



**Appeal number: NV/2019/0019**

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
ENVIRONMENT**

**MARGARET LEACH**

**Appellant**

**- and -**

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

**Respondent**

**TRIBUNAL: JUDGE ALISON MCKENNA (CP)**

**Sitting in public at Columbus House, Newport on 3 March 2020**

**The Appellant appeared in person  
The Respondent was represented by Charles Streeten, counsel**

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## DECISION

1. This appeal is allowed.
2. The Secretary of State's Decision of 2 October 2019 is hereby withdrawn and the matter is remitted to the Secretary of State to make a fresh decision, which must take account of my reasons set out below.

## REASONS

### *A: Background to Appeal*

3. The Green Deal is a statutory scheme intended to assist in increasing the energy efficiency of residential properties. The scheme operates through companies called 'Green Deal Providers'. Green Deal Providers offer loans and arrange the installation of relevant equipment at their customers' properties under a 'Green Deal Plan'. They are required to conduct themselves in accordance with a Code of Practice. If they breach the Code of Practice, they may be sanctioned.

4. This appeal concerns the Secretary of State's Decision on 2 October 2019 to impose the sanction of 'reduction' on GDFC Assets Limited ("GDFC") as a 'relevant person' in relation to breaches of the Code of Practice by a Green Deal Provider known as Home Energy and Lifestyle Management Limited ("HELMS"), in relation to Green Deal Plan ID AC0000089176.

5. Mrs Leach is a 'person directly affected' by that decision, because she entered into the Green Deal Plan referred to above in respect of her home. As such, she has a right of appeal against the decision to this Tribunal, pursuant to regulation 87 of The Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012<sup>1</sup>.

6. The Tribunal convened an oral hearing on 3 March 2020. The Appellant attended in person and Charles Streeten, counsel, represented the Respondent. GDFC was aware of these proceedings but decided not to apply to be joined as a party. Its written submissions to the Respondent were included in the Tribunal's hearing bundle.

7. I am grateful to Mrs Leach and to Mr Streeten for their clear oral and written submissions. I have considered carefully the agreed hearing bundle comprising some 550 pages.

8. I reserved my Decision, which I now provide in this document.

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<sup>1</sup> <http://www.legislation.gov.uk/ukxi/2012/2079/contents/made>

*B: The Law*

9. The Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012 were made pursuant to powers contained in the Energy Act 2011.

10. The Regulations materially provide as follows:

**24.**—(1) *A green deal provider must—*

(a) *comply with any provisions of the code of practice which apply to green deal providers;*

...

**53.** *Subject to chapter 3, the Secretary of State may impose under this Part the sanctions of—*

(a) *cancellation or reduction on a relevant person;*

(b) *compensation further to cancellation on an improver or a notifier, as applicable;*

(c) *a compliance notice on a green deal provider;*

(d) *a financial penalty on a green deal provider;*

(e) *suspension on an authorised person other than a green deal provider;*

(f) *withdrawal on an authorised person.*

...

**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.*

...

**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.*

...

**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.*

...

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

...

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.

11. This is the first appeal under these Regulations to require determination by the Tribunal. The Tribunal's jurisdiction in determining an appeal under regulation 87 above is *de novo* i.e. it requires the Tribunal to stand in the shoes of the Secretary of State and to take a fresh decision about whether to issue a sanction notice - and if so which type of sanction notice - on the evidence before it at the hearing, giving appropriate weight to the reasons for the Secretary of State's decision. The nature of such an appeal is described in *El Dupont v Nemours & Co v ST Dupont* [2003] EWCA Civ 1368 by May LJ at [96]<sup>2</sup>.

12. In taking a fresh decision, I note that the Tribunal is not required to undertake a reasonableness review of the Respondent's decision, but instead to decide whether it would itself issue the same Notice on the evidence before it. The Tribunal has no supervisory jurisdiction – see *HMRC v Abdul Noor* [2013] UKUT 071 (TCC)<sup>3</sup>.

13. In *R (Hope and Glory Public House Ltd v City of Westminster Magistrates' Court* [2011] EWCA Civ 31<sup>4</sup>, the Court of Appeal decided that “careful attention” should be paid to the reasons given by an original decision-maker, bearing in mind

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<sup>2</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2003/1368.html>

<sup>3</sup> [http://taxandchancery\\_ut.decisions.tribunals.gov.uk/Documents/decisions/HMRC\\_v\\_Abdul\\_Noor.pdf](http://taxandchancery_ut.decisions.tribunals.gov.uk/Documents/decisions/HMRC_v_Abdul_Noor.pdf)

<sup>4</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2011/31.html>.

that Parliament had entrusted it with making such decisions. However, the weight to be attached to the original decision when hearing an appeal is a matter of judgment for the Tribunal, “*taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given in the appeal*”. The approach recommended in *Hope and Glory* was approved by the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] 1 WLR 4799<sup>5</sup>.

14. Pursuant to rule 15 (2) (a) (ii) of the Tribunal’s Rules<sup>6</sup>, the Tribunal may when hearing an appeal admit evidence whether or not it was available to the previous decision maker. The burden of proof in a *de novo* appeal rests with the Appellant as the party seeking to disturb the status quo. The usual standard of proof to be applied by the Tribunal in making findings of fact is the balance of probabilities. Regulation 87 (2) requires the Tribunal to determine the appropriate standard of proof in hearing an appeal against a Sanction Notice. Having considered the parties’ submissions, I agree with them that the civil standard (‘the balance of probabilities’) should be applied in this case.

### *C: The Facts*

15. The background facts which were not in dispute may be summarised as follows.

16. Mrs Leach entered into a Green Deal Plan with HELMS in 2014. HELMS had taken a lump sum from a company called the Green Deal Finance Company Ltd in return for the assignment of the benefit of the customer’s loan repayments to that company. GDFC Assets Ltd (“GDFC”) is a subsidiary of the Green Deal Finance Company, and the company to which Mrs Leach’s payments under the Plan were due. For this reason, although Mrs Leach’s Green Deal Provider was HELMS, it is GDFC which falls to be dealt with as the ‘relevant person’ for the purposes of a decision whether to impose a sanction of cancellation or reduction under regulation 53 (a) of the 2012 Regulations, referred to above.

17. Mrs Leach’s agreement with HELMS provided for the installation of solar panels on the roof of her property in South Wales. The solar panels were paid for, in part, by a regulated credit agreement (known as ‘Green Deal Finance’) and, in part, by a ‘Feed-in Tariff’ (‘FIT’) transfer option.

18. The FIT transfer option operates as follows. The FIT is a payment made by an energy supplier to people who produce renewable energy on a small scale, remunerating them for their contribution to the national grid. It is possible to assign the benefit of this payment to a third party. In Mrs Leach’s case, her FIT was assigned to a company called PV Solar Investments Limited (‘PVSI’), which is

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<sup>5</sup> <https://www.supremecourt.uk/cases/docs/uksc-2015-0126-judgment.pdf>

<sup>6</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/367600/tribunal-procedure-rules-general-regulatory-chamber.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/367600/tribunal-procedure-rules-general-regulatory-chamber.pdf)

legally distinct from HELMS and GDFC. The Secretary of State has no relevant powers in relation to PVSI.

19. The solar panels were fitted in October 2014 and in December that year Mrs Leach complained to HELMS that she was being charged in excess of £1 a day for the purchase of the solar panels. She said she had not understood that this would happen as she thought they were provided for free and she felt that she had been misled by HELMS about this cost.

20. The Secretary of State imposed a financial penalty on HELMS in 2015 for its breaches of the Code of Practice in other cases. HELMS is no longer in existence, having ceased trading and finally been dissolved in 2018.

21. Mrs Leach complained to the Financial Ombudsman Service, which investigated and issued a report concluding that Mrs Leach's Plan should be cancelled because it had been mis-sold to her by HELMS. However, the Ombudsman could not impose a sanction on HELMS as by then it no longer existed. Accordingly, the Secretary of State treated Mrs Leach's case as having been referred to him for determination of the relevant sanction under regulation 59 of the 2012 Regulations.

22. The Secretary of State issued a Notice of Intention to GDFC on 14 March 2019, in which he proposed to impose the sanction of 'cancellation' of Mrs Leach's Green Deal Plan.

23. GDFC made representations. Having considered GDFC's representations, the Financial Ombudsman again recommended the sanction of cancellation. However, the Secretary of State decided instead to impose the sanction of 'reduction' and issued a Sanctions Notice on 2 October 2019. It is this decision which is the subject of this appeal.

24. This factual background gives rise to a complex set of legal issues. As at the date of the hearing, I would summarise the relevant issues as follows:

(i) Mrs Leach apparently signed a credit agreement with HELMS, which partially financed the purchase and installation of the solar panels on her roof. She says she was misled into signing this contract, which she says she would not have signed if she had known that it would last for 23 years (until she was into her 70's) and as it charged an interest rate three times higher than that which she could otherwise have obtained with her excellent credit rating. There is doubt as to whether she did in fact sign all the relevant documents (see paragraph 39 below);

(ii) HELMS broke the terms of the Code of Practice in its dealings with its customers. It was penalised for this. It also received a financial penalty from the Information Commissioner's Office in respect of 'cold-calling'. It went into administration and it no longer exists. Whilst Mrs Leach points to the common personalities involved in HELMS and GDFC, they are legally separate entities;

(iii) Mrs Leach's credit repayments remain due and must be made to GDFC because HELMS had borrowed money from GDFC and agreed to repay it using Mrs Leach's payments. Mrs Leach's Green Deal Plan obliged her to make payments to GDFC;

(ii) Mrs Leach still has the solar panels on her roof. These produce energy but PVSI receives the payments for that energy under the contractual terms of Mrs Leach's Green Deal Plan as to the FIT transfer option. If Mrs Leach removed the panels or changed her energy supplier, she would be in breach of her subsisting contract with PVSI;

(iii) PVSI is contractually obliged to maintain and repair the solar panels for 20 years, but the liability for maintaining the roof underneath the panels obviously remains with Mrs Leach. She says that PVSI have not responded to her enquiries about maintenance and repair of the solar panels;

(iv) If Mrs Leach wishes to sell her house, she would need to pass on the solar panels and the contractual arrangements which surround them to her purchaser. She thinks this makes it unlikely that she could sell her house;

(v) Mrs Leach has not so far received the benefit of the reduced energy costs which she thought she would achieve under the Green Deal Plan. It is accepted that her costs exceed her savings. This is a breach of the so-called 'golden rule' imposed by regulation 30 of the 2012 Regulations. The Secretary of State has calculated that Mrs Leach can achieve annual energy savings of £120 from the solar panels, although this will vary over the lifetime of the Plan as usage and energy costs change. Mrs Leach disputes this figure, telling the Tribunal that she could obtain an energy savings of £100 per year at the very best;

(vi) The Secretary of State's decision of 2 October 2019 upheld Mrs Leach's ongoing legal liability to GDFC but reduced the amount she owed, so that her annual payments would match her assumed energy savings. This would, in the Secretary of State's view, put Mrs Leach in the position that she would have been in if the Plan had taken effect as sold to her;

(vii) However, Mrs Leach emphatically does not wish to remain in any kind of contractual relationship with GDFC or PVSI, especially for such a lengthy future period. She wants her contractual obligation to GDFC to be cancelled by the Secretary of State and for her credit payments to be refunded in total;

(viii) GDFC submits that, if Mrs Leach's Plan is cancelled, she will receive a 'windfall' in that she will have obtained the benefit of the solar panels for free. The effect of a cancellation would also be that GDFC would effectively have to compensate Mrs Leach for the loss of the FIT income, whilst PVSI continued to retain the benefit of the FIT transfer option. GDFC submits that this outcome would be irrational and disproportionate;

(ix) Mrs Leach told the Tribunal that she intends to bring proceedings against PVSI once these proceedings are concluded, as she wants the solar panels removed from her roof. She is still within the six-year time limit for bringing such proceedings. The



Secretary of State concluded that removal of the panels was not a realistic option, as in her submissions of May 2019 Mrs Leach stated that she did not intend to litigate (page 207). However, Mrs Leach had clearly changed her position on this point by the time of the hearing.

*D: The Notice of Intention and the Sanction Decision*

25. The Notice of Intention dated 14 March 2019 (page 154) informed GDFC that the Secretary of State had made certain initial findings of fact (set out in an annexe) and proposed to impose the sanction of cancellation on GDFC in respect of Mrs Leach's Plan. The initial findings of fact included the identification of four separate breaches of the Code of Practice which directly impacted on Mrs Leach's ability to understand the nature of the transaction being offered to her, and contained the initial conclusion that *Mrs Leach would not have entered the credit agreement if not for HELMS' breaches of the CoP* and that *Cancellation of the Plan takes Mrs Leach back as closely as possible to the position she would have been in had HELMS not breached the CoP*. The Notice of Intention also noted that *We cannot be certain of what was said by the salesperson when dealing with Mrs Leach. However, the pattern of behaviour alleged in the complaint is consistent with that upon which sanctions were imposed on HELMS by the Secretary of State ...on 19 November 2015*.

26. GDFC made a 92-paragraph representation in response to the Notice of Intention (page 160). It submits that Mrs Leach's complaint that she did not know she was entering into a loan agreement is unsustainable because standard documentation was used by HELMS and signed by her, she had made and produced contemporaneous notes which showed her understanding, and that her original complaint had actually been about the inadequate level of savings, so she has been inconsistent. GDFC accepted that HELMS had been penalised in the past for breaches of the Code of Practice but argued that they were different types of infringement, not amounting to a pattern of conduct which could be prayed in aid here. It also denied that there had been breaches of the CoP consistent with the Secretary of State's initial findings. GDFC submitted that the Secretary of State's approach to the initial fact-finding was flawed. Further, it was submitted that the proposed sanction of cancellation was both unreasonable and disproportionate in its impact on GDFC.

27. The Secretary of State considered submissions from Mrs Leach, responding to GDFC's submissions, before reaching the final Sanction Decision. It is clear from the papers before me that the Financial Ombudsman Service also provided representations on GDFC's submissions (see paragraph 39 below) but these are not referred to in the Secretary of State's final decision, so it seems they were not considered. The Secretary of State's decision letter dated 2 October 2019 (page 218) summarises GDFC's and Mrs Leach's submissions, and goes on to find that HELMS committed four substantive breaches of the CoP, amounting to a breach of the requirement to comply with the CoP contained in the Regulations. The Secretary of State found, inter alia, that *Mrs Leach did not understand the nature of the arrangement she was entering into....Based on the documentary evidence it appears to the Secretary of State that is likely that Mrs Leach was made aware that the Plan was a credit agreement but was led to believe her savings under the Plan would off-*

*set the loan repayments. It appears that Mrs Leach did not fully understand the nature of the Plan nor the savings risks involved.* The Secretary of State concluded that Mrs Leach had suffered substantial losses as a result of the breaches and that the sanction of reduction, rather than cancellation, would put Mrs Leach closest to the position she would have been in if she had not been misled by HELMS.

28. The Secretary of State's decision was to impose the sanction of reduction, back-dated to December 2014 (the date of Mrs Leach's first complaint to HELMS). The reduction has the effect of reducing Mrs Leach's liability under the Plan from a total of £8,359.56 to £2,727.50 (a reduction of £5,632.06). This reduction is to operate in two parts: (i) an immediate refund of £1,132.29 to compensate Mrs Leach for the overpayments she has already made under the Plan; and (ii) a reduction in her daily charge to lower her monthly payments to £9.99. The Secretary of State concluded that the reduction of Mrs Leach's payments to around £120 a year would match her assumed energy savings and that this is how the Plan had been supposed to work.

#### *E: The Appeal - Pleadings and Submissions*

29. Mrs Leach's Notice of Appeal relied on grounds that (i) she has been left 'out of pocket' by the Secretary of State's decision; (ii) the solar panels are likely to require repair and replacement at her own cost; (iii) she will be unable to sell her house whilst the panels remain in place; (iv) her energy savings are in the region of £100 a year, but she could achieve twice that saving if she were permitted to use a different supplier. She seeks the cancellation of the Plan and refund of the total loan payments. In additional submissions, Mrs Leach states that she had understood from HELMS that the solar panels would not cost her any money, she did not realise she was entering into a credit agreement and would not have done so if she had understood this as she has an excellent credit rating and did not need to borrow at such high interest rates. She understood HELMS and PVSI to be effectively the same company given that they share the same address and same director.

30. The Secretary of State's Response to the Notice of Appeal relied on the Secretary of State's decision as one which was considered and proportionate, and asked the Tribunal to uphold it. It referred to the Secretary of State's consideration of GDFC's submissions and those of Mrs Leach, but not those of the Financial Ombudsman. It is submitted that removal of the panels is not a realistic option because of Mrs Leach's contractual obligation to PVSI, and that this factor 'strongly militates' in favour of upholding the sanction of reduction. It suggests that Mrs Leach had not disputed that she had understood the Plan to involve a credit agreement.

31. In her Reply, Mrs Leach submitted that the Secretary of State had missed the point that the Plan was supposed to deliver savings, not merely for her to 'break even'. She asks for an explanation as to why the initial proposed sanction of cancellation was changed to one of reduction and disputes the suggestion that cancellation would offer her a 'windfall'. She takes issue with the Secretary of State's conclusion that she was 'likely' to have known she was entering into a credit agreement, stating that it was just as likely that she did not know the nature of the

agreement and that the Secretary of State was wrong to suggest she had not disputed this, as she had been disputing it for five years.

32. GDFC confirmed that it did not wish to be joined as a party to this appeal and exhibits its submissions in response to the Notice of Intention (page 311).

33. In his oral submissions to the Tribunal, Mr Streeten described the Secretary of State's decision of 2 October 2019 as one that was full, gave clear reasons and was given in the light of all the evidence. He submitted that the Secretary of State was best placed to undertake the necessary evaluative exercise so that the Tribunal should give weight to his decision. He submitted that the Regulations' proportionality requirement related to the nature of the breach rather than the nature of the harm caused. In this respect it was not intended to punish the Green Deal Provider. The Secretary of State's decision was intended to put Mrs Leach in the position she would have been in had she not been misled as to the likely savings she would be able to make.

34. Mrs Leach interjected to say that her insurance guarantee in respect of the panels lasted for ten years only, leaving her exposed to liability for them thereafter. In answer to a question from the Tribunal as to whether, in reaching the reduction decision, the Secretary of State had considered Mrs Leach's exposure to liability by keeping the Plan in place, Mr Streeten replied that only matters placed in evidence before the Secretary of State had been taken into account.

35. In answer to further questions from the Tribunal, he submitted that the Secretary of State's finding that it was *likely* that Mrs Leach understood she was entering into a credit agreement should not be subjected to an overly-legalistic analysis and that it should be read benevolently to constitute a balance of probabilities finding.

36. In her submissions in reply, Mrs Leach asked rhetorically why she would have entered into a credit agreement on these terms? She said the answer was that she did not know it was a credit agreement. In relation to the sanction of reductions, she objected strongly to being tied into this agreement until she was in her 70s and her husband in his 80s. She said she had thought that she could still sell the house with solar panels on the roof, not realising at the time that she would have to pass on the credit agreement too. She said that the continuation of the Plan with reduction would affect her and her husband's credit score and their ability to borrow in the future.

37. Mrs Leach told the Tribunal that if she can get the Plan cancelled then she will bring proceedings against PVSI to have the solar panels removed. She was concerned that PVSI, like HELMS, would go into administration so that no one would have responsibility for the solar panels.

38. I asked Mr Streeten if cancellation had ever been imposed in a case of this nature and he said it had not, but that the Department's approach was evolving.

## *F: Evidence*

39. No formal witness evidence was relied on by either party. There is a statement from Mrs Leach at page 374, which is undated and appears not to have been written for this appeal. The “contemporaneous notes” of a meeting with the HELMS representative are at page 384, but Mrs Leach says this was her husband’s note and she hadn’t been present at the meeting when this was written.

40. The documentary evidence in the Tribunal’s hearing bundle included two reports from the Financial Ombudsman Service, an email from an officer in Trading Standards Scotland (who had investigated HELMS’ activities in that jurisdiction), a letter from Mrs Leach’s Member of Parliament, and considerable copy correspondence between Mrs Leach and various bodies, including responses to her requests for information under the Freedom of Information Act 2000. Copies of the contractual arrangements between Mrs Leach and HELMS are exhibited (pages 356 to 373).

41. At page 539, Mrs Leach exhibits a copy of a letter sent to her from HELMS dated 29 August 2014, which confirms that her Green Deal Credit Agreement has been executed by HELMS. This date was before she herself first met the HELMS representative on 4 September. She has written a note that her husband met a cold caller from HELMS on 20 August and showed him their electricity bill, which seemed to have generated the 29 August letter.

42. The two reports prepared by the Financial Ombudsman Service are dated January and May 2019. In the first report (page 145), it is recommended that Mrs Leach’s Green Deal Plan should be cancelled because:

- *HELMS breached the COP by behaving dishonestly and unfairly towards Mrs Leach and failing to adequately explain the savings associated with her solar PV system.*
- *This behaviour by HELMS is consistent with that for which the company has already been sanctioned by the SoS.*
- *There have been other breaches of the relevant requirements by HELMS in respect of other properties.*
- *Mrs Leach has suffered a substantive loss in having entered into a credit agreement based on the HELMS’ unfair and misleading sales practices. We are satisfied that Mrs Leach would not have entered the credit agreement but for HELMS’ breaches of the Green Deal COP. We therefore consider cancellation of the agreement to be both proportionate to the breach and fair to Mrs Leach by returning her so far as possible to the situation she would have been in had HELMS not breached the COP.*

43. The report also concludes that Mrs Leach has been consistent in saying that she did not know that a form of loan was involved in her Plan. There is a further suggestion that one of the key documents was not signed by her, as her husband

apparently wrote her name on it in her absence. At page 152 of the bundle, it is stated that HELMS had *effectively accepted* this in an email to the Information Commissioner's Office.

44. In the second report from the Financial Ombudsman Service (page 208), written after sight of GDFC's representations on the Notice of Intention, the Ombudsman concluded that Mrs Leach was credible when she said she did not know she was entering into a credit agreement and that "*the documents alone would not be sufficient evidence of what she was told by HELMS' salesperson. We need to consider wider surrounding circumstances...there are some concerns about the documentation as well*" (page 211). Whilst leaving the final decision as to the appropriate sanction to the Secretary of State, the Financial Ombudsman Service's report comments (page 216) that:

*"As HELMS no longer exists it is not clear what would happen if something goes wrong with the panels – who would provide the warranty? In addition, the consumers were expected to have the benefit of an insurance if the provider ceased to exist. But in several HELMS cases there is confusion as to what exactly happened with this insurance. The consumers are not sure of who they could turn to if something goes wrong with the solar panels.*

*Further, the Green Deal loan lasts for a very long term. So by simply reducing the loan (as opposed to cancellation) the consumers are left with a loan they did not want and which they claim weren't told of at the outset. And this problem is exacerbated where the customers were elderly when the sale was made....we have seen cases where the term of the loan runs until the consumers reach their 80s, 90s (and in few cases after they cross 100 years of age).*

*So, in a reduction scenario, even though the loan value gets reduced, the fact remains that the consumers are still liable for repayment of the loan into their 80s and 90s. That clearly distresses them. It doesn't seem right that due to HELMS' mis-sale such vulnerable consumers should continue to be liable for the loan repayments.*

*And as BEIS had pointed out, there appears to be multiple as well as severe breaches involving HELMS".*

45. The email from Trading Standards Scotland (page 263) describes HELMS as operating in areas of low-income and focussing on an elderly demographic. The 'hallmarks' of a HELMS transaction are described, gained from a review of witness statements. This refers to a statement from the HELMS' representative that the solar panels are 'free' and that '*the Government pays for them*'. It states:

*It is clear that they are not being told that the measures will require to be paid for and will require the consumer to enter into a Green Deal Finance Agreement. They are then presented with a HELMS contract, which they are told to sign, without proper explanation of what the implications are. The copy provided to the consumer is the 4<sup>th</sup> page of a carbonated document and is*

*practically illegible, leading to the consumer not seeing the cost of the measures. Consumers report being ‘bamboozled’, ‘confused’ and subjected to a blizzard of paperwork which the sales representative presents and instructs them to ‘sign here’. In the case of solar panels, a section of this contract titled FiT transfer (paid by investor) (sic) a figure of between £3,500 and £3,800 is inserted. Within the other forms presented is a form which effectively assigns the right to the Feed in Tariff to the company PV Solar Investments and records a ‘buy out’ price corresponding to the figure on the contract. Effectively, the consumer is now in a credit agreement spanning 23 or more years, without their knowledge, paying for the measures, and in the case of solar panels will receive no income from any excess electricity generated by them. The credit agreement itself is a multi-page document and the page requiring signature is headed “TOTAL ESTIMATED FIRST YEAR SAVINGS ACKNOWLEDGEMENT” and it is not readily clear that it is a credit agreement.*

46. The letter from Mrs Leach’s MP (page 280) encloses a letter dated 11 December 2018 from the Rt Hon Clare Perry, then Secretary of State, regarding HELMS. She acknowledges that *many consumers say they were unaware they were entering into a credit agreement. The consumer’s position was often worsened because HELMS encouraged them to part-fund the installation by assigning the rights to any Feed-in Tariff from the measures to a separate company – one related to HELMS.*

47. Mrs Leach also exhibits her 2018 Solar Energy Calculator Results from the Energy Savings Trust, which set her installation costs of £8,000 against her total profit after 25 years of “*minus £1,900*”.

#### *G: Conclusions*

48. In reaching my conclusions on this appeal, I remind myself that I stand in the shoes of the Secretary of State and must make a fresh decision considering all the evidence before me as at the date of the hearing. I note that there is considerably more information before me now than appears to have been considered by the Secretary of State in making his decision on 2 October 2019 and I would not, in the light of all the evidence, make the same decision.

49. I find it difficult to give weight to the Secretary of State’s reasons in reaching a decision which was apparently made without considering the substantial body of relevant evidence and submissions which I have seen. Accordingly, my view is that the decision of 2 October 2019 must be set aside and re-made, taking into account the relevant factors which I have highlighted below.

50. Turning to the legislative basis for issuing a sanction, I agree with the Secretary of State that HELMS committed a number of breaches of the Code of Practice, which put them in breach of the over-arching requirement to comply with the Code of Practice. I agree that these breaches were “severe” within the terms of regulation 67 (1) (a) and that the bill payer, Mrs Leach, thereby suffered “substantive loss” for the purposes of regulation 67 (3). This puts the Secretary of State in the position of being

able to impose the sanction of cancellation or reduction on GDFC under regulation 67 (3).

51. I note that regulation 79 requires any sanction imposed to be *proportionate to the breach for which it is imposed*. I cannot find in the Secretary of State's decision letter any proportionality analysis that links the seriousness of the breaches found to have been committed with the sanction imposed for those breaches. Looking at the Notice of Intention and the Notice together, it looks as though the Secretary of State had considered that cancellation or reduction were both proportionate to the breaches for which a sanction was merited, but that other factors influenced the final choice as to which of those sanctions to impose. It seems to me that a fresh decision should provide a clearer explanation of why either sanction is merited, with reference to the breaches themselves, in order to satisfy the proportionality requirement. If the deciding factor is the ability to put Mrs Leach as close as possible into the position she would have been if the Plan had taken effect as sold to her by HELMS, then it seems to me that her unforeseen exposure to liability for the maintenance and repair of the solar panels must also be considered.

52. I also find it difficult to give weight to the Secretary of State's decision in view of the fact that it failed to make clear findings of fact on disputed matters. Mr Streeten submitted that the finding that it was *likely* that Mrs Leach understood she was entering into a credit agreement meant that the Secretary of State was satisfied on the balance of probabilities that this was *more likely than not*. He may be right, but it seems to me it could have been better expressed. Of more concern than the terminology, however, was the failure to balance GDFC's submission that Mrs Leach had been inconsistent in her approach and that her claim not to have understood the nature of the agreement was unsustainable against the other documentary evidence before me which suggests that HELMS' *modus operandi* had been found by the relevant authorities to include bamboozling its customers on this very point. A fresh decision must consider this evidence carefully and weigh it against GDFC's heavy reliance on the strictly compliant format of the contractual documentation.

53. The Secretary of State proceeded on the basis of his understanding that Mrs Leach was not intending to bring proceedings against PVSİ for the removal of the solar panels however, as I have explained, she made a different submission to me. It follows that the Secretary of State's conclusion that the removal of the panels was not a realistic option, described in the Response as a material factor in deciding to impose the sanction of reduction rather than cancellation, cannot stand. Mrs Leach impressed me as a woman of great determination and resourcefulness. Over the past four years she has engaged with Trading Standards, the Advertising Standards Authority, The Financial Ombudsman Service, the Information Commissioner's Office, her Member of Parliament, and BBC Wales in her efforts to right the wrong she feels was done to her. If she says she intends to bring proceedings against PVSİ then I would take her at her word. That being the case, it will be necessary for the Secretary of State to consider again whether cancellation or reduction is the appropriate sanction.

54. Finally, whilst I am not here conducting a procedural review, I observe that I found it surprising that the Secretary of State considered it appropriate, having sought

comments on a Notice of Intention to cancel Mrs Leach's Plan, to decide to reduce it without any prior indication of this change of course. This meant that neither Mrs Leach nor GDFC were given the opportunity to comment on the proposed terms of the reduction or to dispute the calculations there made. It seems to me that it would have been fairer for the Secretary of State to have issued a fresh Notice of Intention inviting representations on the proposal to impose the sanction of reduction before issuing a final decision. In the absence of a second Notice of Intention, Mrs Leach had no alternative but to appeal to the Tribunal and this has undoubtedly been more resource-intensive for the public purse.

55. For all the above reasons, I have concluded that the Secretary of State's decision of 2 October 2019 cannot stand and so I allow this appeal and withdraw it. I accept Mr Streeten's sensible proposal that in doing so I should remit the matter to the Secretary of State to make a fresh decision, in which he will exercise his own skill and judgement but must take into account all the evidence placed before me in deciding this appeal, and pay careful attention to the matters I have referred to in paragraphs 48 to 53 above.

**(Signed)**

**Judge Alison McKenna  
Chamber President**

**DATE: 3 April 2020  
PROMULGATE DATE: 6 April 2020**

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