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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

2017 No. 6543-01

IN THE MATTER OF AN APPLICATION BY MICHAEL DORAN AND ANOTHER FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT FOR THE ECONOMY AND THE MINISTER FOR THE ECONOMY IN CONNECTION WITH THE RENEWABLE HEAT INCENTIVE SCHEME

(NO. 2)

DEENY J

[1] This is an application by Michael Doran and D.A. for judicial review of the decision of the Minister for the Economy and his Department ("the Department")to release into the public domain the names and other personal data of or information concerning recipients of funding under the non-domestic Renewal Heat Incentive Scheme in Northern Ireland. The applicants seek an order of certiorari to quash that decision, a declaration that the decision is unlawful and an injunction prohibiting release of the information.

[2] On 27 January 2017, following an initial application before me on 24 January 2017, I granted the applicants leave to bring the proceedings on a number of grounds arising from their Order 53 statement. The grounds are overlapping. The applicants claim the benefit of Article 8 of the European Convention on Human Rights ("ECHR"), the Data Processing Act 1998, a privacy policy attached to the application form for the Northern Ireland Renewable Heat Incentive ("RHI") Scheme, an argument of substantive legitimate expectation and an argument that there has been procedural unfairness in arriving at the decision in that the Minister has failed to take into account relevant considerations. An interim injunction was granted.

[3] The first applicant is the Chairman of the Renewable Heat Association of Northern Ireland and represents a number of owners or operators of accredited RHI

installations. The second applicant is one of those operators who, he avers in his affidavit, has spent some £300,000 in installing boilers on his premises to burn wood pellets and receive in turn the financial support provided by Government under this scheme. He was granted anonymization as D.A. at the initial hearing until further Order.

[4] As Mr Doran himself is not a recipient of funds he is an applicant here only on behalf of his Association.

[5] At the hearing before me on 22 and 23 February 2017 it emerged that a number of persons who had applied for accreditation under the scheme and obtained accreditation had, nevertheless, not in fact received any grant aid from the Department. As it was the Minister's intention in a decision to disclose the names of recipients of grant aid it seems to me that clearly those who have not received any grant aid should not have personal data released. This would include BW, a person accredited under the scheme who brought separate proceedings of a similar kind to those brought by Mr Doran. Mr Michael Humphreys QC appeared with Ms Anna Rowan for BW. In the circumstances it was not necessary to call on them although they were present for the hearing on 22nd and 23rd. That application was adjourned by me. [Authorial underlining throughout].

[6] At that judicial review hearing Mr Gerald Simpson QC appeared with Mr Richard Shields for the applicants Mr Doran and DA and Dr Tony McGleenan QC appeared with Mr Philip McAteer for the respondents. That hearing was arranged at the earliest possible date to allow an exchange of affidavits and skeleton arguments. The urgency arises from the fact that the Minister will cease to hold office on 2 March, the day of the elections to the Northern Ireland Assembly. As Dr McGleenan pointed out that election was in fact triggered by the controversy about this scheme. It would be to unfairly deprive the Minister of his role if a decision on this application was not delivered prior to that date. I have undertaken to deliver a decision and, if possible, a judgment by that date, which I now do.

[7] Inevitably in the circumstances this judgment will be less refined than would otherwise be the case.

[8] In particular I would propose to recite some of counsels' arguments in the course of my consideration of the different grounds for challenging the decision rather than setting them out in sequence in extenso. I have nevertheless taken them all into account. I am grateful to counsel for their able written and oral arguments.

[9] The scheme itself operates under the Renewable Heat Incentive Scheme Regulations (NI) 2012. These Regulations to which I will turn in a moment were made under Section 113 of the Energy Act 2011 (UK). That Act in turn was prompted by EU Directive 2009/28/EC – Energy from Renewable Sources. Recital 19 of that Directive established that there should be mandatory national targets for energy from renewable sources. The European Union target was to be 20% by 2020

(Recital 8). Support schemes were permitted which would be an exception to state aid prohibitions so that they would allow approximately a 12% return on capital invested. One of the reasons for controversy is, as counsel for the respondents said, that many recipients are in fact achieving a 100% return or more on investment.

[10] By paragraph L/140/46 of the Directive the UK target of 15% from renewable sources by 2020 was set. On foot of that the Act was passed and Regulations were implemented here.

[11] As is now perhaps notorious the Regulations in Northern Ireland closely followed the equivalent Regulations in England and Wales in most respects but departed from them in a number of key regards. In particular no cap was provided on the amount of kilowatt hours a recipient of grant aid could claim for in the course of any year.

[12] It is important, for the purposes of this hearing and the entitlement or otherwise of the Minister to disclose the names of recipients of payments to look at certain aspects of the Regulations. Regulation 3 reads as follows:

> "Renewable Heat Incentive Scheme
>
> 3.-(1) These Regulations establish an incentive scheme to facilitate and encourage the renewable generation of heat and make provision regarding its administration.
>
> (2) Subject to Part VII at Regulation 24, the Department must pay participants who are owners of accredited RHI installations payments referred to in these Regulations as 'periodic support payments', for generating heat that is used in a building for any of the following purposes –
>
> (a) heating a space;
>
> (b) heating liquid;
>
> (c) for carrying out a process."

It is relevant for these purposes to note the statutory obligation on the Department to pay the owners of the installations in accordance with Part VII in Regulation 24. This is relevant to the issue as to whether is one dealing here with a binding contract between the parties or with a public law claim, subject to public law principles.

[13] By Regulation 22 an owner of an eligible installation may apply for that installation to be accredited. That is to be done in writing. The Department is

obliged, if the application has been properly made and the plant is eligible, to accredit the eligible installation and to "enter on a central register maintained by the Department the applicant's name and such other information as the Department considers necessary for the proper administration of the scheme" (22(6)(c)). This particular provision was not addressed at the hearing but can be seen to give the Department the right to use the applicant's name and such other information as is necessary for the proper administration of the scheme. How far that phrase extends was not something on which I received submissions but it would tend to support the Department's wish to disclose.

[14] Regulation 33 bears the rubric "On-going Obligations: General". It begins: "Participants must comply with the following on-going obligations, as applicable –". There then follows a long series of obligations on participants including the duty to record the type and amount of fuel used and to comply with the conditions of their accreditation. One relevant obligation is to found at (p): "They must not generate heat for the predominant purpose of increasing their periodic support payments". One of the aspects of the scheme which emerged in the hearings before me was that the level of support for boilers under 100 kilowatt in capacity was 6.5 pence per kilowatt hour while the level of support for those of over 100 kilowatts was less than a quarter of that at 1.5 pence per kilowatt hour. It may be that generating heat from a number of 99 kilowatt boilers, of which a large number appear to have been chosen by participants under this scheme, in a single location, as opposed to diverse locations might constitute a breach of that obligation at 33(p). The rate for boilers under 20kWth was 6.8 pence. A partial cap was introduced from 18.11.2015.

[15] Regulation 36 provided for the payment of periodic support payments to participants. The Department "must calculate the tariff rates each year in accordance with paragraph (7) and publish on or before 1 April each year a table of tariffs for the period commencing on 1 April that year and ending with 31 March of the following year". As mentioned above there were no sub-paragraphs (9) and (10) of that Regulation, unlike England and Wales.

[16] Under Regulations 43 to 45 the Department has a power to temporarily or permanently withhold periodic support payments to investigate alleged non-compliance or on-going failure to comply or withhold or reduce periodic support payments where there has been "a material or repeated failure" by a participant to comply with an on-going obligation.

[17] It is appropriate to observe at this point that Mr Doran's association not only represents living individuals, "natural persons" as they are known in European Law and as appeared from the list exhibited to his affidavit but also limited companies, "legal persons" as they are known in European law. It is common case that living individuals have certain protections under the Data Processing Act of 1998. It is also contended that Article 8 of the European Human Rights Convention is engaged. The legal persons as corporate bodies cannot avail either of the 1998 Act or the Convention, subject to the argument that identification of them may identify natural

persons or living individuals. For the limited companies it is therefore of very considerable importance to identify what they agreed, as it might be on one view binding in a contractual way on the Department or what legitimate expectation they have arising out of the forms that they completed to be accredited to the scheme. I now turn to what is agreed to be the relevant application form.

[18] The form is to be found at trial bundle 1/201. Its title is: "Application Form for the Northern Ireland Renewable Heat Incentive". I pause there to say that it does not therefore claim to be or take the form of a contract. It is an application for accreditation.

[19] At 1/202 one finds, inter alia, the following bullet point. 'Ofgem will require personal information relating to the authorised signatory of an account in order to verify their identity and assist in fraud prevention.' This like the other matters refers to Ofgem. It is of relevance to note that it is not the Department itself. I accept Mr Simpson's submission that in law Ofgem was acting as the agent for the Department as its principal. Nevertheless I think it of some limited relevance at least that the assurances on which he relies were made by Ofgem and not by the then Minister or the then Department. It is not wholly unlike the situation that arose in Finucane v The Secretary of State [2017] NICA 7 where I observed the greater liberty that a government had to depart from a policy or legitimate expectation made by a previous government. Where the legitimate expectation of confidentiality here, insofar as it went, was created by an agent it may be thought that it makes it less onerous on a principal, identifying some overriding public interest, to resile from the expectation created. That would not be the case if the recipient of the legitimate expectation had acted to his or her detriment. That is not a case made by the applicants here. Those applicants who were accredited and have received grant aid have benefited from the scheme, rather than suffering a detriment, albeit as I will touch on later, to greatly varying extents.

[20] The application form then requires detailed information from the applicant. One question I note is at 8.5: "Are you/your organisation a 'large enterprise' as defined by State aid rules?" That question refers to a footnote, 15, which reads: "This will apply if you are not classed as a small, medium sized enterprise (SME)". The rules regarding State aid within the European Union differ between large enterprises and SMEs.

[21] Section 10 (1/212) deals with heat use and it is apparent from that that a very wide range of uses is permissible to avail of the scheme. Paragraph 10.5 requires the applicant to enter the average hours per week that "your installation operates for". But it goes on to say that if it is in continuous operation you should input 168 i.e. 24 hours multiplied by seven days a week. Counsel submits that there is nothing improper in an accredited operator operating their boilers to that extent. That is if it is for a legitimate purpose.

[22] Given the controversial situation where operating boilers attracted a higher degree of support than the actual cost of the fuel that was being burned that is a significant provision in the original scheme.

[23] Attention was drawn to footnote 21 to section 14.1. 14.1 required an applicant to enter the capital cost of their installation excluding VAT. The footnote reads: "This information is required for monitoring purposes. This information will only be reported in aggregate to preserve commercial sensitivity". The disclosure that the Minister wished to make did not involve a disclosure of the capital costs of installation. The applicants make a different point i.e. that the public, if disclosure is permitted, will see some recipients receiving large sums of money without realising that, like the applicant DA, they will have expended large sums of money in purchasing and installing the boilers.

[24] One notes that the form is addressed to the NI Renewable Heat Incentive Accreditation Team at Ofgem, 9 Millbank, London. In the lead up to the hearing the Department disclosed a document of 1 December 2015. No issue was taken about the date although that is clearly some years after the scheme came into effect. It is said to be strictly in confidence and restricted. It refers to itself as "these arrangements" entered into between the Department of Enterprise, Trade and Investment and the Gas and Electricity Markets Authority (GEMA). Ofgem is an acronym and trading name for the Office of Gas and Electricity Markets which is governed by GEMA. What appears from this document is that DETI was delegating the administration of the non-domestic scheme to Ofgem.

[25] My attention was drawn to para. 8.1 under the rubric Confidentiality. "Each party agrees to be responsible for ensuring (both during the term of these arrangements and after their termination) that the Confidential Information is kept confidential, is not used other than strictly for the purposes of this arrangement and is not disclosed to any third party without the prior written consent of the other Party." This is subject to four exceptions. However, the definition of confidential information is information "which has been designated as confidential by either of the parties …".

[26] I was told that the British Broadcasting Corporation had received a full list of the recipients of grant aid and had received it from Ofgem. Dr McGleenan for the Department was instructed that if that had happened it had not happened with the approval of Ofgem. I have taken this document into account and also a data sharing protocol between the same two parties. From that, as one might expect, DETI, now DfE, becomes a data controller upon receipt of data from Ofgem. The parties are meant to co-operate about disclosure. They will comply with the data protection principles.

[27] Reliance is placed by the applicants on the fifth and sixth bullet points of Clause 9:

> "Access to the RHI Register will be restricted to designated members of staff who have a genuine business need to see the data.
>
> The number of designated members of staff able to access the RHI register will be kept to a reasonable minimum."

Clause 12 of this protocol expressly states that it is not intended to be legally binding. I shall now return to the Application Form.

[28] On the 34th page of the Form there is a 'Declaration by Applicant' which requires the applicant to declare that the information they have given is accurate and complete. It goes on.

> "I understand that I am applying to become the authorised signatory of an account for the Northern Ireland Renewable Heat incentive.
>
> I have read and agreed to the terms and conditions and privacy policy as outlined in the Appendix."

Further down the same page the applicant acknowledges that the information will be inputted on the RHI Register. One then finds the following:

> "I agree to abide by the Terms and Conditions of the website (as set out in the Appendix), and any further conditions as may be presented on the Ofgem RHI Register."

The applicant is then required to provide his, her or its full name, signature and the date of application declaring that the information, to the best of their knowledge and belief, is accurate.

[29] I pause there to say that this drafting is somewhat opaque. The use of the Website Terms and Conditions follows almost immediately in the Appendix. Dr McGleenan argues therefore that this is all these are, i.e. the terms and conditions of the website. I think that as there are references in the Appendix one needs to turn to that. Suffice it to say that it is not, at this point, written as a binding legal contract between commercial parties would be written. What one finds on 1/235 is –

> "**Appendix – Website Terms and Conditions**
>
> NIRHI applications will be in paper format until early 2013. At this point Ofgem will enter details from your application form into the Ofgem RHI Register

> website to create a user account. You may gain direct website access after this date; it is therefore important that you are aware of, and agree to the terms and conditions set out in sections 8.1 and 8.2 below."

Section A1 follows and begins with 3 clauses that are clearly referring to the website. One of those cross-references to the 'General Terms and Conditions' but they again relate to website use and are to be found at A.2. Paragraph 4 of A1 begins : "The Privacy Policy in the Schedule (below) sets out the terms which govern the collection, retention and processing of personal information provided to Ofgem or otherwise held on the website." There is no reference to the Schedule in the opening words of the Appendix nor in the preceding pages. The Schedule is to be found after paragraph 25 of Appendix A1 and before Appendix A2. I find that the Schedule, therefore, is a part of A1 which is in turn a part of the Appendix entitled 'Website Terms and Conditions'. Before turning to the Privacy Policy as such, it is important to quote the last clause of A. 1.

> "**Variations**
>
> 25. These Terms and Conditions may be varied from time to time. Details of variations will be posted in a new Schedule to these Terms and Conditions and posted out to applications without internet access. Please ensure that you review these Terms and Conditions regularly as you will be deemed to have accepted a variation if you continue to use the website after it has been posted."

[30] It can be seen that such provision militates strongly against the view that this is intended to be a legal contract. The unilateral right of one party to vary terms and conditions would be wholly antipathetic to such a proposition. Rather it does seem to reinforce the respondent's submission that all these terms and conditions relate to the operation of the website by Ofgem only.

[31] The Schedule containing the Privacy Policy was subject to close examination by counsel. I shall set it out paragraph by paragraph and summarise the points made.

> "The information you give to us in this form and any documents you provide will be used by Ofgem to process your application for accreditation for the Renewable Heat Incentive Scheme. This information will be held and processed in accordance with the Data Protection Act 1998. The Data Controller is Ofgem and the nominated representative is the Head of Information Management.

> We must protect the public funds we handle so we may use the information you have given us to prevent and detect fraud. As part of this process, your information may be supplied to a credit reference agency to make sure the information you have given us is correct. We may also share this information for the same reasons, with other Government organisations involved in the prevention and detection of crime."

[32] It can be seen therefore that the Data Protection Act does apply as would almost certainly have been the case in any event. But Ofgem is reserving to itself the right to use the information by sending it to a credit reference agency or preventing fraud. One of Dr McGleenan's points is that by making public the recipients of grant they will be encouraged to conform to best practice and, in effect, the disclosure will help to prevent fraud.

[33] The Policy goes on as follows.

> "In addition, we may use your information, or disclose it to our agents, representatives or successors, or to other public bodies or third parties for the following purposes:
>
> - to carry out Ofgem's administrative functions in relation to the Renewable Heat Incentive Scheme;
>
> - to enable us to inform you about, or provide literature or services about renewable heat and/or the Renewable Heat Incentive Scheme;
>
> - to carry out statistical analysis or research and development in relation to the Renewable Heat Incentive Scheme;
>
> - to provide information or data in relation to the Renewable Heat Incentive Scheme on an aggregated or non-attributable basis; and
>
> - for any of the purposes permitted by the Data Protection Act 1998."

[34] Pausing there counsel for the applicants compares the discretionary "we may use" with the words about to come. Counsel for the respondent points out that as well as disclosure to Government organisations and credit reference agencies, disclosure here is permissible to others so that they provide literature, or to researchers. Most importantly he says, as least so far as living individuals are concerned, all the data is available if it conforms with the 1998 Act.

[35] The Policy goes on as follows.

> "Details of an accredited installation, including its location, technology type, installation capacity, accreditation date and payments received will be freely available to the general public. All other information provided to Ofgem, including your account security information (user name and password) will be kept confidential. By agreeing to these Terms and Conditions and (where applicable) using the website, you are consenting to the processing of any information provided for these purposes and to the publication of certain information as set out above."

Some information is expressly to be "freely available to the general public." The Department has released the location of the different recipients but they have defined location as the first 4 letters and numbers of a Northern Ireland postal code. The Permanent Secretary has told the Assembly that location across the water has just meant England or Wales. It might be argued that location could be much more precise than the first 4 letters or digits of the postal code.

[36] Mr Simpson lays stress on the contrast between that free availability and the promise, as he puts it, that other information will be kept confidential. He submits that that must clearly include the names and query addresses of the recipients.

[37] One issue that arose both at the leave hearing and at the main hearing was whether the terms of this privacy policy constituted a binding or legal agreement between the recipients of grant aid and the Department. The first thing to note is that the application before me is an Order 53 application by way of judicial review rather than a private law action for an injunction to preserve confidentiality under a contract. This indicates the applicant's initial view of the matter. Moreover the skeleton argument before the court at the main hearing where the applicants were relying on legitimate expectation, Article 8, the Data Protection Act and Wednesbury unreasonableness is to like effect.

[38] It seems to me the applicants are right in that approach although an interesting discussion took place at the hearing. Persons who install the necessary boilers or equipment and are accredited acquire a right to "support payments" but that right stems from the 2012 Regulations and not from any contract.

[39] The terms and conditions that might in theory constitute a contract are to be found only in the document which I have just addressed published by Ofgem on behalf of the Department. It is not in dispute that they were acting as an agent with the Department as their principal but the document we are dealing with does not purport to be a contract. It is an application form as I have set out above. Note that

it is not a term of the application form that the operators will install the appropriate installation on a promise to receive the support funding. As is clear, for example, from section 3 of the form, they already have to have installed the installation before they can be accredited. In that sense therefore there is no consideration passing from the applicants for support funding to Ofgem or the Department. This is clearly a public law scheme for public funding to support what was thought to be a worthwhile objective at the time.

[40] Furthermore, if one looks at the declaration by the applicant to be found at trial bundle 1 page 234, while it is true that the applicant records that they have "read and agreed" to the terms and condition and privacy policy as outlined in the appendix one sees overleaf that that is expressly described as 'Appendix – Website Terms and Conditions'. These are not the terms and conditions of a contract as a whole but of the operation of the accreditation and register by Ofgem.

[41] Such a conclusion is reinforced by the further statement at 1/234:

> "I agree to abide by the terms and conditions of the website (as set out in the Appendix), and any further conditions as may be presented in the Ofgem RHI Register."

[42] Not only is there a further reference to the website here but the inclusion of a right of Ofgem to impose further conditions makes it clear that this is not a private law contractual agreement.

[43] The privacy policy is clearly part of these website terms and conditions. The first paragraph of the Appendix refers to sections A1 and A2 below. As stated above the privacy policy is clearly part of section A1.

[44] I acknowledge that there is a clause stating the governing law and jurisdiction. But that is not inconsistent with website terms and conditions and in any event it refers disputes to the laws of England and Wales which both parties accept was not intended by the parties. One reminds oneself as the highest court in the land has now repeatedly said that one must look to the intention of the parties here. I do not see that they intended this to be a binding legal contract.

[45] Again Clause 25 of the terms and conditions set out in Appendix 1 allows variation of those terms and conditions on a unilateral basis. This is quite antipathetic to the concept of a binding legal contract. Even if I am wrong in that, it is clear that Ofgem, and therefore the respondents, are at liberty to vary the terms of any alleged contract pursuant to Clause 25.

[46] I therefore conclude that the highest the applicants can put the matter is that they have a legitimate expectation to confidentiality. It seems to me appropriate to

deal with what that legitimate expectation is while still embracing all of the members of the applicant's association whether corporate or personal.

[47] It is trite law that substantive legal expectation requires a clear and unambiguous representation without conditions made to the applicant by the decision-maker.

[48] At one point in the course of argument Mr Simpson was and did rely on the doctrine of *contra proferentem*. That is something of a two-edged sword for him as while I find it does not assist him in contract as I do not consider there was a binding legal agreement between the parties it rather weakens the case for their being a clear and unambiguous representation because *contra proferentem* only applies when there is some ambiguity in a contract which should then be read against the party which had prepared the contract. Dealing with the terms and conditions and the privacy policy as best I can I conclude that the three key features are the reference to the Data Protection Act 1998, the reference to "all other information" and Clause 25. It seems to me that all other information, as Mr Simpson submitted, must really cover names of participants in the context in which one reads the whole document. But it is qualified to an important extent by the reference to the 1998 Act and by the fact that Ofgem as agent, and therefore *a fortiori*, the Department as principal can vary the terms and conditions from "time to time". By this means they can remove the expectation of confidentiality with regard to names and addresses permitting those to be disclosed on the website or in some other form.

[49] I now address the issue of "overriding public interest". On the view which I have taken i.e. that the respondents retain to right to vary the terms and conditions including the privacy policy it is not in fact necessary for the Department or Minister to demonstrate an overriding public interest.

[50] However, in case I am wrong in that conclusion, arising from the plain words of Clause 25 of the text on the website, I will turn to briefly consider the competing contentions of the parties.

[51] In passing I point out that my summary of the contentions of the appellants deliberately does not include any argument that the Minister's decision was ultra vires section 20 sub-section 4 of the Northern Ireland Act 1998 or section 2.4 of the Ministerial Code as the applicants did not proceed with those arguments.

[52] In considering the necessary overriding public interest in the context of legitimate expectation I have the assistance and indeed am bound by the recent decision of the Court of Appeal in Northern Ireland, on which I sat, per Gillen LJ in Finucane v Secretary of State [2017] NICA 7.

[53] It is convenient to set out the relevant paragraphs of that judgment:

"[70] Harvested from an array of familiar but powerful authorities cited before this court, and which were common to the arguments of both parties, we can distil a number of well-established principles:

(1) Legitimate expectations derives from a promise that is clear, unambiguous and devoid of relevant conditions, the initial burden to prove this lying on the person so asserting (Re Loreto Grammar School's Application for Judicial Review [2012] NICA 1 at [42] et seq).

(2) A policy, promise or practice may change on rational grounds. A policy with no terminal date or terminating event will continue in effect until rational grounds for cessation arise.

(3) Once the elements of the promise have been proved by the applicant, the onus shifts to the authority to justify the frustration of the legitimate expectation. To depart from the promise would only be unlawful if to do so would be so unfair as to amount to an abuse of power and even then the court would consider whether or not it is appropriate to exercise its discretion to grant the remedy. Thus it is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest (Paponette v Attorney General of Trinidad and Tobago [2010] 1 AC 1.

[71] Public authorities typically, and central Government par excellence, enjoy a wide discretion when it is their duty to exercise a public interest. (R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ. 755 and R (Coghlin) v North East Devon Health Authority [2001] QB 213.

[72] The rationale for this is clear. A public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Public authorities have to decide the content and the pace of change. Often they must balance different, indeed even opposing, common interests across a wide

> spectrum. Generally they must be the masters of procedure as well as substance. (Bhatt Murphy at paragraph [41]).
> [73] It is not essential that the applicant should have relied on the promise to his detriment but it is a relevant consideration in deciding whether the adoption of a policy is in conflict with the promise and amounts to an abuse of power. The denial of the expectation is less likely to be justified as a proportionate measure where there has been an unambiguous promise, where there is detrimental reliance, and where the promise is made to an individual or specific group. Such considerations are pointers not rules (see R (On the Application of Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ. 1363 at paragraph [69]) and (R v Secretary of State for Education and Employment ex p Begbie [2000] 1 WLR 1115).
>
> [74] When conducting the balancing exercise to establish whether a refusal to honour the promise is an abuse of power, the degree of intensity of review will vary depending upon the character of the decision. The more the decision challenged lies in the macro political field, the less intrusive will be the court's supervision. Here abuse of power is less likely since within it changes of policies, fuelled by broad conceptions of public interests, may more readily be accepted as taking precedence over the interests of the group which enjoyed the expectation generated by the earlier policy."

[54] Consideration of the public interest relied on by the Minister is to be found first, in the public forum, in the letter of 15 December 2016 from the Department for the Economy to grant recipients. In that letter they were asked whether they would have any objection to their name or the name of their business being published. The reasons for wishing to do so were given as follows:

> "There is significant public concern about the way the scheme has operated and questions have been asked as to who has benefited. In the interests of openness and transparency and given that the payments are paid for by tax-payers, the Department is minded to publish the list of beneficiaries of the scheme. In considering this, we must strike a balance between this clear public interest and our obligations to protect

> your privacy and confidentiality, as provided for in the Data Protection Act 1998, and the RHI privacy policy (copy attached)."

[55] Although of more consequence for a later aspect of the case the recipients of the letter were not expressly asked for any reasons they had for objecting, if they did object. In fact 94% of those who replied did object and only 4% consented and even then with conditions in most cases. The respondents point out that 59% of the 94% who objected did in fact provide a reason by email or by letter or in the form of a standard template letter.

[56] The affidavit of Stephen McMurray, the Director in the Department for the Economy, responsible for the Renewable Heat Incentive Task Force (but only from 19 December 2016), sets out a careful iteration of what happened which it is unnecessary to replicate here. Suffice to say that he shows that both the Public Accounts Committee of the Assembly and the Minister for Finance in a personal capacity and others were pressing for the release of the names. Despite reservations from officials as to whether the process followed by the Minister and the Department at that stage was fully fair the Minister directed on 23 January 2017 the delivery of a letter to grant aid recipients indicating his intention to publish the names on 25 January. An application to the court and an interim injunction prevented that happening.

[57] The Minister's intention to do so had been made known on 18 January. Mr Simpson referred to a meeting of the Public Accounts Committee of the Assembly where Mr Lunn MLA described this move on the part of the Minister as cynical. Mr Simpson went through the various submissions to the Minister and his responses with a view to demonstrating that transparency was not the true purpose of the Minister's decision but that his intention was to score political points. He laid particular stress on a passage in the Minister's reply on the debate to his amending Regulations of 2017. I have taken that passage into account but accept the submission of Dr McGleenan that the fact that the Minister in the course of the debate suggested that transparency would "reveal members and supporters of – many parties in the Assembly" does not permit the court to draw a conclusion that the Minister was acting in bad faith or that he did not desire transparency.

[58] On the contrary counsel for the respondent argued that this was an exceptionally strong case of overriding public interest in these circumstances. He pointed out that the current publicly stated estimate for the cost of this scheme to the Northern Ireland budget was some £490m over the life of the Scheme. It had led to the collapse of the power sharing Executive which had been reformed as recently as last year. This in turn had led to an election for the Stormont Assembly to be held on 2 March. As I have stated the Minister will lose office on that day, I was informed. It has led to a real prospect that no Executive will be formed after that election. It has led to the setting up of a public inquiry under Sir Patrick Coghlin pursuant to the Inquiries Act. To help, as one speaker in the Assembly has said, to restore

confidence in the system the Minister was entitled to wish to disclose the names of all of those who had received grant aid.

[59] As put forward by the respondents that information would be accompanied by the information in the list exhibited to the affidavit of Mr McMurray i.e. it would give approximate location, number of boilers and their capacity, the dates of accreditation for each installation and the amount of money that had been paid under the support scheme to each recipient in respect of each installation.

[60] It was submitted on behalf of the respondents that the Minister was entitled to take the decision he did take at that time and that he was not obliged to publish a schedule with varied terms and conditions as envisaged in Clause 25 of the website terms and conditions. The only variation he is proposing is the publication of the names insofar as the other information was already expressly stated to be "freely available to the general public" under the privacy policy. I pause there to say that it seems to me that is a correct submission. It would be formalism of a regressive kind to have a schedule set out by Ofgem on behalf of the Minister saying what he has already said in the letters of 15 December 2016 and 23 January 2017. He is not re-writing the website terms and conditions but moving one item, albeit an important one, the names of participants, from the confidential section to the disclosed section.

[61] Counsel was able to call in aid on the importance of transparency weighty authority in the European sphere. This is of particular relevance in this case as the drive for financial support for renewable energy schemes came from the European Union. The decision of the Grand Chamber of the Court of Justice of the European Union to which I will refer in a moment was drawn to the attention of the court and the parties by the United Kingdom Information Commissioner, Elizabeth Denham, through her solicitor. Without intervening formally in the proceedings she wished, out of courtesy, to highlight the case to the court. Volker und Markus Schecke GbR v Land Hessen: Eifert v Land Hessen [2012] All ER (EC) 127; joint cases C-92/09 and C-93/09, were cases relating to disclosure of names under the common agricultural policy of the EU. As Advocate General Sharpston points out in the first paragraph of her opinion 'this has been the Union's most important policy for more than 40 years'. It accounts for approximately 40% of EU expenditure. Under Article 44(a) of Council Regulation (EC) 1290/2005 member states were to ensure annual *ex post facto* publication of the beneficiaries of the European Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development and the amounts received per beneficiary under each of those funds. In our own jurisdiction this takes the form of publication of that information with regard to beneficiaries of Single Farm Payments. The information, which had to be on a single website per member state and capable of being consulted using a search tool, should also include the municipality where the beneficiary resided or the equivalent postcode information. The two applicants, an agricultural undertaking in the form of a partnership and a full-time farmer, applied for funds. They took issue with the publication of this information. The administrative court in Wiesbaden, Germany, referred the matter to the European Court of Justice as it took the view that the obligation to disclose

under Article 44(a) constituted an unjustified interference with the fundamental right to the protection of personal data, did not improve the prevention of irregularities and that it was not proportionate to the aim pursued.

[62] The court held that that Article and the related Article 42(8b) were invalid insofar as, with regard to natural persons who were beneficiaries of the funds, those provisions imposed an obligation to publish personal data relating to each beneficiary without drawing a distinction based on relevant criteria such as the periods during which those persons had received such aid, the frequency of such aid or the amount and nature thereof. It was necessary for the institutions, before adopting the provisions whose validity was contested, to ascertain whether publication via a single freely consultable website in each member state of data by name relating to all the beneficiaries concerned and the precise amounts received by each of them from the two funds – with no distinction being drawn according to the duration, frequency or nature and amount of the aid received – did not go beyond what was necessary for achieving the legitimate aims pursued. The court did not find that such publication was completely and automatically unlawful but that the Council of the EU and the Commission had not taken into consideration methods of publication causing less interference e.g. that it was only to be disclosed during the periods when aid was being received and/or might be accompanied by information about other natural persons benefiting from aid under the funds and the amounts received by them.

[63] I pause there to say that in this case, quite properly it seems to me, the proposal is to make a mass disclosure of information. That would put everybody's payments in the context of other receipts. It would also counter the suggestion that there was some implicit criticism of persons who had lawfully applied for these support payments.

[64] To return to the ECJ it found that the objective of transparency did not automatically take priority over the right to protection of personal data, even if important economic interests were at stake. The court went on, however, to make an important distinction between natural persons i.e. living individuals under the Data Protection Act and legal persons i.e. such as companies or limited partnerships. The court held that the relevant provisions of EU law, insofar as they concerned the publication of data relating to legal persons who received aid from the funds, observed a fair balance in the consideration taken of the respective interests in issue. The seriousness of the breach of the right to protection of personal data manifested itself in different ways for, on the one hand legal persons and on the other natural persons. Legal persons are already subject to a more onerous obligation in respect of the publication of data relating to them. Furthermore, the obligation on the competent national authorities to examine, before the data in question was published and for each legal person who was a beneficiary, whether the name of that person identified natural persons would impose on those authorities an unreasonable administrative burden.

[65] Given this decision of such authority and relevance it is right to quote somewhat further from it. It is preceded by an opinion of the Advocate General as I have mentioned. She drew attention to the European Transparency Initiative of 2005 where the European Commission stressed the importance of a "high level of transparency" to ensure that the Union is "open to public scrutiny and accountable for its work". The Commission identified one of the main areas for action as being to "allow better scrutiny of use of EU funds". She pointed out, at paragraph 66, that the importance of transparency is firmly established in the EU law:

> "Article 1 EU refers to decisions being taken 'as openly as possible'. The court has described the purpose of the principle of transparency as being to give the widest possible access to citizens to information with a view to reinforcing the democratic character of the institutions and the administration. Providing data to the public about the beneficiaries of EU funds under shared management is one of the specific measures identified in the ETI."

See also paragraphs 67 and 69.

[66] She notes at paragraph 72 that the ECHR has held that a legal person (as well as a natural person) may invoke Article 8 ECHR and that its protection extends to professional and business activities. The right to privacy is not an absolute right. The Grand Chamber of the ECJ in its decision, which I have summarised above, was not fully with the Advocate General in as much as they drew a bright line between legal persons and natural persons, while acknowledging at paragraph 53 the rights of legal persons to benefit from Articles 7 and 8 of the Charter.

[67] The court said as follows at paragraph 75:

> "It is not disputed that the publication on the internet of data by name relating to the beneficiaries concerned and the precise amounts received by them from the EAGF and the EAFRD is liable to increase transparency with respect to the use of the agricultural aid concerned. Such information made available to citizens reinforces public control of the use to which that money is put and contributes to the best use of public funds."

[68] The court went on, as indicated, to say that it did not appear that the Council and the Commission had sought to strike a balance between the right to privacy and the importance of transparency with regard to natural persons. But as I have also quoted the Court robustly drew a distinction with legal persons. Inter alia, they reached that conclusion because an obligation on national authorities to examine

before publication details of each legal person as to whether the name of that person identifies natural persons would impose an unreasonable administrative burden.

[69] Pausing there given that there are thousands of applicants under the Renewable Heat Incentive Scheme those words appear to be applicable in the context with which I am dealing.

[70] Counsel for the respondent also relied on foot of the decision in Finucane et alia including paragraphs 109 and 116 on the nature of the decision of the Minister here. It was in the macro political field. The Minister should have an appropriate margin of appreciation. As the Court of Appeal found in Department of Education v Cunningham [2016] NICA 12, at [70], "The price of probity is eternal vigilance". The Minister's decision is on the side of vigilance.

[71] Dr McGleenan also drew to the court's attention that as long ago as June 2016 the Comptroller and Auditor General had qualified the accounts of the Department because of the operation of the scheme. It had received the attention of the Public Accounts Committee of the Assembly at a succession of meetings since that. He submitted disclosure of the names would tend to good conduct on the part of the beneficiaries discouraging any tendency to abuse, contrary to the Regulations. Dr McGleenan took me through the list in alphabetical order which the Department wished to publish. As I pointed out it transpired that some accredited parties, both corporate and personal, had not in fact received any grant aid and are therefore, as I have indicated, to be excluded from any disclosure simply on that ground. As to the others there is a wide range of benefits. One well-known company has no less than 7 of the 99 kilowatt capacity boilers which attract the higher rate of subsidy. They have received £302,000 in funds since 13 July 2015. It may be this is explicable because they have a number of different premises justifying the smaller boiler and its intensive use.

[72] A similar observation might be made about a number of other users. Some of the payments, to both corporate and personal users, are modest. Some appear surprising i.e. where a company has 10 of the 99 kilowatt boilers all at one postal code area.

[73] There may be reasons why some operators are content to have a large capacity boiler which then attracts a quite modest subsidy whereas others choose to have multiple 99 kilowatt boilers but this can be explained to any enquiring journalist or member of the public.

[74] Counsel submits that by shining a light on this, as transparency is intended to do, higher standards and observance of the rules will be applied. It seems to me that this not only sounds as a reinforcing reason why a court should be slow to interfere with the Minister's decision but points to benefit from it - that tax-payers money will be saved if abuses are discouraged by the disclosure of the identity of recipients of support payments.

[75] I find that the respondents have made out the case both in law and on the strikingly unusual facts of this case, by a wide margin, that there is, if required, an overriding public interest for achieving transparency here by disclosing the names of the beneficiaries along with the other information which they had all agreed would be published under the privacy policy. The applicants therefore fail on the contract and legitimate expectation grounds.

[76] In the light of those findings I can turn, at somewhat less length, to the further grounds relied on by the applicants in seeking an injunction against the disclosure of the names.

[77] The first of these grounds is under Article 8 of the European Convention. While I accept that there is authority for the proposition that in certain circumstances e.g. if a professional person works from home, Article 8 might extend to persons working in a corporate setting, this 'right to respect for private and family life' essentially adheres to the natural persons who have availed of the Scheme here.

[78] Article 8(2) of the European Convention provides that:

> "There should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[79] The court is therefore required to consider whether disclosure here of the names of the recipients of grants is necessary, in this context for the economic well-being of the country, for the prevention of crime and for the protection of the rights and freedoms of others.

[80] As to the last of those this is not a classic juxtaposition of Article 8 rights of privacy against Article 10 rights to freedom of expression. It might be if one of the media organisations which have apparently received the list of names was in contention. It therefore seems to me appropriate to say a word on this topic albeit obiter, as the respondents in the form of the State are not entitled to rely on Article 10. The Article 8 disclosure here is that one has received grant aid. It is not that one suffers from a disease or one's marriage is in difficulties or one is carrying on an illicit relationship of a sexual kind. It is not disclosure of some piece of criminal folly from one's youth. The freedom of expression to be balanced against it is disclosure of a matter of acute and legitimate public interest at this time. It seems to me that between Article 8 and Article 10 in this context Article 10 would prevail. More narrowly in this case the Minister can pray in aid the "economic well-being of

the country". It seems clear that the economic well-being of the country is being damaged by excessive payments well beyond that contemplated by the European Union being made because of the way in which the scheme was implemented in Northern Ireland. I accept Dr McGleenan's submission that disclosure of names will tend towards best practice and to reducing abuses under the scheme. Given the nature again, of the personal information being disclosed and the potential benefit to the public it seems to me that publication will be justified under that ground and is indeed necessary for that purpose.

[81] While there is no doubt that the vast majority of the recipients of grant aid are behaving according to law nevertheless disclosure will tend to prevent crime by discouraging any persons from abusing the scheme in breach of the Regulations, especially Reg. 33 (p). That too would justify an Article 8 disclosure.

[82] In any event the Article 8 arguments tend to overlap to a very great extent with those under the Data Protection Act 1998. It might be said that the test under the latter Act is stricter than under the qualified Article 8 right.

[83] Mr Simpson QC set out very ably both the statutory protections enjoyed under the 1998 Act and the way in which this was dealt with by the Department and the Minister. Before I turn to that I observe that in this judgment, being delivered under considerable pressure of time because of the events triggered by this very scheme, it will be appropriate to read across from one topic to another conclusions and findings of the court as there is extensive overlap between the different grounds relied on by the applicants.

[84] It is common case that the names of the recipients of support payments constitute 'personal data' within the meaning of section 1 of the Data Protection Act 1998. It is equally common case that it does not constitute "sensitive personal data" within the meaning of section 2. I note that section 2(b) provides that information as to the political opinions of individuals does amount to sensitive personal data. The definition of personal data at section 1 means "data which relate to a living individual who can be identified". It is living individuals that the Act is concerned with. They equate to the 'natural person' of European law.

[85] Section 10 of the Act deals with the right to prevent processing likely to cause damage or distress. It provides that an individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing any personal data in respect of which the individual, for specified reasons would suffer or would be likely to cause substantial or substantial distress to him or to another and that that damage or distress is or would be unwarranted.

[86] This provision was drawn to the attention of the Department in the course of its consideration of these issues by the Information Commissioner's Office. It was

then the test applied by the Information Management Unit of the Department to assess the objections lodged to disclosure of names.

[87] I accept the submission of Mr Simpson that this was not the correct test. It may be that to some degree it overlaps with the correct test to which I will come but its application across the board by the relevant officials of the Department does constitute a flaw in the consideration of these issues by the respondents.

[88] In passing I note that section 32 of the Act creates an exception for the use of personal data for reasons of journalism, literature and art. It is relevant by way of analogy to note that a journalist who meets the criteria within that section may disclose personal data. By way of analogy it strengthens the case for a Minister responsible for sizable public expenditure to do so also.

[89] Section 4 of the Act deals with the Data Protection Principles which are set out in Part I of Schedule 1 and are to be interpreted in accordance with Part II of Schedule 1. Section 4(3) provides that Schedule 2 applies to all personal data and sets out conditions applying for the purposes of the first principle.

[90] One turns to Schedule 1, Part I and the first of these principles which reads as follows:

> "Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
>
> (a) At least one of the conditions in Schedule 2 is met.
>
> (b) In the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

[91] As the applicants take issue with the disclosure here it falls to the court to consider whether the processing of the data i.e. by disclosure of names is being done fairly, lawfully and with at least one of the conditions in Schedule 2 being met.

[92] I have taken into account the submissions of counsel with regard to Part II of Schedule 1.

[93] Dr McGleenan helpfully submitted that the respondents were only relying on two of the conditions relevant for the purposes of the first principle set out in Schedule 2 of the Act. The first condition is that the data subject has given his consent to the processing which has happened in a small number of cases here. The respondents do not rely on Condition 5 where processing is necessary for the exercise of any of the functions of the Crown, a Minister of the Crown or government Department. As the respondents have taken that position I shall say no more about it.

[94] The respondents do rely on Condition 6(1). This reads:

> "The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

[95] It is important to closely examine this principle in the light of what happened here. Firstly it is clear to me that the respondents are pursuing "legitimate interests" in seeking to vary the earlier policy by now disclosing the names of recipients in the light of all that has occurred.

[96] The second question is whether that is "necessary" within the meaning of the principle. I bear in mind the points addressed earlier in this judgment.

[97] The parties to this application adopted the suggestion emanating from the Information Commissioner for the UK that the relevant considerations relating to this issue and indeed to Condition 6(1) of Schedule 2 to the Act generally are set out in the decision of the Upper Tribunal (Administrative Appeals Chamber) in Goldsmith International Business School v The Information Commissioner and Another [2014] UKUT 563 (AAC). The applicant school made a request under the Freedom of Information Act 2000 to the Home Office about an immigration decision notice relating to two of their students. The Home Office refused the request. The judgment records that the principal issue on the appeal from that refusal and the decision of the First Tier Tribunal was the proper interpretation of the test of "reasonable necessity" to be applied when considering Condition 6(1). I set out the relevant paragraphs.

> "33. In making his submissions Mr Knight referred me to four authorities, being (in date order) decisions of the Information Tribunal, the Divisional Court, the Supreme Court and the Upper Tribunal respectively. These were: (1) Corporate Officer of the House of Commons v Information Commissioner and Others (EA/2007/0060-0063, 0122-0123 and 10131) (abbreviated here to '*Corporate Officer (Information Tribunal)*'); (2) Corporate Officer of the House of Commons v Information Commissioner and Others [2008] EWHC 1084 (Admin) ('*Corporate Officer (Divisional Court)*'); (3) South Lanarkshire Council v Scottish Information Commissioner [2013] UKSC 55 ('*South Lanarkshire*'); and finally (4) Farrand v

Information Commissioner [2014] UKUT 310 (AAC) ('Farrand'). The last, of course, was decided after the Tribunal had given its decision on the present appeal.

34. Mr Knight helpfully set out eight principles or, as I prefer to call them, eight propositions, derived from this case law. I set them out below, including references to the relevant passages in the various decisions as authority for these propositions as (a) I endorse them; (b) they assist in resolving the present appeal; and (c) this taxonomy may well prove a useful roadmap for the Commissioner and other First-tier Tribunals when seeking to chart a path through the thicket of issues thrown up by Condition 6(1) of Schedule 2 in other cases. My natural resistance to referring to first instance decisions as "authorities" in this context is overridden here, given that the appeals from the decisions in *Corporate Officer (Information Tribunal)* were dismissed by the Divisional Court and the Information Tribunal's observations have subsequently received the endorsement of the Supreme Court in *South Lanarkshire*.

35. *Proposition 1*: Condition 6(1) of Schedule 2 to the DPA requires three questions to be asked:

> '(i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
>
> (ii) Is the processing involved necessary for the purposes of those interests?
>
> (iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?'

Authority: *South Lanarkshire* at [18].

36. *Proposition 2*: The test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Authority: Corporate Officer (Information Tribunal) at [58], *South Lanarkshire* at [18] and *Farrand* at [29].

37. *Proposition 3*: 'Necessity' carries its ordinary English meaning, being more than desirable but less than indispensable or absolute necessity.

Authority: Corporate Officer (Divisional Court) at [43] and *Farrand* at [26]-[27].

38. *Proposition 4*: Accordingly the test is one of 'reasonable necessity', reflecting the European jurisprudence on proportionality, although this may not add much to the ordinary English meaning of the term.

Authority: Corporate Officer (Divisional Court) at [43], *South Lanarkshire* at [27] and *Farrand* at [26].

39. *Proposition 5*: The test of reasonable necessity itself involves the consideration of alternative measures, and so "a measure would not be necessary if the legitimate aim could be achieved by something less"; accordingly, the measure must be the "least restrictive" means of achieving the legitimate aim in question.

Authority: Corporate Officer (Information Tribunal) at [60]-[61] and *South Lanarkshire* at [27].

40. *Proposition 6*: Where *no* Article 8 privacy rights are in issue, the question posed under Proposition 1 can be resolved at the necessity stage, i.e. at stage (ii) of the three-part test.

Authority: *South Lanarkshire* at [27].

41. *Proposition 7*: Where Article 8 privacy rights *are* in issue, the question posed under Proposition 1 can only be resolved after considering the excessive interference question posted by stage (iii).

Authority: Corporate Officer (Information Tribunal) at [60]-[61] and *South Lanarkshire* at [25].

42. *Proposition 8*: The Supreme Court in *South Lanarkshire* did not purport to suggest a test which is

any different to that adopted by the Information Tribunal in *Corporate Officer (Information Tribunal)*."

[98] I have found that the respondents are pursuing a legitimate interest, indeed an important public interest. I then ask whether the processing involved is necessary for the purposes of those interests. I note that the authorities set out at propositions 3 to 5 above convey that this does not mean indispensable or absolute necessity but something more than desirable. The alternative phrase used reflecting the European jurisprudence is "reasonable necessity". One is obliged to consider whether any alternative measures are available. Pausing with that third heading either one discloses the names or one does not so far as transparency is concerned here. The principal distinction that might usefully be made, to which I will turn shortly, is between the corporate bodies and the living individuals, the legal persons and the natural persons, although see below at [108].

[99] It seems to me that the respondents establish the test of reasonable necessity with ease. This matter is one of acute and legitimate public interest. The disclosure of the names is likely to encourage adherence to the terms of the Regulations and to best practice and therefore may achieve a material saving in expenditure. The Minister and the Department have a duty to seek good value in the expenditure of tax-payers money and this is a legitimate way to do so and one which, in my view, is reasonably necessary at this time.

[100] I accept at proposition one that a third question then is whether processing is "unwarranted" in this case "by reason of prejudice to the rights and freedoms or legitimate interests of the data subject". As I have said that means a living individual. The Department's position is that this was done by writing on 15 December to the recipients of grant aid and then considering their replies in the Information Management Unit. Although there is no express reference to Condition 6 and its test it is not dissimilar to the section 10 test which was applied by the Unit. Therefore counsel for the respondents submits the respondents have done enough.

[101] It seems to me that that is not a well based submission so far as the living individuals are concerned. So far as they are concerned Mr Simpson has identified more than one flaw in the application of the Act to these individuals. I have referred to section 10 on a number of occasions already. The tests are not the same albeit not wholly dissimilar. But the Unit pointed out itself to its superiors through the Head of the Human Resources Group that the letter of 15 December did not expressly ask participants to give reasons for their objections. It may be, submits Mr Simpson, that other good reasons exist for exempting these people from disclosure.

[102] I find these submissions are well founded. They receive support at a number of points in the papers very candidly disclosed by the respondents in accordance with the current practice in Northern Ireland. To take just one of those one goes to the memorandum of Wendy Johnston, Director of HR and Central Services of 20

January 2017 and sent to a number of her colleagues and superiors in the Department including the Permanent Secretary. At paragraphs 13 and 14 she says the following:

> "Furthermore 320 applicants responded with an objection but did not supply any further information thus making it impossible to assess these responses against the set criteria. In addition to the above in terms of fairness we should also be taking into consideration that the process initially did not ask for reasons for objections and is therefore likely to be viewed as unfair in its own right."

At paragraph 17 she stated the opinion of her section of the Department that disclosure at that time was not recommended.

[103] On 2 February 2017 the Permanent Secretary sent a memorandum to the Minister which again has been disclosed to the other party and the court with only modest redactions for legal advice. This was being written after the interim injunction had been granted. At paragraph 13 one finds the following:

> "If the hearing is successful from the Department's point of view, the same process of providing an opportunity for participants to provide any reasoned objection to the release of relevant data, followed by the assessment of each remaining individual case against the criteria under Section 10 of Data Protection Act, would then need to be rolled out for those participants who were covered by the injunction. Only this would ensure that the cohort is covered in its entirety and any risk of unfairness that might be caused by the release of a non-representative sample would be nullified."

It will be recalled that the injunction in its initial form only applied to individuals and that it was only with reluctance that I extended it to the corporate members of the Association included in the list on the day the injunction was granted. It can be seen that the Permanent Secretary, quite rightly in my conclusion, had in mind individuals covered by the Act. At paragraph 17 the Permanent Secretary was recommending that a "more defensible and reasonable process would be to initiate a DPA compliant process for all the beneficiaries after the JR was concluded so that all are being treated in the same way and in the same timeframe".

[104] It seems to me that in so finding, at [102], I also deal with the applicant's alternative ground of breach of the Wednesbury principles of judicial review by the Minister. I find that he has failed to take into account relevant considerations i.e. the

need to apply the test under Condition 6(1) of the Second Schedule to the Act. He has also failed to take into account a relevant consideration, namely the reasons that any of the individual recipients of grant would have for saying the processing was unwarranted in their case by reason of prejudice to their rights and freedoms and legitimate interests. That had not been expressly asked for. It ought to have been in this context. So that ground is also established.

[105] Given that the Department is already alive to this point I am minded to think that no further injunction is necessary. I am minded to make a declaration that the respondents have established that it is necessary for the purposes of legitimate interests of the respondents to disclose the names of the recipients of support payments under the scheme but that prior to doing so they must carry out a process compliant with the act to balance that necessity against any relevant counter reasons advanced by living individuals within the wording of Condition 6(1).

[106] I then turn to the question of what is to be done about the corporate recipients of support payments, the legal persons as opposed to natural persons in the terminology of European law. Dr McGleenan submitted that if I were not with him in permitting disclosure in relation to all grant aid I should draw a bright line between the corporate interests and the living individuals. I observe that he, in his own submissions, did contemplate the Department doing what I am declaring it should do i.e. complete a compliant process with regard to individuals. His submission is that his client should be permitted to proceed forthwith with the disclosure of the names of the corporate bodies.

[107] I have carefully reflected on the submissions of Mr Simpson in regard to this without setting them all out. As counsel for the Association he owed a duty to the members of the Association both corporate and non-corporate. He submitted, particularly at the earlier hearing, that there were three categories of persons involved: the living individuals, companies which by their names would lead to the ready identification of the individuals involved in them and a third category of more anonymous corporate bodies. I must respectfully say, without criticising him because he was discharging his duty to all his clients, that his submissions on behalf of the members of the Association whose corporate names would disclose their identity cut across his alternative submission to the court. He pointed out that there was a legal obligation to record in Companies House the current directors of a company. Indeed that information is nowadays available on-line. Furthermore it seems that the identities of foreign directors of such companies remain available also. Therefore he says living individuals in the form of directors of companies will also be identified if the names of the companies are disclosed. He says that in support of an argument that there should be no disclosure.

[108] I am not persuaded by these arguments. This scheme was set up in furtherance of an EU Directive. It is appropriate to follow the decision of the European Court of Justice on such a topic. I appreciate that in the Volker decision Regulations required all names to be disclosed and the court was expressing some

hesitation about the extent of disclosure. In that sense the decision is not on all fours with the decision I have to make. But it seems to me inappropriate and unwise not to follow such a closely apposite decision. In any event I respectfully agree with it. I would point out that information on the amounts paid under the Common Agricultural Policy in the United Kingdom is available on-line from DEFRA. It appears that the United Kingdom took into account the decision in Volker and links the payments to particular financial years and schemes. They also do not disclose the names of beneficiaries who receive less than €1250 in subsidy (equivalent to £1045 in 2014 and £972 in 2015). But otherwise disclosure is made.

[109] The payments under this scheme, many of which it can be seen from the postal codes are going to rural areas, have considerable similarity with payments under the Common Agricultural Policy. They both emanate from EU initiatives. They are both lawful exceptions to the general prohibition on State aid.

[110] They differ markedly from the making of Social Security payments to individuals. Such payments by their nature will or may indicate that the recipient is impecunious or disabled, data with a degree of sensitivity not to be found in this area.

[111] Are the corporate entities here to be subjected to the further process of evaluation which I consider appropriate for the individual persons? The original emails of 15 December about disclosure were sent to 2128 'applicants'(sic). A further 968 hard copy letters were sent on 20 December. The European Court of Justice expressly contemplated that it was an unreasonable administrative burden to impose on public authorities that they consider each of many corporate bodies to decide whether natural persons were identified. In any event it seems to me that that is a futile search when one can find the directors of the companies on the Companies House website. There is therefore high authority for this court reducing the burden on the Department here to carry out such a process with regard to the corporate applicants. It would be expensive and therefore add to the costs of a scheme from which all these corporate clients have already benefited and will continue to benefit as the Minister has explained in the Assembly debates to which my attention was drawn, even if the lawfulness of his new amending Regulations are upheld by the court.

[112] Although not expressly referred to in Volker it seems to me that decisions of this kind with regard to corporate bodies could well lead to very fine lines having to be drawn by officials of the Department assessing such matters. Inevitably two views could be taken of which side of a line a particular company might fall on. I would apprehend further costly litigation arising and consider that that is more likely if I were to extend the process under the 1998 Act to the corporate bodies.

[113] I observe that these corporate bodies will all have been set up by individuals, albeit sometimes long in the past. These natural persons then or more recently have chosen to operate through a corporate structure. They enjoy the benefits of doing so.

The obvious benefit in any limited company or limited liability partnership is indeed limited liability for losses. But it is likely that in very many cases there are benefits also by way of avoidance of taxation burdens or mitigation of tax.

[114] I also bear mind that what is being disclosed is merely that these legal persons applied for a publicly advertised scheme to encourage the use of renewable sources of energy. It is not suggested, as the Department made clear in its two letters to recipients, that the disclosure implies any wrongdoing on the part of the recipients. I commend the view taken by the Department that to emphasise that is the case it is better to have wholesale disclosures of names rather than doing it piecemeal. Of course those wholesale disclosures could be of corporate clients' first and living individuals after a Data Protection Act compliant process has been completed.

[115] I find it is within the margin of appreciation of the Department and Minister to decide whether they wish to give corporate bodies an opportunity to check that the information to be disclosed is correct but I do not order such a step to be taken as that too would add an administrative burden to the respondents. That too would then add to the costs on the Northern Ireland taxpayer of this scheme. It is also within their discretion to decide whether to impose a *de minimis* level for non-disclosure as seems to be done under the CAP in the UK.

[116] Mr Simpson urged me against disclosure to leave the matter to the audit being carried out on behalf of the Department by PWC. I have very limited information about that. One does not know how many persons have been assigned to that task. What one does know is that they too will have to be paid at the not immodest rates recoverable by large firms of chartered accountants and, therefore, add further to the burden on the taxpayer. Such a process is likely to be slow. It may helpfully identify some legal or natural persons with questions to answer. But it does not seem to me a sufficient reason to prevent the disclosure which the Minister wishes to make at large and which I have found in law he is entitled to do.

[117] I have already said that authority points to a distinction being drawn between the legal persons and the natural persons. I propose to follow that authority.

[118] The Departmental Solicitor's Office disclosed some emails from the respondents yesterday, 28 February. It transpired that the Department had received a Freedom of Information request in 2016. They took advice from the Head of Information Management at Ofgem. On foot of that they released the names on 15 August 2016 of those who applied for accreditation in the last two weeks of the Scheme who were limited companies, or, I see, who traded as if they might be limited companies e.g. 'John Smith Poultry', but not the names of individuals. As this information was not before the court at the hearing and the applicants did not have an opportunity to comment on it I shall disregard it.

[119] In the alternative and in any event the court in deciding what relief is granted to applicants has a discretion to apply. In the exercise of that discretion I decline to

grant an injunction restraining the respondents from disclosing the names of legal persons, corporate bodies, who have successfully received grant aid under this scheme. The figures involved will show that the grant aid received by many of them is modest. If eyebrows are raised about some of the expenditure that may cause embarrassment to those companies or individuals but that is not a good reason for granting them an injunction. I have taken into account the matters set out in the affidavits on behalf of the applicants and no doubt they can be canvassed further by living individuals. But the fact of the matter is that the applicants have been unable to point to any breach of the peace or other unlawful activity committed against the recipients of grant aid although it is clear by now that not only have a number of individuals been identified as receiving payments but that lists of the recipients are in the hands of more than one media organisation. This is not sensitive personal data. This is something that the Minister is entitled to conclude the public should see. It will tend to encourage compliance with the Regulations across the board and the adoption of best practice. In all the circumstances therefore I do draw a distinction between the corporate recipients of payments and individuals and impose no bar on the Department and the Minister disclosing the names of the former without further steps being required.

[120] The applicants are entitled to an order of certiorari quashing the Minister's decision to publish the names of living individuals without further steps, set out in his solicitor's letter of 20 January 2017. Contrary to the Order 53 Statement he was not proposing to publish precise addresses but only the first two letters and first two digits of the postal addresses, which accords with the decision of the ECJ in Volker. I will hear counsel on the wording of any declaration consequent upon this judgment. It follows that the interim injunction will be vacated.

Summary

[121] I summarise my findings as follows.

[122] There is no binding legal contract between the recipients of support payments under the Renewable Heat Incentive Scheme and the respondents (or Ofgem) restraining the publication of the names of recipients.

[123] Even if there was such a binding legal contract, the respondents would be entitled to vary it unilaterally pursuant to Clause 25 of the website terms and conditions. I find that the correspondence of December 2016 and its subsequent consideration was sufficient consultation in public law terms to constitute an effective variation of the privacy policy as part of the terms and conditions.

[124] It is not the case that the recipients of payments had a clear and unambiguous representation of permanent confidentiality of their names without condition, the normal basis of substantive legitimate expectation.

[125] It is the finding of the court that they had a reasonably clear expectation that their names would not be disclosed but it was subject to the respondent's power of variation at Clause 25.

[126] In any event the respondents have established an overriding public interest in setting aside any legitimate expectation on confidentiality on the facts established in this case and on the case law.

[127] On the authority of the European Court of Justice in Volker a valid distinction can be drawn, and I do draw it here, between legal persons and natural persons. The respondents are at liberty to publish the names of all limited companies and limited liability partnerships which have received support payments under the scheme.

[128] The respondents are not at liberty to disclose the names of any accredited operator who has not in fact received support payments.

[129] The respondents are not in breach of Article 8 of the ECHR in seeking to disclose the names of any of the recipients of support payments as they have sufficient justification to necessitate that disclosure in compliance with Article 8(2).

[130] The respondents are in breach of the Data Protection Act 1998. The Department applied a test under section 10 of the Act when the correct test is to be found at Schedule 2, Condition 6(1) of the Act. Furthermore living individuals/natural persons have not been given a sufficient opportunity to state the particular reasons why they might constitute exceptions to Condition 6(1). The respondents have shown that the processing is necessary for the purposes of their legitimate interests subject to any such exceptions.

[131] The respondent's failure to comply with the 1998 Act constitutes a breach of the principles set out in Associated Provincial Picture Houses Limited v Wednesbury Corporation [1947] AER 498 in that there was a failure to take into account relevant considerations. In the circumstances it is not necessary to consider whether the Minister took into account any irrelevant considerations.

[132] An order of certiorari will therefore issue to quash the Minister's decision set out in his solicitor's letter of 20 January 2017 to publish the names of living individuals without giving them an adequate opportunity to state their objections and have those considered in accordance with Schedule 2 of the 1998 Act. The court will hear counsel on the wording of any further declaration sought. The interim injunction is discharged.