulation 2, for the heat pump.

11. In light of this, the Claimant commissioned an EPC in order to calculate his potential subsidy entitlement. The EPC assessment scheme was developed for domestic property sales and it is governed by the Energy Performance of Buildings (England and Wales) Regulations 2012. EPC assessors are independent professionals who are trained to apply the prescribed methodology. The methodology is as approved by the Secretary of State under regulation 24 of the Building Regulations 2010. In this case, the EPC assessor was required to apply a methodology called the 'Reduced data Standard Assessment Procedure ("RdSAP") which makes assumptions about the performance of buildings, and the heating requirements of occupants, to estimate heat demand. The RdSAP methodology is revised from time to time.

12. The EPC assessment of the Property was carried out on 24 February 2017, when the Property was still primarily heated by electric storage heaters. The EPC was issued on 3 March 2017, applying RdSAP v.9.92, which was in force at that date. The deemed annual space heat demand for the Property under v.9.92 was assessed at 226,783 kWh (kilowatt hours).

13. As the Claimant explained in paragraphs 4 to 37 of his third witness statement, a building of a specific size and construction requires a certain amount of heat energy (measured in kilowatt hours) to reach, and remain at, a particular temperature, regardless of the type of heating system used. However, different heating systems may require more or less fuel to generate the same amount of heat energy, which will affect running costs. Different heating systems may be efficient or inefficient in maintaining a particular temperature, depending on the effectiveness of thermostats and other controls, and whether they are slow to warm and cool down.

14. Prior to installation, the Claimant was provided with the MCS Performance Estimate which installers are required to provide to customers prior to entering into a contract. The MCS Performance Estimate provided him with the SPF information which enabled him to calculate his subsidy entitlement.

15. The Claimant was not able to calculate his subsidy using the First Defendant's online calculator, as the heat demand figures in his EPC exceeded the caps inserted into the online software. However, he was able to calculate it following a worked example provided by Ofgem in its guidance ('Essential Guide for Applicants', v.3.0 March 2016,

p.29). The Claimant's worked calculation to ascertain his subsidy entitlement was set out in his fourth witness statement, at paragraph 88:

Estimated annual heat load (from the EPC)	229,413 kWh
SPF	4.79
Current heat pump tariff rate (September 2017)	19.64 p/kWh
Estimated annual heat load (total heat demand x (1 – 1/SPF):	229,413 kWh x (1-1/4.79) = 181,519 kWh
Total annual Domestic RHI payment (tariff x estimated annual heat load):	181,519 kWh x 20.89 p/kWh = £35,650.30
Quarterly Domestic RHI payment	£35,650.30 ÷ 4 = £8,9125.58

16. In reliance upon his calculation that he would be entitled to a subsidy of about £35,650.30 per annum, the Claimant applied for a loan. On or about 4 September 2017, Earth Source Energy Limited installed and commissioned a ground source heat pump system at the Property, comprising three pumps. It supplied space and water heating.

17. On 14 September 2017, the Claimant completed and submitted an online application for accreditation to the DRHI Scheme, based upon his installation of a ground source heat pump system, used both for space and water heating at the Property.

18. The Claimant was required to submit any application for accreditation within 12 months of the date on which the new system was commissioned (regulation 17(4) of the 2014 Regulations).

19. The Claimant was required to support his application with the most recent EPC for his Property (regulation 17(2)(a) and paragraph 1(i) of Part 1 of Schedule 4, 2014 Regulations). By paragraph 1(2)(b) of Schedule 3 to the 2014 Regulations, the EPC had to have been issued less than 24 months before the date on which the application is made.

20. The Claimant's EPC issued on 3 March 2017 fulfilled both these requirements and accordingly he submitted it with his application. Neither the 2014 Regulations nor Ofgem's guidance required him to produce an EPC in respect of his new ground source heat pump heating system.

21. The Claimant's online application was diverted out of the automatic accreditation system for a manual review by a member of staff, because it was identified as a potential high value subsidy payment. In an email dated 19 September 2017, Mr Chau, a Domestic RHI Officer at Ofgem, wrote to the Claimant informing him that his

Application was under review and further information was required in order to process the claim. He noted that: "[l]ooking upon the current Energy Performance Certificate (EPC) it seems that the heat requirement of your property is considerably higher than the average property". He asked for site notes produced during his EPC survey and the heat loss calculations used to size the installation of the renewable heating system. This information was provided by the Claimant.

22. On 1 December 2017 Mr Chau confirmed receipt of this information, as well as the MCS (microgeneration certificates scheme) certificates for his installation which confirmed that it had been installed in accordance with MCS scheme standards. He explained that there was a delay in processing applications because of a surge in applications resulting from a regulation change on 20 September 2017.

23. On 15 February 2018, Ofgem informed the Claimant that his domestic RHI heating system required a site audit. The site audit was undertaken on 13 March 2018 by Ofgem's external contractor, Ricardo. The heat demand of the property was modelled by Ricardo both on the Claimant's old heating electric storage heating system and on his new ground source heat pump heating system.

24. When undertaking the site audit, Ricardo applied the current version of the RdSAP methodology, namely v.9.93, as this was the prescribed methodology for an EPC assessment as at 13 March 2018. The RdSAP methodology had been updated with effect from 19 November 2017 from version 9.92, which had been used for the EPC dated 3 March 2017. The changes in version 9.93 included a revised and more optimistic assumption about the insulation properties of solid brick/stone walls and a more favourable calculation of heat loss (u value) which meant that the deemed heat requirements for the Claimant's Property were assessed as lower under v.9.93 than under v.9.92.

25. Based on the Claimant's old electric storage heating system, the deemed annual space heat demand under version 9.92 was assessed at 226,783 kWh. Under version 9.93, Ricardo assessed it at the lower figure of 190,347 kWh.

26. Ricardo assessed the deemed annual heat demand for the Claimant's new ground source heat pump system at 140,553kWh. This was considerably lower than the deemed annual heat demand of 226,783 kWh in the Claimant's application, based upon the EPC dated 3 March 2017.

27. Ricardo sent a report to Ofgem on 28 March 2018. Ofgem considered the Claimant's application in the light of the Ricardo report. In an email dated 11 April 2018 to 'Domestic RHI Delegated Authorities', Renato Votto, Assistant Audit Manager – Domestic RHI, explained that the application had been selected for audit because of the high payments potentially involved. He summarised the audit results and said:

> "During my audit report review I've not found any issues with the information declared on the participant's EPC and all the characteristics used to model it match the EPC site notes provided during manual review. It appears that the participant's EPC is correctly representing the property at the time of its assessment. This is also supported by the auditor's draft EPC

> which has no discrepancies except for the mentioned heating system.
>
> Furthermore, in the past we have not penalised participants who have their old heating system on the EPC they applied with.
>
> However as the quarterly payments are quite high …. We would like DA to make a decision on whether we can accept the deemed heat demand of the participant's EPC."

28. Ms Charlotte Morris, Senior Operations Manager at Ofgem, was a recipient of the 11 April 2018 email and she forwarded it to Ofgem's policy team asking for its view on 18 May 2018. In a series of internal emails, Ofgem staff discussed the possible reasons for the discrepancies in the figures. Ms Charlotte Morris was copied into those emails.

29. In an email dated 15 June 2018, Renato Votto said:

> "From our experience reviewing site audits, we still strongly confirm the fact that this isn't a new case in terms of circumstances, but among the same cases it is particular for the heat demand discrepancy and the money figures at stake. Furthermore, in my personal experience, this is the first time we have at disposal an auditor's draft EPC which is a 100% replica of the accredited EPC, as usually auditor's draft includes the current RHI accredited heating technology, and we find more justification in discrepancies than solely the software updates."

30. The application was referred to an internal "issues and precedents" ("I & P") meeting. I & P meetings consider novel, difficult and/or potentially contentious cases. The written submission to the I & P meeting referred to Ms Charlotte Morris as DRHI Owner/Case presenter, along with Ms Vanessa Cook, though only Ms Cook was named as Case Owner at the I & P meeting. The submission stated:

> "**Proposed options**
>
> 1) In the past we have not penalised participants who have their old heating system on the EPC they applied with. We are quite satisfied the EPC submitted at application was correct at the time. We should therefore consider accrediting the application with the heat demand of 226,783 kWh.
>
> 2) We have a duty to protect the public purse and we are satisfied the EPC submitted with the application is higher than our auditors estimation. We should ask the applicant to get a new EPC to satisfy ourselves of the correct (and likely lower) heat demand. Risk: this isn't consistent and if we are audited/challenged we may lose the case. This case has also been in review since September 2017 so that would likely cause aggrievance"

31. At the I & P meeting on 22 May 2018, the minutes of the meeting included the following "Discussion points":

> " – We have the power to request for a new EPC after accreditation where we believe it is necessary, as per the definition of 'relevant EPC' in reg 2.
>
> - We may treat accreditations differently as its circumstantial. So afar we have treated this application differently due to the high value payments and we conducted a pre-accreditation site audit. Our site audit found a new EPC may have a much lower heat demand and we should act on this information.
>
> - We believe the EPC submitted in the application was correct, and our precedent is to accept EPC's with the original heating system on, however we have a duty to protect the public purse and doing nothing may not be appropriate – we considered how an external auditor would view this.
>
> - Heat demand limits came into force 6 days after their application date.
>
> Proposed decision: we should take a proactive rather than reactive approach and request for a new EPC. This new EPC will become the 'relevant EPC' for us to base payments on."

32. Ms Charlotte Morris was an attendee at the I & P meeting and took part in the decision.

33. Ofgem implemented the decision to request a new EPC by an email dated 21 August 2018 from Mr Votto to the Claimant which stated:

> "We have requested you to provide us with a new Energy Performance Certificate (EPC) related to your property in order to allow us to proceed with your application to the Domestic RHI.
>
> ……
>
> Please note that failure to provide any information requested in this letter within the time frame advised may lead to rejection of accreditation under Regulation 22(1)(d)"

34. Mr Votto attached a formal decision letter, also dated 21 August 2018, which stated:

> "Following the site audit carried out by Ricardo Energy and Environment on 13/3/2018, I am writing to inform you that your installation has been given an audit rating of **weak**.
>
> Your installation has been awarded this assurance rating because the following non-compliances and observations identified upon inspection;

> **Non-compliance: Your Energy Performance Certificate (EPC) heat demand is overestimated**
>
> **What is the issue?**
>
> During the recent site visit on your property, the auditor completed a full EPC assessment in order to confirm the accuracy of your EPC….The auditor modelled two versions, once with the current heating system and related controls (ground source heat pumps) and the other one with the same heating system used in your EPC (electric storage heaters) in order to produce an exact copy of your certificate. Both the certificates produced by the auditor show a space heating demand which is considerably lower than the one declared on your EPC, which is 226,783 kWh.
>
> For these reasons we believe that the heat demand specified in your EPC is overestimated.
>
> Your Domestic RHI support payments are based upon the total heat demand figure from your EPC and we require an EPC that represents adequately the heat demand of your property.
>
> As stated in regulation 26, we have duty [sic] to make payments to the participant of the RHI scheme. In making payments we are also required to aim to ensure that public funds are disbursed appropriately.
>
> **What action is required?**
>
> Under Regulation 17(2)(b) as read with para 2(m) of Part 2 of Schedule 4, for the reasons explained above, we require a new EPC certificate.
>
> You will need to get a new EPC completed by a new EPC assessor to accurately describe your property. They will need to issue you with a new EPC which adequately represents the heat demand of the property and modelled with the current heating system installed consisting of the ground source heat pumps and their related control system.
>
> ….."

35. On 17 September 2018, the Claimant made a request for a formal review of the decision under regulation 62 of the 2014 Regulations.

36. On 27 September 2018, Ofgem responded to the Claimant's request for a formal review. Ms Charlotte Morris reviewed the decision and decided that it was "correct and still stands". She said:

> "The EPC that you provided with your RHI application …. lists Storage Heaters as the main heating source for your property.

> Your property is now heated by a ground source heat pump, and the EPC is therefore incorrect. Following the audit of your installation, we determined that this had a very large effect on the heat demand for the property. It is for this reason that we asked for a new EPC to be provided.
>
> You indicated in your letter that you expect the heat demand for a new EPC to go down, as the EPC methodology has changed. This was taken into account when we made the decision to ask for a new EPC, as we agree that for most applicants who made an application when you did, the methodology in place at the time of the application would be used for the EPC. However, as the audit indicated that the heat demand of your property was vastly different with the heat pump compared to the storage heaters, we could not use the original EPC as the heat demand would have been inaccurate. Any new EPC will, by necessity, have to use the current methodology."

37. Although the original decision was upheld on review, it is apparent from the text of the letters that the reasoning was differently expressed.

38. Pursuant to an amendment in the regulations which took effect in respect of applications made on or after 20 September 2017, the annual heat demand figure was capped at 30,000 kWh, effectively preventing high level subsidy payments. As the Claimant applied prior to 20 September 2017, the cap did not apply to him.

39. During the hearing, the Defendants produced at my request a schedule setting out the alternative heat demand and subsidy figures, which I found helpful. It was indicative only – the figures were neither agreed nor proved.

"

Main heating system	**RdSAP version**	**EPC heat demand figure (space heating and hot water) in kWh**	**Annual payments**	**Total payments over up to 7 years' support available under DRHI**
Electric storage heaters	9.92	229,413	£37,919.28	£265,434.96
Ground source heat pump	9.92	179,619	£29,688.92	£207,822
Electric Storage heaters	9.93	193,313	£31,952.38	£223,666.66
Ground Source heat pump	9.93	143,519	£23,722.01	£166,054.07

Ground source heat pump	9.93	Capped to 30,000	£4,958.65	£34,710.55

1. The calculation in respect of a ground source heat pump using RdSAP v.9.92 was not modelled by Ricardo. No other EPC reflects a ground source heat pump using RdSAP v.9.92. The 179,619 kWh heat demand figure is therefore only an outline indication: it uses the 49,794 kWh difference between the ground source heat pump and electric storage main heating systems as assessed using RdSAP v.9.93 (193,313 – 143,519kWh) and applies that difference to the 229,413 figure for electric storage heaters as assessed under RdSAP v.9.92 and reflected in the EPC submitted by the Claimant with his application. Because there are likely to be differences between versions v.9.92 and v.9.93 of RdSAP that have not been fully addressed in the evidence, these figures can be illustrative only.

2. The figures for electric storage and ground source heat pump heating systems are the basis for the £8,230.36 figure identified at paragraph 5.b. of David Fletcher's Second Witness Statement (i.e. annual payments of £31,952.38, less £23,722.01 total £8,230.37). The penny difference is attributable to a calculation error: see the footnotes below for full details of calculations.

3. A tariff of £0.2089 and SPF value of 4.79 is used for all of the calculations."

Statutory framework

40. Relevant extracts from the 2014 Regulations are set out in the Appendix to this judgment.

Grounds of challenge

The Claimant's case

41. The Claimant submitted that the purpose of the subsidies paid under the DRHI Scheme was to provide financial support to consumers, to incentivise them to switch from non-renewable to renewable energy heating systems in the UK, thus reducing carbon emissions, and assisting the UK Government in meeting its carbon reduction targets in the Climate Change Act 2008 and its obligation under EU law to meet a renewable energy target of 15% by 2020.

42. Under the DRHI Scheme, the amount of the subsidy was not calculated precisely. The DRHI Scheme only estimated the heat energy required to heat a property, relying on the general assumptions in the EPC assessment, and applying a formula to it. Moreover, Ofgem and the 2014 Regulations permitted an applicant to rely upon an EPC based

upon a previous non-renewable heating system, rather than the new renewable heating system which was eligible for the subsidy. This enabled an applicant to calculate his potential subsidy in advance, and to decide whether it was affordable, in accordance with Ofgem's guidance and the online calculator. In light of this, Ofgem's rejection of the Claimant's EPC, on the grounds that the heat demand was overestimated and inaccurate as it was based on electric storage heaters rather than a ground source heat pump system, was contrary to the terms of the DRHI Scheme, as set out in the 2014 Regulations and contrary to Ofgem's guidance. Ofgem unfairly departed from past practice adopted in other cases. The effect of Ofgem's decision was to reduce the Claimant's subsidy significantly below the figure which he had calculated when deciding whether or not to proceed with installation of the ground source heat pump system.

43. The Claimant's grounds of challenge were as follows:

i) **Ground 1**: The 2014 Regulations did not confer any power to require the Claimant to provide a new EPC in the circumstances of his case and so Ofgem's decision was *ultra vires.*

ii) **Ground 2**: The Claimant had a legitimate expectation that his application would be determined on the basis of the EPC which he submitted in support of his application, in accordance with the 2014 Regulations, and/or representations in Ofgem's published guidance, and/or its past practice in respect of other applications. He relied upon the representations in the 2014 Regulations, Ofgem's published guidance, and past practice when he decided to install the ground pump heating system, to his detriment. Ofgem's decision was in breach of those representations and/or departed from past practice.

iii) **Ground 3**: Ofgem delayed the processing of the Claimant's application unreasonably, thereby causing him prejudice. His subsidy payments were unexpectedly delayed, causing him financial difficulties. By the date of Ofgem's decision, a revised methodology for EPC assessments had come into force (v.9.93) which was less favourable to the Claimant than v.9.92 which was in force when his March 2017 assessment was undertaken.

iv) **Ground 4**: The Claimant was discriminated against, and singled out for different treatment, because of the potentially high level of his subsidy. Other applicants have not been required to commission new EPCs to reflect either a change in their heating systems or a change in the RdSAP methodology.

The Defendants' response

44. In response the Defendants agreed with the Claimant as to the purpose of the DRHI Scheme, as set out in paragraph 41 above. However, the Defendants further submitted that the payment of subsidies under the DRHI Scheme had to be narrowly circumscribed because the payments were state aid measures, and thus contrary to the free market principles of the Treaty on the Functioning of the European Union

("TFEU"). In its report in 2013[1], the European Commission approved the DRHI Scheme as compatible with the internal market, pursuant to article 107(3)(c) TFEU, but only upon the basis that it was limited to compensation for the additional costs of renewable heat, as compared to the cost of a conventional fossil fuel. It was anticipated that over-compensation would be avoided by limiting the scope of the DRHI Scheme; by periodic reviews; and by use of the degression mechanism, which could adjust the level of support provided if demand for subsidies increased.

45. The Defendants submitted that, on a proper construction of the 2014 Regulations, Ofgem was entitled to require that the Claimant provide a new EPC in all the circumstances of the case, and it did so in a procedurally fair manner without undue delay or discrimination against the Claimant.

46. **Ground 1**: The Claimant's construction of the 2014 Regulations was flawed in that it failed to give effect to all the provisions of the regulatory scheme. In particular, the Claimant's assertion that regulation 18(1)(b) and (c) of the 2014 Regulations were exhaustive as to the circumstances in which Ofgem could request a new EPC was unwarranted in view of the express statutory language of regulation 18(1)(d) and the provisions of Schedule 4 Part 2.

47. Moreover, Ofgem's published guidance made reference to the power to request further EPCs, and did not limit the scope of such requests in the manner suggested by the Claimant.

48. In the circumstances of this case, Ofgem was entitled to require that the Claimant provide a new EPC since he would otherwise have obtained a windfall benefit – a subsidy far in excess of the actual renewable heating demands of his property – at the expense of the public purse.

49. **Ground 2**: The Claimant failed to identify any past practice or representations in Ofgem's guidance or the 2014 Regulations upon which the claimed legitimate expectations could be founded. Ofgem's guidance permitted new EPCs to be requested in circumstances such as those in the Claimant's case.

50. **Ground 3**: The length of time taken to process the Claimant's application was reasonable and fair in all the circumstances. It was lawful and proper to apply the version of RdSAP methodology in force at the date of any further EPC assessment. As v.9.93 RdSAP came into force on 19 November 2017, any delay by Ofgem after 19 November 2017 made no difference. Although the Claimant had not yet received any subsidy payments, once his application had been accredited, subsidy payments would be backdated to the date of his original application.

51. **Ground 4**: As clarified by the Supreme Court in *R (Gallaher Group and others) v Competition and Markets Authority* [2019] A.C. 96, there was no free-standing common law ground of judicial review arising from unequal treatment.

[1] State Aid No SA.35766 (2013/N) – United Kingdom. Extension of the Renewable Heat Incentive (RHI) to the domestic sector

The unlawful review

52. After the claim was issued, and Ofgem's internal documents were disclosed, it became apparent that there had been a breach of regulation 62(4) of the 2014 Regulations, which provides that a review must not be carried out by any person who was involved in the decision under review.

53. Ms Charlotte Morris, Senior Operations Manager at Ofgem, made the review decision and in her decision letter of 27 September 2018 she referred to the 2014 Regulations and stated "I can confirm that I was not involved in making the decision that has been reviewed". That statement was incorrect. As I have set out above, at paragraphs 28, 30, 31 and 32, Ms Morris was involved in email correspondence about the case following the audit; her name appeared on the submission to the I & P meeting; and she was listed as an attendee at the I & P meeting on 22 May 2018. Mr Fletcher, Deputy Director in Ofgem's E-Serve division, also said in his second witness statement that she continued to be copied into emails up to 19 June 2018.

54. Ofgem conceded the breach of regulation 62(4) of the 2014 Regulations and has offered the Claimant a fresh review. Obviously there was no purpose in holding such a review until the issues in dispute in this judicial review had been decided.

Ground 1: statutory power to require a new EPC

55. The First Defendant introduced the DRHI Scheme in furtherance of the objective of reducing carbon emissions, and meeting the target for using renewable and low carbon energy sources and technologies to supply energy needs, introduced by Directive 2009/28/EC on the promotion of the use of energy from renewable sources. Directive 2009/28/EC permits the use of financial "support schemes" to promote the use of energy from renewable sources by reducing the cost of that energy (articles 2(k) and 3.3).

56. The Claimant submitted that, on a proper interpretation of the 2014 Regulations, Ofgem only had power to require applicants to provide a new EPC in the limited circumstances specified in the regulations, none of which applied in this case. Therefore, Ofgem's request to the Claimant to provide a further EPC was *ultra vires*.

57. According to the Claimant, the only powers to require a further EPC were as follows:

    i) The requirement in regulation 17(2)(a) and paragraph 1(i) of Part 1 of Schedule 4, to provide the most recent EPC, issued less than 24 months before the date on which the application was made, in accordance with paragraph 1(2)(b) of Schedule 3.

    ii) The requirement in regulation 17(2)(b) to comply with such of the information specified in Part 2 of Schedule 4 as Ofgem may require, which may include, under paragraph 2(h):

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

iii) The requirement in regulation 18(1)(b) which provides:

> "(b)that the applicant provides details of a further Energy Performance Certificate … if the Authority has reason to believe that the applicant has not provided details of the most recent Energy Performance Certificate;"

iv) The requirement in regulation 18(1)(c) which provided:

> "(c)that the applicant provide details of a further Energy Performance Certificate for the eligible property if –
>
> (i)the applicant declares that … insulation cannot be installed in the property because of a reason set out in paragraph 1(4) of Schedule 3; and
>
> (ii)the Authority is not satisfied that the … insulation recommended in the recommendation report cannot be installed and has requested a new Energy Performance Certificate in which that insulation is no longer recommended in the recommendation report;".

58. The Claimant submitted, and the Defendants accepted, that the Claimant complied with the requirement in regulation 17(2)(a) and paragraph 1(i) of Part 1 of Schedule 4, to provide the most recent EPC, issued less than 24 months before the date on which the application was made, in accordance with paragraph 1(2)(b) of Schedule 3.

59. The Claimant submitted, and the Defendants accepted, that Ofgem did not require the Claimant to submit a further EPC as part of his initial accreditation application, and therefore Ofgem erred in relying upon the powers conferred by regulation 17(2)(b), in the decision letter of 21 August 2018 and the review letter of 27 September 2018.

60. The Claimant submitted that regulation 18 only confers powers on Ofgem to request a further EPC in the specific circumstances set out in either sub-paragraph 1(b) or sub-paragraph 1(c). Contrary to the Defendants' submissions, there is no residual power to request a further EPC pursuant to regulation 18(1)(d) and Part 2 of Schedule 4, as this power is confined to "other" information i.e. information not expressly provided for earlier in regulation 18.

61. In my judgment, the Claimant's interpretation of the 2014 Regulations was unduly narrow and constrained. The 2014 Regulations clearly confer powers enabling Ofgem to check the information provided in support of an application, and to seek further information where required, to ensure that the accreditation and the subsidy are consistent with the terms of the DRHI Scheme, and its objectives. In my view, this is unsurprising, given the complexity of the DRHI Scheme, the wide range of potential applications, and the large sums of money involved. All public bodies have a legal duty to ensure that taxpayers' money is spent properly and lawfully. As the Defendants rightly submitted, in construing the 2014 Regulations, it is appropriate to bear in mind that state aid is generally prohibited under EU law. The subsidies were only authorised by the European Commission for the DRHI Scheme on the basis that they would be

limited to compensation for the additional costs of renewable heat, as compared to the cost of a conventional fossil fuel.

62. Part 2 of Schedule 4 to the 2014 Regulations is headed "Additional information which may be required from an applicant for accreditation". Read together with regulation 17(2)(b), it empowers Ofgem to require an applicant to provide additional information in support of his accreditation application. Read together with regulation 18(1)(d), it empowers Ofgem, when considering an accreditation application, to request by notice that an "applicant provide such other information specified in Part 2 of Schedule 4 as the authority may require". Ofgem erroneously relied upon regulation 17(2)(b) in its decision and review letters as it did not in fact require the Claimant to provide a further EPC in support of his accreditation application. Ofgem only decided to ask the Claimant for a further EPC once the application had been submitted and was being considered for accreditation. Therefore, the relevant power was to be found in regulation 18(1)(d). However, the error made no difference to the decision in this case as the powers conferred by Part 2 of Schedule 4 apply under both regulation 17 and 18. Although regulation 18 is not mentioned in paragraph 2 of Part 2 of Schedule 4, it is referenced under the heading to Schedule 4.

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

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

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

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

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

65. The power in sub-paragraph 2(m) of Part 2 of Schedule 4 may be exercised by Ofgem when considering an accreditation application under regulation 18. Regulation 18(1) identified, in sub-paragraphs (b) and (c), two specific instances in which the maker of the 2014 Regulations anticipated that details of a further EPC could be required from an applicant, neither of which arose in this case. However, I could not accept the Claimant's submission that sub-paragraphs (b) and (c) are an exhaustive list of the circumstances in which a further EPC can be required. On an ordinary and natural construction, the broad residual power in sub-paragraph 1(d) caters for any other information which is not specified in the preceding sub-paragraphs of paragraph (1), including a further EPC for some reason other than those specified in sub-paragraphs (b) and (c). On the Claimant's construction, Ofgem would be powerless to request a further EPC even where, for example, irrefutable evidence emerged during the course

of the accreditation assessment that the EPC provided with the application was based upon a flawed assessment. That would be a startling restriction on Ofgem's powers.

66. In my judgment, regulation 19 does not support the Claimant's construction of regulation 18. Regulation 19 provides:

> "Where the Authority gives a notice under regulation 18(1), the applicant must comply with that request within—
>
> (a) three months of the date of the notice if the information is a new Energy Performance Certificate and regulation 18(1)(c) applies;
>
> (b) three months of the date of the notice if the heat generated by the plant for which accreditation is being sought must be metered under regulation 13 and the information is evidence that the metering requirements are met; or
>
> (c) 28 days of the date of the notice in any other case."

67. The Claimant submitted that the extended 3 month time limit in paragraph (a) applies to a request for a new EPC, in recognition of the need for additional time for it to be commissioned, and it confirms that such a request could only be made in the circumstances set out in regulation 18(1)(c). It was not intended that a new EPC could be required under regulation 18(1)(d), where only a 28 day time limit applied.

68. In my judgment, Ofgem's alternative construction of regulation 19 was correct. Regulation 19(a) prescribes two criteria: first, that the information required is a new EPC, and second, that regulation 18(1)(c) applies. It was implicit from the cumulative criteria in regulation 19(a) that there were situations other than those described in regulation 18(1)(c) in which information in the form of a new EPC can be requested, otherwise the word "and" in regulation 19(a) would be otiose. Where a new EPC is requested under either regulation 18(1)(b) or 18(1)(d), the shorter time limit of 28 days applied. This was explained in version 1.0 of Ofgem's published guidance entitled 'Frequently Asked Questions: Domestic Renewable Heat Incentive (RHI) FAQs about Energy Performance Certificates (EPCs)', dated July 2016. At page 12, the July 2016 FAQs stated:

> "**21. Ofgem requested a new EPC even though I just got a new one; can I refuse?**
>
> At Ofgem, we administer the Domestic RHI scheme on behalf of DECC. To help protect the public purse, we carry out desk and site audits to verify that evidence and declarations are accurate. If we have reason to believe that the information on your EPC is incorrect, we may ask you to provide us with a new EPC. Should this occur, we'll be happy to explain to you our reasons why we believe a new EPC is needed."
>
> ……

> **"23. I have been asked to get a new EPC; how much time do I have to get one?**
>
> It depends on what we are asking you for.
>
> If we ask you to follow the recommendations on your domestic EPC to add loft and/or cavity wall insulation, you need to send us a new domestic EPC within 3 months.
>
> For any other reason you need to send us a new domestic EPC within 28 days.
>
> ……"

69. The Claimant also submitted that Ofgem did not have power to conduct a site visit. In my view, Ofgem was entitled to exercise the power conferred by paragraph (2) of regulation 18 (to arrange for a site inspection to satisfy itself that the plant should be given accreditation) in the circumstances of this case, in the light of the high subsidy claimed, and to check whether the EPC had been issued on the basis of an accurate assessment.

70. The Claimant further submitted that Ofgem had no discretion to refuse the Claimant's accreditation, as regulation 21(1) imposed a duty to give accreditation where Ofgem is satisfied that the criteria in paragraph (2) are met, namely, the application has been properly made under regulation 17 and the plant meets the eligibility criteria. In my judgment, this interpretation could not be correct, since it did not take into account Ofgem's powers under regulation 18 to seek further information when considering an application for accreditation. Moreover, regulation 22(1)(d) provides that an accreditation application could be rejected if, inter alia, information requested by Ofgem is not provided within the time limit under regulation 19.

71. In my judgment, Ofgem's published guidance did not provide support for the Claimant's interpretation of the 2014 Regulations, as it referred to Ofgem's powers to seek further information, including another EPC. To avoid repetition, I refer to my consideration of the guidance under Ground 2.

72. For these reasons, the Claimant failed to establish ground 1.

Ground 2: Legitimate expectation

73. The Claimant submitted that he had a legitimate expectation that Ofgem would grant him accreditation because he met the eligibility requirements in regulation 21(1) of the 2014 Regulations. Ofgem had made the following representations in its published guidance, namely, that Ofgem would:

    i) Accept an EPC that was up to 24 months old at the date of application;

    ii) Accept an EPC based upon a previous non-renewable heating system, and not the renewable heating system which was the basis of the application;

    iii) Calculate the subsidy due based upon that EPC;

iv) Not ask an applicant to submit a new EPC based upon the renewable heating system which was the basis of the application, provided the EPC which was submitted with the application met the eligibility criteria;

v) Not ask an applicant to submit a new EPC because of a RdSAP methodology change.

74. Representation no. 6 was that it was possible for an applicant to calculate the subsidy entitlement due prior to installation of the new renewable heating system, and rely upon the subsidy figure for investment purposes.

75. The Claimant further submitted that Ofgem's practice had always been in accordance with these representations.

76. The Defendants submitted that the Claimant had failed to establish a claim of legitimate expectation, applying the following legal principles.

77. It was well-established that, in order to found a claim of legitimate expectation, "… it is necessary that the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification" (*R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, per Bingham LJ at 1569G). In *R (Bancoult) v Foreign Secretary (No. 2)* [2009] 1 AC 453, Lord Hoffmann approved this test, at [60], and added "the question is what the statement unambiguously promised" (at [62]). The Defendants submitted that this was a high preliminary hurdle in the path of a party seeking to establish a legitimate expectation and was as onerous in the context of substantive expectations as procedural expectations: *R (Patel) v GMC* [2013] EWCA Civ 327 at [40]- [41].

78. In construing the representation, the question for consideration was how, on a fair reading of the statement, it would have been reasonably understood by those to whom it was made: *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, per Dyson LJ, at [56]. The Court was not concerned with the Claimant's subjective views as to either a representation having been made or its content. The Claimant's subjective assessment of a representation as being a clear and unambiguous promise could be rejected if unsupported by the totality of the evidence.

79. Alleged representations to the world at large were considered in *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, where Laws LJ held at [46]:

> "These cases illustrate the pressing and focussed nature of the kind of assurance required if a substantive legitimate expectation is to be upheld and enforced. I should add this. Though in theory there may be no limit to the number of beneficiaries of a promise for the purpose of such an expectation, in reality it is likely to be small, if the court is to make the expectation good. There are two reasons for this, and they march together. First, it is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to diverse class. As Lord Woolf MR said in *Ex p. Coughlan* (paragraph 71):

> "May it be … that, when a promise is made to a category of individuals who have the same interest it is more likely to be considered to have binding effect than a promise which is made generally or to a diverse class, when the interests of those to whom the promise is made may differ or, indeed, may be in conflict?"

The second reason is that the broader the class claiming the expectation's benefit, the more likely it is that a supervening public interest will be held to justify the change of position complained of. In *Ex p Begbie* I said this (1130G — 1131B):

> "In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear … In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players … The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes.""

80. The Supreme Court in *R (Davies) v HMRC* [2011] 1 WLR 2625, held that establishing a legitimate expectation deriving from conduct or practice was particularly onerous. Lord Wilson said, at [49]:

> "….it is more difficult for the appellants to elevate a *practice* into an assurance to taxpayers from which it would be abusive for the revenue to resile and to which under the doctrine it should therefore be held. "The promise or practice … must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured": *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, para 43, per Laws LJ. The result is that the appellants need evidence that the practice was so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to a group of taxpayers including themselves of treatment in accordance with it."

81. The Defendants also referred to *Samarkand Film Partnership No 3 v HMRC* [2017] EWCA Civ 77, as being analogous on the facts. The HMRC guidance in issue in that

case was published online. The guidance was stated to be based on the law, rather than a restriction upon or qualification to it. Further, there were extensive warnings limiting reliance on the guidance. Giving the judgment of the Court, Henderson LJ held, at [126]:

> "By no stretch of the imagination, however, can the representations relied on by the taxpayers be characterised as "devoid of relevant qualification". To the contrary, the guidance is permeated with qualifications relating to tax avoidance."

The Defendants submitted that substantially the same observation should be made with regard to the Ofgem guidance.

82. In my judgment, the Claimant's representations 1 to 5 correctly reflected aspects of the operation of the DRHI Scheme, but the Claimant failed to establish that either the 2014 Regulations or Ofgem's guidance represented to applicants that representations 1 to 5 were unqualified, and would be applied in all cases.

83. The 2014 Regulations conferred upon Ofgem discretionary powers to require an applicant to submit a further EPC, as set out under ground 1 above.

84. On reading Ofgem's published guidance on the criteria to be met and the procedures to be followed, it was clear that Ofgem did not purport to provide a comprehensive guide, applicable in all cases. It repeatedly cross-referred to the 2014 Regulations, and at no stage did the published guidance qualify or restrict Ofgem's entitlement to exercise its powers to seek further information, including a further EPC, under regulations 17 and 18 and Schedule 4, Part 2.

85. Version 3.0 of Ofgem's 'Essential Guide for Applicants' was published in March 2016. It was the most recently published version of that guidance document when the Claimant applied for DRHI accreditation. It did not qualify or limit Ofgem's entitlement to request a new EPC under the 2014 Regulations. At page 3, it stated: "All of our guide materials are based on the Domestic Renewable Heat Incentive Scheme Regulations." The underlined words provided a hyperlink to the DRHI Regulations. It went on to state:

> "This guide is designed to provide most of the information about the scheme that applicants will need. It doesn't give full information about certain aspects of the scheme; instead you'll see links to the relevant section in our detailed Domestic RHI Reference Document."

Additionally, page 22 of the 2016 Guidance referred to Ofgem's power to seek further information, including an updated EPC.

86. Ofgem's 'Domestic RHI Reference Document', version 4.0 dated October 2016, was the most recent version when the Claimant submitted his application for DRHI accreditation. Again, it did not qualify or limit Ofgem's entitlement to request a new EPC under the DRHI Regulations. At page 3 it stated:

> "The information provided in this document is … intended to provide assistance with the interpretation of certain provisions of the Domestic RHI Regulations [hyperlink] but does not cover all the provisions and is not necessarily representative or applicable in all situations that may arise. Also, this document should be read in conjunction with the Regulations and should not be regarded as a substitute for them. If you have any questions or need further clarification, our Applicant Support Centre is available at …."

87. Ofgem's publications also included a "frequently asked questions" or "FAQ" document which made it clear that Ofgem could ask for a further EPC in certain circumstances. Version 1.0 of a document entitled 'Frequently Asked Questions: Domestic Renewable Heat Incentive (RHI) FAQs about Energy Performance Certificates (EPCs)' was dated July 2016. The July 2016 FAQs were the most recent version of that document when the Claimant submitted his application for accreditation. At page 10, the July 2016 FAQs stated:

> "**21. Ofgem requested a new EPC even though I just got a new one; can I refuse?**
>
> At Ofgem, we administer the Domestic RHI scheme on behalf of DECC. To help protect the public purse, we carry out desk and site audits to verify that evidence and declarations are accurate. If we have reason to believe that the information on your EPC is incorrect, we may ask you to provide us with a new EPC. Should this occur, we'll be happy to explain to you our reasons why we believe a new EPC is needed."
>
> ……
>
> "**23. I have been asked to get a new EPC; how much time do I have to get one?**
>
> It depends on what we are asking you for.
>
> If we ask you to follow the recommendations on your domestic EPC to add loft and/or cavity wall insulation, you need to send us a new domestic EPC within 3 months.
>
> For any other reason you need to send us a new domestic EPC within 28 days.
>
> ……
>
> If you can't provide us with a new EPC within this timeframe you need to let us know as soon as possible or we may reject or revoke your application."

88. In my view, this guidance made it clear to applicants that Ofgem reserved the right to seek a further EPC if it had concerns about the EPC submitted with the application.

89. In response to the Claimant's submission that it was not Ofgem's practice to require further EPCs, Ofgem provided to the Court examples of other cases where further EPCs had been required, both before and after accreditation. As Ofgem's internal minutes revealed, the Claimant's case had unusual features and so was not on all fours with the examples provided, but in my view, Ofgem's practice of requiring further EPCs was clearly evidenced by the Defendants, and refuted the Claimant's assertion.

90. Turning to representation no. 6, the First Defendnat provided an online calculator to enable a prospective applicant to obtain an estimated figure for the subsidy to which he might be entitled. However, the Claimant found he was not able to use it to calculate an estimated figure because the heat demand figure specified in the March 2017 EPC exceeded the upper limits which had been set for the online calculator. Therefore no representation was made to him via the online calculator.

91. Nonetheless, it was relevant that the online calculator website pages made it clear to prospective applicants, including the Claimant, that figures obtained via the online calculator could not be relied upon. The calculator and accompanying documentation contained a number of express qualifications on its use such that calculations of the calculator were not representations capable of founding a legitimate expectation as to the level of subsidy payments an applicant was to receive. The qualifications included the following:

i) In Image 2:

> "IMPORTANT: The estimated Domestic RHI payments provided by this calculator may not reflect the actual payments you might receive through the Domestic RHI."

ii) At paragraph 3 of guidance accompanying the calculator entitled 'About the Domestic Renewable Heat Incentive (Domestic RHI) payment calculator':

> "**Are Domestic RHI payment calculator estimates taken into account when applying for the scheme with Ofgem?**
>
> Although sponsored by Government, this calculator and the estimates it gives you has no bearing on Ofgem's decisions regarding payments or other elements of eligibility to the Domestic RHI scheme. The calculator should just be seen as an indication, not a guarantee, of what someone's payments might be."

iii) The Q&A document provided:

> "**Am I guaranteed to get these tariffs when/if I apply?**
>
> No. This is just an estimate of the payments you could receive through the domestic RHI scheme, based on the tariff applicable at the time.".

92. The Claimant's evidence was that, as he could not use the online calculator, he estimated his likely subsidy for himself by following a worked example in the 'Essential Guide for Applicants', v.3.0 March 2016, at p.26. These were stated to be "example figures and are not representative of the tariff you will receive". The example demonstrated the method of calculation, but unlike the online calculator, it did not provide an estimated figure. The calculation turned upon the heat demand figure taken from the EPC, together with the SPF, which were variables. If the Claimant was required to provide a further EPC, under regulation 17 or 18 of the 2014 Regulations, this would potentially alter the calculation. At best, this was an indication; it was not sufficiently "clear, unambiguous and devoid of relevant qualification" to amount to a representation which could form the basis of a legitimate expectation.

93. In conclusion, the Claimant failed to establish a settled practice or representations in Ofgem's guidance or the 2014 Regulations upon which the claimed legitimate expectations could be founded. For these reasons, the Claimant failed to establish ground 2.

Ground 3: Delay

94. The Claimant submitted that Ofgem unreasonably delayed the processing of the Claimant's application.

95. Ms Morris, in her review decision letter of 27 September 2018, addressed the Claimant's concern about the delay in resolving his application. She explained the delay in the following terms:

> "You have outlined that you believe Ofgem to be 'gaming' your accreditation by deliberately delay the accreditation. I am sorry that you feel this way, but I can assure you that this is not the case.
>
> I acknowledge that your application has taken us longer to process than the majority of applications that we receive. That is because you are due to receive a much higher than average RHI payment. We therefore carry out additional checks compared to applications with lower expected payments which necessarily will take us longer to carry out. You submitted your application on 14 September 2017. This was just before a regulation change on 20 September 2017, which introduced 'Heat Demand Limits', which effectively cap the amount of RHI payments that can be made to individual properties, As a result of this regulation change, we received a large volume of applications, many of which were for larger properties which, as I have outlined above, require a more in depth review. This large volume took us a while to process, which also contributed to the longer than usual review time for your application.
>
> ……

> We asked you to provide information on 19 September, which you sent to us on 30 October 2017. On 15 February 2018 we notified you that your installation had been selected for an audit. We then notified you of the outcome of the audit on 21 August 2018. It took us this length of time to complete the audit, as we wanted to make sure that we came to the right decision when asking you to provide a new EPC. This decision was not taken lightly and we consulted with several different departments before confirming this to you."

96. Excessive and unreasonable delay by a public body in discharging its statutory functions may amount to procedural unfairness, irrationality, or an abdication of discretion. Although there was some delay in this case, which was regrettable, I did not consider that it was so excessive and unreasonable as to give rise to a ground for judicial review.

97. Straightforward applications for accreditation could be processed automatically, but it was Ofgem's practice to refer more complex applications, such as the Claimant's, for manual review. That necessarily entailed some delay. I accepted Ofgem's evidence, from Mr Chau and Ms Morris, that there was a surge in applications prior to the introduction of the cap on annual heat demand and subsidies, with effect from 20 September 2017. Although the Claimant argued that the number of applications during this period was not unusually high, I accepted the evidence in Ms Morris' review letter, that there was an increase in the number of complex applications which were referred for manual review. In those circumstances, the delay was not unreasonable.

98. In my judgment, it was legitimate for Ofgem, in the exercise of its discretion, to refer this application for a site audit, to investigate further the reasons for the very high annual heat demand figure. The audit was carried out within a reasonable time.

99. I accepted that there was delay between the completion of the Ricardo report on 28 March 2018 and the issuing of the decision letter on 21 August 2018. However, it was apparent from the evidence that the Claimant's case was under active consideration during this time, and it was referred to a high level. As Ms Morris explained, there was consultation among different departments, and the decision was not taken lightly. In those circumstances, I do not consider that the delay was excessive and unreasonable.

100. The Claimant submitted that he had been prejudiced by the delay because by the time his application was decided, v.9.93 RdSAP had been introduced, which had the effect of significantly reducing the level of the Claimant's subsidy. However, v.9.93 RdSAP was introduced with effect from 19 November 2017. Given the complexities of the Claimant's application, I did not consider that there was any reasonable prospect of Ofgem making a final decision prior to 19 November 2018, even in the absence of any delay.

101. Once v.9.93 RdSAP was in force, Ofgem was entitled to require an EPC in accordance with it. EPCs were defined in regulation 2 of the 2014 Regulations as having the meaning given by "regulation 2(1) of the Energy Performance of Buildings (England and Wales) Regulations 2012". The revised RdSAP methodology was approved pursuant to regulation 24 of the Building Regulations 2010 on 19 November 2017.

102. The Claimant has experienced financial difficulties because of the non-payment of subsidy whilst Ofgem reached its decision. However, once his application is accredited, he will be entitled to be paid the subsidy due to him, back-dated to the date of accreditation.

103. The delay in accreditation as a result of the issue of these proceedings was the responsibility of the Claimant, not Ofgem.

104. For these reasons, the Claimant failed to establish ground 3.

Ground 4: Discrimination

105. The Claimant submitted that Ofgem was discriminating against him because of his high value application, and treating him differently to other applicants by imposing a requirement that he should obtain a further EPC, which would be assessed under the current methodology v.9.93 RdSAP.

106. In the recent case of *R (Gallaher Group and others) v Competition and Markets Authority* [2019] A.C. 96, the Supreme Court confirmed that inconsistent or unequal treatment was not a freestanding ground for judicial review. Lord Carnwath said, at [24]:

> "….the domestic law of this country does not recognise equal treatment as a distinct principle of administrative law."

Lord Sumption agreed, and added that the principle of equality was no more than a particular application of the ordinary requirement of rationality imposed on public authorities (at [50]).

107. The Claimant has wisely not pleaded irrationality in this case. In my judgment, Ofgem was entitled to reach the conclusion, in the exercise of its discretion as the administrator of the DRHI Scheme, that the size of the discrepancies identified in the audit and the substantial over-compensation which the Claimant would gain as a result, did distinguish his case from others, and justified a request for an EPC based upon the renewable heating system installed at his property.

108. Therefore the Claimant failed to establish ground 4.

Conclusion

109. For the reasons set out above, the Claimant's claim for judicial review is dismissed, save in respect of the unlawful review conducted by Ms Morris, which was conceded by the Defendants.

Appendix

Domestic Renewable Heat Incentive Scheme Regulations 2014 (as amended by SI 2016 No. 257) as at 14 September 2017 (historic version obtained from Westlaw)

PART 1

Introductory provisions

2. Interpretation

…

"Energy Performance Certificate" has the meaning given by—

(a) in relation to a property in England and Wales, regulation 2(1) of the Energy Performance of Buildings (England and Wales) Regulations 2012;

(b) in relation to a property in Scotland, regulation 2(1) of the Energy Performance of Buildings (Scotland) Regulations 2008;

…

["relevant EPC" means—

(a) on the date on which an accredited domestic plant providing heat to an RHI property is given accreditation, the most recent Energy Performance Certificate for that property for which details have been provided to the Authority; or

(b) if, after the date on which an accredited domestic plant providing heat to an RHI property is given accreditation, the Authority has requested a new Energy Performance Certificate for that property, the most recent Energy Performance Certificate for that property for which details have been provided to the Authority pursuant to such a request; **]** [2]

…

PART 3

Accreditation of plants

17.— Accreditation applications

(1) An owner of a plant which meets the eligibility criteria may apply to the Authority for that plant to be given accreditation if that person owns or occupies the [eligible] [3] property to which the plant provides heat.

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[2] Definition substituted by Renewable Heat Incentive Scheme and Domestic Renewable Heat Incentive Scheme (Amendment) Regulations 2016/257 Pt 3 reg.16(f) (March 24, 2016)

[3] Word inserted by Domestic Renewable Heat Incentive Scheme (Amendment) Regulations 2015/143 reg.11(2) (February 5, 2015)

(2) Accreditation applications must include—

(a) all of the information specified in Part 1 of Schedule 4;

(b) such of the information specified in Part 2 of Schedule 4 as the Authority may require;

…

18.— Powers of the Authority when considering an accreditation application

(1) The Authority may by notice request—

(a) that information about the plant or any eligible meters installed in relation to it be provided—

(i) by the certified installer who was responsible for the installation of the plant;

(ii) by the certified installer who was responsible for, or checked, the installation of the meters; or

(iii) by the applicant and verified by the relevant certified installer referred to in paragraph (i) or (ii) as applicable;

(b) that the applicant provide details of a further Energy Performance Certificate for the eligible property if the Authority has reason to believe that the applicant has not provided details of the most recent Energy Performance Certificate;

(c) that the applicant provide details of a further Energy Performance Certificate for the eligible property if—

(i) the applicant declares that loft insulation or cavity wall insulation cannot be installed in the property because of a reason set out in paragraph 1(4) of Schedule 3; and

(ii) the Authority is not satisfied that the loft insulation or cavity wall insulation recommended in the recommendation report cannot be installed and has requested a new Energy Performance Certificate in which that insulation is no longer recommended in the recommendation report; and

(d) that the applicant provide such other information specified in Part 2 of Schedule 4 as the Authority may require.

(2) The Authority may arrange for a site inspection to be carried out in order to satisfy itself that the plant should be given accreditation.

19. Time limits for provision of information

Where the Authority gives a notice under regulation 18(1), the applicant must comply with that request within—

(a) three months of the date of the notice if the information is a new Energy Performance Certificate and regulation 18(1)(c) applies;

(b) three months of the date of the notice if the heat generated by the plant for which accreditation is being sought must be metered under regulation 13 and the information is evidence that the metering requirements are met; or

(c) 28 days of the date of the notice in any other case.

20. Conditions of accreditation

The Authority may make an accreditation subject to any conditions it considers to be appropriate.

21.— Accreditation

(1) Where paragraph (2) applies, subject to regulation 22, the Authority must—

(a) give accreditation for the plant;

(b) notify the participant that the accreditation application has been successful;

(c) enter on the central register the participant's name and such other information as the Authority considers necessary for the proper administration of the domestic RHI scheme;

(d) notify the participant of any conditions attached to the accreditation;

(e) provide the participant with a written statement (a "statement of eligibility") including the following information—

(i) the RHI date for the plant;

(ii) the applicable initial tariff and details of how subsequent tariffs will be calculated;

(iii) details of the frequency and timetable for payments;

(iv) the tariff lifetime and tariff end date;

(v) if the plant is a heat pump, the seasonal performance factor for the heat pump; and

(vi) the deemed annual heat generation for the plant; and

…

(2) This paragraph applies where—

(a) an accreditation application has, in the Authority's opinion, been properly made in accordance with regulation 17;

…

22.— Rejection of accreditation applications

(1) The Authority may reject an accreditation application if—

(a) the Authority is not satisfied that the accreditation application has been properly made in accordance with regulation 17;

(b) the Authority is not satisfied that the plant meets the eligibility criteria;

(c) the Authority has reason to believe that one or more of the applicable ongoing obligations will not be complied with; or

(d) subject to paragraph (2), information requested by the Authority is not provided within the time limit specified in regulation 19.

(2) The Authority must not reject an accreditation application on the basis that information has not been provided in accordance with regulation 19(c) if—

(a) the applicant contacted the Authority before the 28 day period expired—

(i) stating that the information sought is not yet available;

(ii) stating that the information cannot be provided; or

(iii) providing alternative information; and

(b) fewer than three months have passed since the date of the first notice in which the Authority requested the information.

(3) Where the Authority decides to reject an accreditation application it must notify the applicant that the application has been rejected, giving reasons.

…

PART 5

RHI payments

…

29.— Calculation of deemed annual heat generation

(1) The amount of heat in kWh which an accredited domestic plant is deemed to generate every 12 months (the "deemed annual heat generation") is calculated in accordance with this regulation.

…

(5) If the accredited domestic plant is a heat pump which provides both space heating and domestic hot water heating to the RHI property, the deemed annual heat generation is calculated in accordance with the following formula—

$$A \times (1 - {}^{1}/_{B})$$

where—

(a) A is the heat demand for space heating and water heating specified in the relevant EPC for that property;

(b) B is the seasonal performance factor for the heat pump.

…

PART 7

Ongoing obligations for participants

39. Ongoing obligations: general

A participant ("P") must comply with the following ongoing obligations, as applicable—

(a) if the accredited domestic plant is a biomass plant, upon a request by the Authority P must provide to the Authority evidence as to the type of fuel purchased and used in that plant for any period specified in the request during which P was a participant;

(b) P must not receive any grant from public funds for any of the costs of the purchase or installation of the accredited domestic plant other than any grant which was notified to the Authority when the accreditation application was made;

(c) P must ensure that the accredited domestic plant continues to meet the eligibility criteria;

(d) P must comply with any condition attached to P's accreditation;

(e) P must keep the accredited domestic plant in good working order;

(f) if P is not the owner of the RHI property, P must provide a copy of any notification under regulation 40(1)(i) or 40(1)(j) to the owner or owners of that property;

(g) P must repay any overpayment in accordance with any notice served under regulation 60;

(h) P must not move the accredited domestic plant to a new location;

(i) P must comply with such other administrative requirements that the Authority may specify in relation to the effective administration of the domestic RHI scheme;

(j) on receipt of a request for access under regulation 56 or regulation 63(3)(b), P must—

(i) allow the Secretary of State, the Authority or the Authority's authorised agent, as applicable, access to the RHI property **[** and any related property **]** [4] to carry out any of the activities described in those regulations; and

[4] Words inserted by Domestic Renewable Heat Incentive Scheme (Amendment) Regulations 2015/143 reg.13(a) (February 5, 2015)

(ii) offer reasonable cooperation to that person;

(k) P must comply with any other requests by the Secretary of State under regulation 63(3)(c);

(l) if P does not live in the RHI property P must have, at all times, agreement from all occupants of **[** the RHI property and any related property **]** [5] that those occupants will allow the Secretary of State, the Authority or the Authority's authorised agent reasonable access in the event of a request under regulation 56 or regulation 63(3)(b) and will co-operate with such a request; and

(m) P must not seek accreditation under the Renewable Heat Incentive Scheme Regulations 2011 [6] for an accredited domestic plant, or any other plant which provides heat to the same RHI property as an accredited domestic plant.

40.— Ongoing obligations: changes affecting accredited domestic plants

(1) A participant ("P") must notify the Authority if, at any time in the tariff lifetime—

(a) P becomes aware that any of the information provided in support of the accreditation application for P's accredited domestic plant is incorrect;

(b) the accredited domestic plant no longer generates heat for the RHI property;

(c) a replacement plant is installed which generates heat for the RHI property;

(d) any other plant is installed which generates heat for the RHI property;

(e) the RHI property is occupied for less than 183 days in any 12 month period after the RHI date for the plant, unless the Authority has provided a metering statement for the plant;

(f) the accredited domestic plant no longer provides heat for an eligible purpose;

(g) P becomes aware that P will not be able to comply with an ongoing obligation;

(h) P ceases to comply with an ongoing obligation;

(i) P, or another owner of the accredited domestic plant, intends to transfer ownership of all or part of the accredited domestic plant within 28 days;

(j) any change in ownership of all or part of the accredited domestic plant has taken effect;

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[5] Words substituted by Domestic Renewable Heat Incentive Scheme (Amendment) Regulations 2015/143 reg.13(b) (February 5, 2015)

[6] Amended by S.I. 2012/1999, S.I. 2013/1033, S.I. 2013/2410 and S.I. 2013/3179.

(k) there is any other change in circumstances which may affect P's eligibility to receive RHI payments; or

(l) any meter which is required under a metering statement for the accredited domestic plant is moved, is replaced, is reset or ceases to operate, be in good working order or be an eligible meter, or any eligible meters are added or removed.

(2) A notification under this regulation must be made within 28 days of P becoming aware of the circumstances to which the notification relates.

…

SCHEDULE 3

Eligible properties

Regulations 4 and 18

1.—

(1) The requirements set out in this Schedule in relation to a property are that an Energy Performance Certificate ("EPC") has been issued for the property on the basis that it consists of a dwelling and—

(a) the property is an eligible new-build property; or

(b) the requirements in—

(i) sub-paragraph (2) are met; and

(ii) either sub-paragraph (3) or (4) are met.

[(2) The requirements referred to in sub-paragraph (1)(b)(i) are that—

(a) the property was first occupied before the first commissioning date for the plant; and

(b) the period between the date on which the EPC was issued and the RHI date is less than 24 months. **]** [7]

(3) The requirements referred to in sub-paragraph (1)(b)(ii) are that the EPC—

(a) does not include a recommendation report; or

[7] Substituted by Renewable Heat Incentive Scheme and Domestic Renewable Heat Incentive Scheme (Amendment) Regulations 2016/257 Pt 3 reg.26 (March 24, 2016)

(b) includes a recommendation report which does not recommend that loft insulation or cavity wall insulation be installed.

…

SCHEDULE 4

Information required for accreditation

Regulations 17, 18, 45, 48 and 69

PART 1

Information required from all applicants making an accreditation application

1.

The information referred to in regulation 17(2)(a) is—

…

(i) the unique reference number for the Energy Performance Certificate for the property to which the plant for which accreditation is sought provides heat which is the most recent Energy Performance Certificate for the property on the date on which the application is made [.] [8]

[…] [8]

PART 2

Additional information which may be required from an applicant for accreditation

2.

The information referred to in regulation 17(2)(b) is—

(a) information to enable the Authority to satisfy itself as to the identity of the individual completing the application;

(b) where an individual is making an application on behalf of the applicant, evidence which satisfies the Authority that the individual has authority from that person to make the application on its behalf;

(c) details of the plant for which accreditation is sought, including its make, model and cost;

(d) evidence regarding the value of any grant from public funds and details of the body from which the grant was given;

[8] Revoked by Renewable Heat Incentive Scheme and Domestic Renewable Heat Incentive Scheme (Amendment) Regulations 2016/257 Pt 3 reg.27 (March 24, 2016)

(e) any information held by the applicant about the plant's certification in accordance with regulation 8;

(f) details of the property to which the plant for which accreditation is sought provides heat, including evidence that the applicant owns or occupies the property;

…

(h) a copy of any Energy Performance Certificate for the property including, if applicable, any Energy Performance Certificate issued on or after the RHI date for the plant;

…

(k) details regarding any other plant which provides heat to the same property as the plant for which accreditation is sought;

(l) evidence as to any of the other matters for which the applicant has given a declaration; and

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

…