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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY PIGEON TOP WINDFARM LIMITED

AND IN THE MATTER OF A DECISION OF THE GAS AND ELECTRICITY MARKETS AUTHORITY (OFGEM) DATED 31 MAY 2017

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KEEGAN J

Introduction

[1] This is an application for judicial review brought against a decision dated 31 May 2017 of the gas and electricity markets authority ("Ofgem") in relation to eligibility for windfarm subsidy. The parties agreed that this case should proceed as a rolled-up hearing given the timeframes for windfarm development within the relevant legislation. I heard the matter on that basis over two days on 28 and 29 September 2017.

[2] Mr Dennys QC and Mr Jonathan Dunlop BL appeared on behalf of the applicant. Ms Emily Neill BL appeared on behalf of the proposed respondent Ofgem. Mr Michael Humphreys QC appeared with Mr McAteer BL on behalf of the notice party the Department for the Economy ("DfE"). I am grateful to all counsel for their written arguments and for the oral submissions that they made to me.

[3] Before the hearing began I raised three issues with Mr Dennys namely:

(i) Whether he was raising any challenge to the legislation itself.

(ii) Whether there was an alternative remedy by way of complaint to an industry regulator.

(iii) Why affidavits from the instructing solicitor have been filed commenting upon the facts and legal arguments in the case.

In relation to point (i) Mr Dennys was quite clear that he did not wish or need to make such a challenge. Mr Dennys did not offer any view on the second point which is perhaps understandable given Ofgem's regulatory role. As to the third point, Mr Dennys suggested that this was a common practice and so I am compelled to comment upon it. I can understand that solicitors' affidavits may be filed when there are particular issues that the solicitor can address such as delay. However, in judicial review the evidence must come from the applicant and the solicitor's affidavits in this case were entirely inappropriate in terms of commenting on the case and making legal arguments. Mr Dennys accepted my criticism and indicated that he would not be relying on the affidavits as they did not add to the case. I am satisfied that this was a proper approach and I trust that this will not arise again.

Background

[4] The issue in this case is whether a windfarm development can meet the eligibility requirements for a subsidy. In Northern Ireland as in Great Britain the scheme has been subject to legislative closure. However, a grace period is provided for within the legislation. The question is whether the applicant can avail of the grace period to come within the scheme. The applicant is Pigeon Top Windfarm Limited ("PTWL"), a company incorporated in Northern Ireland and a wholly owned subsidiary of TCI Renewables Limited ("TCI"). This company's business includes renewable electricity generation.

[5] In September 2015 the Department of Enterprise, Trade and Investment in Northern Ireland ("DETI"), now the Department for the Economy, announced its intention to follow the UK Government's announcement of 18 June 2014 to close the Renewable Obligation ("RO") to large onshore wind by March 2016 and implement early closure of the Northern Ireland Renewables Obligations ("NIRO") support mechanism for encouraging increased renewable electricity generation in Northern Ireland to large scale onshore wind generating schemes over five megawatts. This would include the Pigeon Top project.

[6] This very brief summary sets the scene for the current case. The Governmental Statement I have referred to was made by the relevant Minister Amber Rudd in 2014 and in broad terms it contained the following commitment:

> "The Government is committed to meeting objectives and cutting carbon emissions in the UK's 2020 renewable energy targets. Onshore wind has deployed successfully to date and is an important part of our energy mix. We now have enough on shore wind in the pipeline, to be subsidised by bill payers through their renewable obligation or contracts for difference, for onshore wind to play a

> significant part in meeting our renewable energy commitments."

[7] The Statement continues that:

> "..the renewable obligations will be closed however to protect investor confidence in the wider renewable sector, I am proposing a grace period which would continue to give access to support under the RO to those projects which, as of today, already have planning consent, a grid connection offer and acceptance, and evidence of land rights for the site on which their project will be built. I believe this draws the line in the right place but I want to hear views from the industry and other stakeholders before framing the terms of the legislation."

[8] On 30 September 2015 the DETI Minister Jonathan Bell MLA issued a two week consultation on the proposed closure of the Northern Ireland Renewables Obligation to onshore wind from 1 April 2016. In issuing this consultation the Minister explained the rationale for his proposal to align the approach being taken in Great Britain by the Department of Energy and Climate Change ("DECC"). The rationale was that this would maximise the contribution of the onshore wind sector whilst minimising subsidy costs for energy consumers.

[9] I have been referred in detail to the DETI response to this consultation. The index sets out a list of NIRO Consultation responses and this includes TCI renewables which is the parent company of the applicant. Part 2 of the paper contains some important points under the heading "grace period-points of clarification". The investment freezing grace period is also explained. Paragraphs 2.44 - 2.47 set out the requirements for a declaration and the evidence required as follows:

> "2.44 The proposed investment freezing condition requires operators of affected projects to provide a declaration stating that, to the best of the operator's knowledge and belief that as at the date of coming into operation of the Renewables Obligation Closure Order (Northern Ireland) 2016:
>
> (a) funding from a recognised lender was required before the station could be commissioned or additional capacity could form part of the station;

(b) the recognised lender was not prepared to provide funding until the Renewables Obligation Closure Order (Northern Ireland) 2016 was made because of uncertainty over whether the Order would be made or its wording if made; and

(c) the station would have been commissioned, or the additional capacity would have formed part of the station, on or before 31 March 2017 if the funding had been provided before the Renewables Obligation Closure Order (Northern Ireland) Order 2016 was made.

2.45 The operator of the project will also be expected to secure a letter or other document, dated on or before the date which is 28 days after the Renewables Obligation Closure Order (Northern Ireland) 2016 is made, from a recognised lender confirming (whether or not the confirmation is subject to any conditions or other terms) that the lender was not prepared to provide funding in respect of the station or additional capacity until the Order is made, because of uncertainty over whether the Order would be made or its wording if made.

2.46 A 'recognised lender' is 'a provider of debt finance which has been issued with an investment grade credit rating by registered credit rating agency'.

2.47 The investment freezing condition is intended to work in the same way as existing grace periods relating to the closure of the NIRO. There is no separate application to determine eligibility for the grace period or for the additional time for projects affected by an investment freeze – projects just need to submit the required evidence to demonstrate eligibility at the time they apply to Ofgem to accredit under the NIRO."

[10] Ultimately the Renewables Obligation Closure Order (Northern Ireland) 2016 ("the Order") was enacted on 16 March 2016. The purpose of the Order was to close the NIRO on 31 March 2016 to onshore wind generating stations including additional capacity over five megawatts in Northern Ireland which were not

commissioned by that date. The current project the Pigeon Top project was not able to connect prior to 31 March 2016 and so it fell within this closure provision.

[11] The NIRO scheme is a subsidy for renewable electricity. Once accredited, the applicant is entitled to a subsidy for 20 years or until 2037 when the scheme ends. Ofgem administers the accreditation process.

[12] As per the Ministerial Statement, the Order did provide for a number of grace periods available to renewable energy generating station operators. These projects were affected by the early closure where certain eligibility criteria were established. These eligibility criteria are set out in the Order and are threefold namely, satisfaction of the approved development conditions, satisfaction of the grid delay conditions and satisfaction of an investment freezing condition. By virtue of satisfaction of these conditions the operator could avail of a further period to connect.

The applicant's evidence

[13] The application for judicial review is supported by an affidavit of Mr Brett O'Connor dated 14 August 2017. He describes himself as the Director of PTWL having worked for the parent company TCI for some 13 years and within the same group of companies for some 18 years. Mr O'Connor states that he is a chartered civil engineer with considerable experience. PTWL is a renewable energy company. The project at issue is the development of a windfarm known as Pigeon Top at Drumquin in County Tyrone. The intention is that Pigeon Top connects to the Northern Ireland electricity network distribution at Curraghamulkin cluster (formerly the Drumquin cluster). This cluster is a sub-station developed by Northern Ireland Electricity ("NIE") in accordance with its cluster connection policy. The affidavit states that at the current date there are three windfarm operators owning the four windfarm projects connecting to the Curraghamulkin cluster namely Cornaviro, Slieve Glass, Castle Craig and Wind Top. Mr O'Connor avers that by the end of August 2017 PTWL will have invested around £1.425m on the project in terms of set up. This is a large onshore windfarm operation over five megawatts.

[14] The affidavit of Mr O'Connor explains that after the publication of the legislation there was industry interaction with Ofgem. Ofgem issued a number of guidance documents in respect of Northern Ireland from March 2016 onwards. These were designed to assist operators of onshore windfarms affected by the Order. The first draft guidance was dated 24 March 2016. In that Guidance, the 28 day period for the investment funding letter is cleared flagged. I was referred in particular to Template 3 of Appendix 3 from the March 2016 Guidance which matched entirely Article 12(4)(a)(iii) of the Order stating that to the best of the operator's knowledge and belief as at the date on which the closure was made being 16 March 2016 the station would have commissioned on or before 31 March 2017 if

funding was obtained before the Closure Order was made. This condition is at the core of the case given that Ofgem subsequently accepted that the requirement for the station to be commissioned by 31 March 2017 was entirely unworkable. At paragraph 15 of his affidavit Mr O'Connor avers that Ofgem's interpretation is legitimate if the purpose/aim of the grace periods is to be given effect. At paragraph 22 he also avers that the grid delay was already known and so the project could not commission prior to 31 March 2017.

[15] Representatives of the applicant parent company and other contractors attended an Ofgem workshop on 6 April 2016. Following from this, TCI Renewables sent a letter to Ofgem dated 21 April 2016. This correspondence is detailed and includes the following representations:

> "RE: Response to Ofgem Consultation on Ofgem's E-serve draft guidance-Northern Ireland Renewables Obligation-Closure of the Scheme to Large Onshore Wind
>
> Thank you for the opportunity to comment on the draft guidance for the Northern Ireland Renewables Obligation (NIRO): closure of the scheme to large onshore wind, issued 24 March 2016. TCI Renewables Limited has a substantial portfolio of wind energy development projects in Northern Ireland and has had a continuous office in Belfast since 2005, employing local staff.
>
> As previously discussed, at the 6 April 2016 workshop in Belfast and at a separate meeting at Ofgem's Office in London, we have two principal points (although a third is mentioned) related to the above referred consultation, as described below:
>
> 1. Amendments to 'Approved Development Condition' qualifying planning permission obtained after 30 October 2015
> 2. Table 1 'Approved Development' Condition evidence
> 3. Declaration pursuant a qualifying grace period grid delay [pursuant draft presented at Appendix 3 Template 2 of the consultation document]."

[16] I have not recited the narrative under points 1 and 2 however it is relevant to note that as regards the third point and the declaration the letter states as follows:

> "The final draft of the guidance should clarify that once an operator becomes aware of a qualifying grid delay, that the declaration does not require the operator to have progressed the construction of the project so that it could have been commissioned in all other respects (except for the grid delay) before the primary date."

[17] Further guidance was provided with an adjustment to the text which had been suggested by the Department and an industry group on a fairly regular and rolling basis. The June 2016 guidance has been taken to be important because in that guidance reference is again made to the template whereby the 31 March 2017 date was provided. Further guidance was issued in the ensuing months. There are no particular changes noted in relation to any of this guidance. However, on 11 May 2017 Ofgem published a four week consultation on further draft amendments to guidance on the closure of the renewables obligation to onshore wind in Great Britain and Northern Ireland. The amendments related to Templates 2 and 3 of Appendix 3 in relation to the declaration of grid and/or radar delay conditions and the declaration of investment freezing conditions. The proposed amendments are purported to clarify the combination/interaction of the grace periods because it had come to Ofgem's attention by that stage that the wording of the template declarations published in the guidance did not reflect the true meaning of the Order as properly constructed. This was essentially that the date contained in Article 12 of the Order of 31 March 2017 was unworkable.

[18] In Mr O'Connor's affidavit he states at paragraph 41:

> "It was evident based on the language of the Order in the March 2016 guidance that such an investment freeze letter was therefore of no benefit as all Curraghamulkin cluster connectees were unable to validly make the required investment (freeze declaration) related to the project needing to be commissioned prior to 31 March 2017 at the time."

He goes on to state that:

> "Post-summer 2016 PTWL was extremely perplexed as to how operators in the Curraghamulkin cluster were financing projects given the contradiction between the Order."

[19] Mr O'Connor avers that due to the difficulty in making a declaration under Article 12 PTWL did not apply at the relevant time for an investment freeze letter from a lender. Therein lies the core of the dispute.

[20] PTWL took this issue up with Ofgem. There followed exchanges which culminated in a view expressed by Ofgem that it was not willing to accept the correspondence put by PTWL as meeting the requirements under the legislation. I have been referred to substantial correspondence between the solicitors on behalf of the applicant and Ofgem. In summary there was an exchange of correspondence to see whether the issue of the investment freeze could be rectified by various means as follows:

(i) The applicant produced to Ofgem a letter from Barclays Bank dated 22 March 2016. This was a letter in relation to another windfarm however it states as follows:

> "Barclays Bank Ireland Plc is an active lender to the wind energy sector. Barclays Bank Ireland Plc is rated A by S&P. We have been in discussions with the developer and operator (the operator) regarding the provision of senior bank debt funding for the …… in County ….. Northern Ireland …… which is owned by ……. Windfarm Limited. We understand the Renewables Obligation Closure Order (Northern Ireland) 2006 (the Order) was passed into legislation on 17 March 2016 (the Order date). This letter is provided in relation to the Investment Freezing Condition as set out in Article 12 of the Order specifically Article 12(4)(b). Barclays Bank Ireland Plc was not prepared to provide funding in respect of …….. due to uncertainty over the wording or whether the Order would be made."

(ii) An e-mail was provided by a representative of Barclays Bank on 26 July 2017 to the applicant by way of clarification it states as follows:

> "The bank's policy on and around the NIRO Closure Order date, was that it was not prepared to provide funding in respect of grace period projects in Northern Ireland due to uncertainty over whether the NIRO Closure Order would be made or its wording if made. The bank's position would have naturally applied to Pigeon Top Windfarm should it have been approached to provide funding for

> the project on or about the NIRO Closure Order date."

(iii) A letter was provided from the Bank of Ireland dated 28 April 2017 this states, *inter alia* re Pigeon Top Windfarm.

> "The Governor and Company of the Bank of Ireland (the Bank) is an active lender to the wind energy sector and is rated BBB by S&P and Baa2 by Moodys. We have been in discussions with Pigeon Top Windfarm Limited, the owner, developer and operator of the windfarm, since the beginning of 2017, regarding the provision of senior bank debt funding for Pigeon Top Windfarm in County Tyrone, Northern Ireland (the project). We understand the Renewables Obligation Closure Order (Northern Ireland) 2016 (the Order) was passed into legislation on 17 March 2016 (the Order date). We further understand that the project did not seek provision of this letter from a recognised lender within 28 days after the Order date as it was in a position at that time to make the declaration set out in Article 12(4)(a) of the Order (the declaration).
>
> The position of the bank on and around the Order date was that it was not prepared to provide funding in respect of grace period projects in Northern Ireland such as the project and/or consider progressing due diligence and internal credit submissions in relation to funding of any such project until enactment of the Order, due to uncertainty over whether the Order would be made or its wording if made."

[21] There followed further correspondence between the applicant and Ofgem in relation to whether or not this information was sufficient to meet the requirements of the legislation. I note from this correspondence Ofgem's commitment to look at the matter flexibly. In particular, the clear position of Ofgem was that it would accept a policy statement from the bank at the relevant time. However, the applicant's position as to proofs was not accepted by Ofgem as sufficient and as a result following extensive pre-proceedings correspondence the applicant brought this judicial review.

[22] The applicant claims, *inter alia*, that the position of Ofgem is irrational, unfair and in breach of European law. The affidavit refers to the fact that there is urgency in this action arising from two events. Firstly, the timing of a substantial grid payment which has to be made to NIE and secondly the necessary construction programme to enable the project achieving accreditation on before 31 December 2018. Mr O'Connor has also filed a substantial rejoinder affidavit dated 15 September 2017 which I have considered.

The evidence of the proposed respondent

[23] The proposed respondent's case is made out in the affidavit of Mr Rupert Charles Hargreaves dated 8 September 2017. He is employed as the Associate Director for Ofgem with responsibility for the administration of the renewables obligation in Great Britain and Northern Ireland. This affidavit confirms that Ofgem is the executive arm of the Authority, a non-ministerial Government department staffed by civil servants that support the Authority in discharging its functions. Ofgem is tasked with providing guidance and applying the legislative structure within Northern Ireland. Mr Hargreaves points out that Ofgem has not amended the legislation in any respect but he accepts that the wording of Article 12(4)(a)(iii) of the Order required to be read in a purposive way otherwise the whole Order would be unworkable.

[24] Mr Hargreaves contends that the requirement for a dated investment freeze letter in Article 12(4)(b) is a separate provision which does not require any elucidation and that this provision should be given its literal meaning. He avers that the statutory intention was to have this in place as part of the application. The affidavit refers to the history of the closure project and the various conditions. The affidavit helpfully refers to the fact that each year Ofgem receives many hundreds of enquiries from potential applicants and that it assists as part of its administration of the scheme. Mr Hargreaves explains this at paragraph 43 of his affidavit. He states that it important to assist potential applicants to understand the accreditation process, to avoid them applying for accreditation where it would not be granted and to assist them in making a successful application where they would be entitled under the legislation.

[25] In order to assist applicants, Ofgem also publishes guidance on how it will administer the scheme. Mr Hargreaves goes on to explain the guidance issued in this area. There is a suggestion made in the affidavit that as Ofgem has not yet exercised any statutory function its actions are not reviewable by the Court at all. The argument is made that this is because the applicant has not yet made an application for accreditation. However, Ofgem makes the following concession at paragraph 49 of the affidavit as follows:

> "However in a similar spirit to that with which Ofgem has engaged with the applicant, Ofgem

> considers that it is of significant assistance that the court determine the issues raised in this case, namely the correct interpretation of Article 12(4)(b) and whether Ofgem would be acting with unlawful retrospectivity, irrationality and unfairly, in frustration of the legislative purpose and in a disproportionate and discriminatory way if, upon an accreditation application, it were to refuse or read out or amend the requirement for a dated letter."

[26] Paragraph 50 goes on to state:

> "Ofgem, for its part, considers that the interpretation of the Order which it has adopted is correct (for the reasons explained below). However, Ofgem recognises the importance to the applicant of certainty in this regard. It is for this reason that Ofgem has agreed to a rolled-up hearing on an extremely expedited timetable, despite the applicant having delayed significantly since it first appreciated that it would not be able to meet the requirement for a dated letter and since Ofgem adopted an approach to the interpretation of Article 12(4)(a)(iii) which departed from the literal meaning of that provision."

[27] The affidavit also refers to the draft guidance issued throughout 2016 culminating in the final June 2016 guidance which was further amended in October 2016. A consultation took place in 2017 following which further guidance is awaited. In particular from paragraph 75 the affidavit refers to the fact that the wording for the investment freezing condition declaration in the final June 2016 guidance was suggested by various bodies for the following reasons regarding primary date and grid connection delay:

> "However, on reflection, it came to Ofgem's attention that the declaration does not go far enough because -
>
> (a) It does not take account of 1 April to 31 December 2017 primary date for Article 9 applicants; and
>
> (b) Has the potential to let into the scheme operators relying on Article 8 even where they would also have been delayed beyond 31 March 2017 due to grid connection delay in circumstances which did not meet the Article

> 10 requirements or other non-permissible reasons."

[28] Accordingly, as Mr Hargreaves avers, Ofgem explained in the further consultation document that the wording of the template declarations as published in the final June 2016 guidance is not consistent with the intention of the legislation as properly construed and a new wording was suggested to the template otherwise the situation would be that the legislation would be internally inconsistent. The affidavit then repeats the applicant's point that there were extensive discussions between Ofgem and the applicant as described in the affidavit. In particular paragraph 129 of the affidavit states as follows:

> "Ofgem did not make demands for documents from the applicant. If the e-mail chain is reviewed it is plain that Ofgem was clarifying whether the applicant was planning to submit further documents to it in the context of the consultation or the guidance."

[29] Paragraph 130 also refers to the fact that:

> "What Ofgem actually said was that we would be happy to consider this evidence along with what had already been provided and that depending on the evidence that may be sufficient to meet the requirement. The reference here is to contemporaneous internal evidence from any recognised lender that their policy at the time was not to lend."

[30] The affidavit describes that in this case Mr Hargreaves had gone as far as speaking to a bank in order to reassure the bank as to Ofgem's approach to sensitive documents. However, he avers at paragraph 133 that:

> "Ofgem cannot make a commitment to the applicant on the basis of hypothetical documents and it would be important for Ofgem to have regard to the precise wording of any document and evidence produced by the applicant to support an actual application when deciding whether it falls within Article 12(4)(b) of the 2016 Order. It states that this repeatedly had been made clear to the applicant."

[31] Mr Hargreaves explains Ofgem's position on the various documents presented during the course of the proceedings namely, the letter from the Bank of Ireland dated 28 April 2017, and the letter from Barclays (redacted) dated 22 March

2016 and the e-mail from Barclays Bank dated 26 July 2017. The position from the affidavit is that these are not sufficient either individually or cumulatively but the affidavit states that Ofgem has repeatedly made clear that it remains willing to consider any further documents which the applicant may wish to submit.

[32] A further point is taken by the proposed respondent in this case, reflected in paragraph 143 of the affidavit is that there has been some delay on the part of the applicant and also that the applicant did not properly raise this issue. Mr Hargreaves states at paragraph 143 that he is aware that in the seven months from June 2016 when the guidance was published the applicant did not at any time between June 2016 and 30 January 2017 approach Ofgem to raise any questions or issues about the letter or other document requirement in the investment freezing condition. He also avers at paragraph 144 that he knows that the applicant did not make any representation to Ofgem about any difficulties in meeting the requirement whilst others did and that the applicant actually made representations on two issues pursuant to Ofgem's March 2016 consultation, but said nothing about the point at issue.

[33] Mr Hargreaves avers that he would have expected a reasonable operator who was unclear as to whether they could avail of grace period in light of the conflict of language between Article 10 and Article 12(4)(a)(iii) to have prudently obtained a letter or other document within the stated period and then approached Ofgem. Finally, he states that from evidence submitted by TCI it appears that other developers in the same situation appear to have taken a more prudent approach. In conclusion Mr Hargreaves avers that Ofgem has acted in a diligent and responsible manner in administering the NIRO scheme. He accepts that there are issues in the way the legislation is drafted in respect of the specific requirements of the investment freezing condition and its interaction with other parts of the Order. He says in conclusion "we have worked extensively with the applicant in order to try and resolve these differences on this matter. We will welcome the court's view on the correct interpretation of the Orders."

Legislative framework

[34] Article 3 of The Renewables Obligation Closure Order (Northern Ireland) 2016 states as follows:

> "No certificates to be issued in respect of electricity generated after 31st March 2016 by large onshore wind generating stations
>
> 3(1) Subject to paragraph (2), no renewables obligation certificates are to be issued under a renewables obligation order in respect of electricity

generated after 31 March 2016 by a large onshore wind generating station.

(2) Paragraph (1) does not apply to electricity generated in any one or more of the circumstances set out in Articles 4 to 12."

Article 9 reads as follows:

"Large onshore wind generating stations accredited, or additional capacity added, between 1 January 2018 and 31 December 2018: grid or radar delay condition met

9(1) The circumstances set out in this Article are where the electricity is—

(a) Generated using the original capacity of a large onshore wind generating station—

(i) Which was accredited during the period beginning with 1 January 2018 and ending with 31 December 2018,

(ii) In respect of which both the approved development condition and the investment freezing condition are met, and

(iii) In respect of which the grid or radar delay condition is met."

Article 10:

"The grid or radar delay condition

10(1) This Article applies for the purposes of Articles 5, 7 and 9.

(2) The grid or radar delay condition is met in respect of a large onshore wind generating station if, on or before the date on which the Authority made its decision to accredit the station, the documents specified in paragraphs (4), (5) or (6) were—

(a) submitted by the operator of the station, and

(b) received by the Authority.

(7) In this Article the primary date means—

(a) In a case within Article 5(a)(i) or (b)(i) and (ii), 31 March 2016;

(b) In a case within Article 7(a)(i) and (ii) or (b)(i) to (iii), 31st March 2017;

(c) In a case within Article 9(a)(i) and (ii) or (b)(i) to (iii), 31 December 2017."

Article 12:

"The investment freezing condition

12(1) This Article applies for the purposes of Articles 8 and 9.

(2) The investment freezing condition is met in respect of a large onshore wind generating station if the documents specified in paragraph (4) were provided to the Authority with the application for accreditation of the station.

(3) The investment freezing condition is met in respect of additional capacity if the documents specified in paragraph (4) were provided to the Authority on or before the date on which the Authority made its decision that the additional capacity could form part of the large onshore wind generating station in question.

(4) The documents specified in this paragraph are—

(a) A declaration by the operator of the station that, to the best of the operator's knowledge and belief, as at the date on which this Order is made—

(i) The relevant developer required funding from a recognised lender before the station could be

commissioned or additional capacity could form part of the station,

(ii) A recognised lender was not prepared to provide that funding until this Order is made, because of uncertainty over whether the Order would be made and its wording if made, and

(iii) The station would have been commissioned, or the additional capacity would have formed part of the station, on or before 31st March 2017 if the funding had been provided before this Order is made, and

(b) A letter or other document, dated on or before the date which is 28 days after the date on which this Order is made, from a recognised lender confirming (whether or not the confirmation is subject to any conditions or other terms) that the lender was not prepared to provide funding in respect of the station or additional capacity until enactment of this Order, because of uncertainty over whether this Order would be made and its wording if made."

The nature of the challenge

[35] The Order 53 statement as originally drafted and dated 14 August 2017 is broad and sweeping in its scope. It seeks an order of certiorari to bring up to the Court and quash the impugned decision of Ofgem, a declaration that the said impugned decision is unlawful, ultra vires and of no force and effect and an order of mandamus requiring Ofgem to accept such evidence as the applicant has provided, as sufficient, to meet the requirements of Article 12, in the light of the new interpretation of Ofgem is to give to it. The following grounds were pleaded:

(a) Unlawful retrospectivity.

(b) Irrationality and conspicuous unfairness.

(c) The respondent has frustrated the legislative purpose.

(d) The respondent has failed to interpret the order to achieve a proportionate and non-discriminatory outcome in accordance with EU law.

[36] It is fair to say that at the hearing of this matter counsel realised that there were some difficulties with the pleaded case. An application was made to amend

the Order 53 late on the first afternoon of hearing. This application was not opposed by the proposed respondent to save costs and to avoid an adjournment of the case. However, this situation was somewhat unfortunate in terms of the lateness of an amendment and the fact that the case was really only clarified after a full day of hearing.

[37] The amended Order 53 abandoned the claim for an order of certiorari or mandamus and simply asked for declaratory relief on three fronts contained within the amended paragraph 15 at (b)(c) and (d) as follows:

> "(b) A declaration that the letter of 22 March 2016 and/or the letter from Bank of Ireland dated 28 April 2017 read either individually or in combination together shall satisfy the requirements of Article 12(4)(b) of the Closure Order.
>
> (c) Further or in the alternative, a declaration that Article 12(4)(b) of the Closure Order should be read as though the words "dated on or before the date which is 28 days after the date on which the order is made" do not appear.
>
> (d) Further or in the alternative, a declaration that the words "dated on or before the date which is 28 days after the date on which this order is made" in Article 12(4)(b) of the Closure Order are substituted by the words "dated on or before the date which is 28 days after the date on which the application for judicial review herein is determined"."

[38] The amendment crystallised the case into two discrete issues which I articulate as follows:

> (i) Whether or not I should interpret the legislation by removing the 28 days requirements for the investment freeze letter.
>
> (ii) Whether I should declare that the evidential proof in this case is enough to satisfy the legislative requirements.

Arguments made by the parties

[39] I have read the comprehensive skeleton arguments filed by the applicant on the proposed respondent. I do not intend to repeat the arguments in substantial detail particularly given how the case evolved. However I summarise some salient points raised as follows.

[40] Mr Dennys referred to the EU Directive 2009/28/EC which has at its core the promotion of the use of energy from renewable sources. He also referred to the obligation upon Member States contained within the Directive to take appropriate steps to ensure that comprehensive information on the processing of , authorisation, certification and licensing applications for renewable energy installations and on available assistance to the applicants are made available at the appropriate level. He contended that all of this set the context for a case such as this.

[41] Mr Dennys then turned to the domestic legislation at issue and he stressed the fact that Article 12(4)(a)(iii) and 12(4)(b) are interrelated. In essence he argued that because Ofgem have applied a certain interpretation to 12(4)(b)(iii) it should apply a broad interpretation to 12(4)(b) and the investment freeze condition. In his argument he relied on R (Noone) v HMP Drake Hall [2010] UKSC 30 and the judgments of Lord Philips and Lord Mance and the dicta that "by one route or another, the legislation must be construed so as to avoid what would otherwise produce irrational and indefensible results". Mr Dennys also placed some emphasis on the various changes to the guidance and the fact that 2017 guidance has not yet issued.

[42] Mr Dennys relied upon Homesun v SSECC [2011] EWCA 3575 and Breyer v DECC [2015] 1 WLR 4559. Mr Dennys enjoined the court to apply a Marleasing interpretation given that this legislation derives from EU law regarding renewable energy. In his argument Mr Dennys submitted the interpretation suggested by Ofgem is not proportionate, discriminatory and offends legal certainty.

[43] Ms Neill stressed that Ofgem has no vested interest in this case as it has simply been tasked to administer a scheme. She also queried the basis for judicial review but stated in her argument that "Ofgem consented to a rolled up, expedited hearing because the applicant claims it needs to know the correct meaning of Article 12(4)(b) urgently to make investment decisions. As a responsible public body, Ofgem has sought to accommodate the applicant and is grateful to the Court for a similar accommodation. Ofgem has also not sought to knock out the claim on grounds of delay nor on the absence of a reviewable decision."

[44] Ms Neill referred to the Energy (Northern Ireland) Order 2003 which contains the power to set up and close a scheme, in particular Article 55EA(1) which states that "the Department may make a renewable obligation closure order". In her argument Ms Neill accepted that that Ofgem have departed from a literal meaning of the legislation regarding the commissioning declaration in Article 12(4)(a)(iii). In that regard she contended that the literal meaning makes the Order internally inconsistent because of the obvious clash with the primary dates contained within the Order. Ms Neill relied on Lord Nicholls dicta in Inco Europe v First Choice Distribution [2000] 1 WLR 586 to justify this approach. She also referred to Bennion on Statutory Interpretation (6th Edition) and drew in aid the principle that there can be a departure where a literal construction offends Parliamentary intention. Ms

Neill argued that no such departure is needed regarding the investment freeze condition because the wording is clear and the intention is clear. She summarised the legislature's intention as follows: that if a project had been unable to obtain funding because of the uncertainty arising from the Order, that project should nonetheless be accredited if meeting the criteria in the Order; this could be established if delay was caused because uncertainty over the closure of the NIRO scheme prevented funding and where there was near contemporaneous evidence of that; the requirement for contemporaneous evidence avoids hindsight.

[45] As regards the alleged unlawful retrospectivity, Ms Neill argued that this ground is wrong in law and that the cases of Homesun and Breyer relied upon by the applicant are not relevant and on different facts. Ms Neill also defended an irrationality and unfairness challenge on the facts. She submitted that the course taken by Ofgem does not frustrate the legislative purpose. Ms Neill rejected the claims made by the applicant that the course suggested by Ofgem represents a conflict with EU law, proportionality, non-discrimination and legal certainty. Ms Neill contended that Marleasing is not apposite in this case. She relied upon the opinion of Lord Mance in Assange v Swedish Prosecuting Authority [2012] UKSC 22 that even though a domestic Court may depart from the precise words in the legislation being construed, the result must "go with the grain" and not be "inconsistent with some fundamental or cardinal feature of the legislation"

[46] Mr Humphrey's QC filed a skeleton argument on behalf of the notice party the Department for the Economy. He made the point that some of the averments in the affidavits raised concern that the applicant may in fact want to challenge the Order and as such he said that the Department needed to hold a watching brief. In assisting the Court Mr Humphreys stressed the high level of engagement of the applicant during the consultation process and the applicant's knowledge of the evidence required in order to satisfy the investment freeze condition. He pointed to the fact that after the guidance was published in March 2016, the applicant corresponded in April 2016 but the apparent difficulty in contemporaneous evidence of investment freeze was never mentioned.

Consideration

[47] In determining this application I have considered the affidavits of Mr O'Connor and Mr Hargreaves and the arguments of the parties. I should say that I asked on the first day of hearing whether or not this case was really rooted in its own particular facts or whether it had a wider application. Ms Neill suggested that there were wider implications. Some reference was made to the potential that this would affect many other applicants and that there might be a financial implication. These submissions were made by both Ms Neill and Mr Humphreys without any particular evidence being provided. However, I accept the proposition that there is a social cost to any subsidy scheme.

[48] Mr Dennys has properly (although very late in the day) focused on the facts of this case rather than making a wider point of general importance. This approach also simplified the case into a consideration of the two discrete issues I have identified at paragraph [38] above.

[49] Fundamentally the applicant, like many others I am sure, wants to be able to benefit from the subsidy scheme which applies to the provision of renewable energy in Northern Ireland. The applicant is an experienced operator in the field. The scheme is now closed for windfarms in the position of this one. The applicant wants to apply relying on the grace periods provided for. The applicant can do that up to 31 December 2018. However the applicant understandably wants to ensure that all of his proofs are in order by asking the Court whether or not one of the conditions relied upon namely the investment freeze condition can be satisfied. In that sense this is a pre-emptive application for declaratory relief. There was no argument put before me that development consent posed a problem. The grid delay element is common to everyone and has clearly led to uncertainty in relation to connection. However, that issue did not form a core part of this debate. The case centred on the sole issue of the applicant's difficultly with the investment freeze condition. The suggestion is that it would be fair and in accordance with law to conclude that the applicant can in fact meet the requirements of that condition so that the applicant can obtain the benefit of the subsidy when the application is made.

[50] This is a judicial review court exercising a supervisory function. I note the reservations which were initially raised in relation to justiciability in this case. These are valid however they were not pursued with any vigour which reflects the fact that there was a purposive approach taken in this case. However, I must frame any decision within the proper parameters of judicial review. I am not myself permitted to decide on the merits of any case. It was accepted that I can exercise my supervisory function in relation to overseeing the actions of the public body in administering a statutory scheme in this particular case.

[51] I stress that I was not asked to look at the legislation itself. I made this point at the outset to Mr Dennys and he clearly confirmed that he was not pursuing any challenge to the legislation. In my view this is significant because there are limits on how far a Court should interfere with interpretation of the Order if the legislation itself is not challenged. Many other legal points were relied upon by the applicant in this case. I acknowledge the erudition of counsel in presenting these legal arguments however I am bound to say that much of the argument had limited relevance to the particular issue I was tasked to decide. Suffice to say that I entirely accept the arguments made by Ms Neill that the case relying on European law is not well founded. This case is not about the principle of renewable energy but rather it is about the mechanics of closure and the requirements placed upon applicants to avail of a grace period. I also accept Ms Neill's well-made arguments in relation to retrospectivity. It is clear to me that this case simply comes down to issues of

rationality and fairness in terms of Ofgem's role in administering the statutory scheme.

[52] In considering this issue it follows as a matter of course that I must look to the legislation in the first instance. This has been described as intricate and to that I would also add complicated. In relation to the core questions it seems to me that the issue is whether or not the two provisions of Article 12 are so intertwined that the provision for the investment freeze letter depends on the interpretation of the commissioning declaration provision at 12(4)(a)(iii). I have considered this and in my view whilst the two issues are connected they are not so closely intertwined. I say this on the basis of what the intention is behind each provision.

[53] Firstly, it is clear and it was common case that the first provision (12(4)(a)(iii)) if interpreted strictly within the legislative structure would lead to impossibility in terms of the commissioning declaration. In other words the stations could not be commissioned on or before 31 March 2017. In this regard there is a variable beyond the control of any applicant namely grid delay. It therefore makes sense that this provision has to be relaxed for the scheme to work. But that does not mean that the provision in 12(4)(b) should automatically also be relaxed. There is no variable outside of the applicant's control in relation to that provision. This provision relates to the applicant's financing arrangements which must be verifiable in or around the time of the enactment of the Order. The letter is needed to show that a bank was unwilling to lend due to uncertainty regarding the closure of the scheme. The purpose is clear and the timeframe is clear.

[54] The affidavits filed on behalf of the applicant state that there was a conscious decision not to apply for an investment freeze letter on the basis of the impossibility of making a declaration given the 31 March 2017 date. I find this somewhat curious given that the applicant is an experienced operator within the realm of renewable energy. There was also no indication that the scheme was going to fold in its entirety. The Order is fundamentally to protect projects in the pipeline which had reached a stage of development before the early closure. It would have made commercial sense to adopt a belt and braces approach and simply get the investment freeze letter. That is unless there was some impediment in getting the investment freeze letter at the relevant time. If so the applicant may simply not be eligible. There may also have been other commercial factors at play which I am not aware of.

[55] I am strengthened in my view because the applicant was so engaged in the consultation process and because of the applicant's delay in raising the matter. It was certainly not raised in April 2016 in the detailed correspondence sent to Ofgem. There is also little by way of convincing explanation about this in the affidavit evidence.

[56] If I stand back and look at this case it is clear to me that the investment freeze issue comes down to the adequacy of the documentary proof. I understand the

point made by the applicant that there was a problem with this legislation. All agree that it is intricate. The interpretation of the legislation has evolved as evidenced by the fact that Ofgem had to change its own guidance. The real issue for me is whether or not it is fair of Ofgem to suggest in those circumstances that the proofs provided by the applicant are not sufficient. I bear in mind that the decision maker should be afforded some latitude in this regard as the actual administrator of the scheme.

[57] I take particular cognizance of the fact that Ofgem, throughout the correspondence with the applicant, has said that a flexible approach would be applied. They did not require a specific letter from the lender at the time but were content to rely upon other policy documents. As such I must consider whether unfairness has been occasioned to the applicant in the particular circumstances of this case. My conclusions are as follows. Firstly, I am not prepared to re-interpret the legislation as per the declarations suggested in 15(c) and (d) of the amended Order 53. I consider that this suggested course is against the grain of the legislation and has little merit.

[58] I was more open to consider the declaration sought at 15(b) which is that the letter of 22 March 2016 and the letter from the Bank of Ireland dated 28 April 2017 read in combination should satisfy the requirements of Article 12(4) (b) of the Order. I have reflected on this approach. I remind myself that Ofgem administers a statutory scheme which must be fair to all. I bear in mind that there are three conditions which establish eligibility and then the length of the grace period. The investment freeze is one of them and ironically it may be the least complicated of the three. This requirement must have been included for a reason. The most obvious one is that if an applicant was clearly intending to proceed with a windfarm at the time of the closure being announced the need arises for contemporaneous evidence of investment freeze. By virtue of the way the case developed it is clear to me that the applicant implicitly acknowledged this principle because the emphasis was upon satisfying the contemporaneity requirement albeit by an imaginative route.

[59] As I have said, the investment freeze letter has its own particular purpose and whilst the criteria can be applied flexibly they cannot in my view be by passed completely. This is not simply a matter of form but rather an issue of substance. On any reading the applicant's case is a stretch in relation to the proofs currently presented. I cannot conclude that it is unfair or irrational of Ofgem to say that evidence from another windfarm and evidence from another bank which is not contemporaneous can suffice. So, I cannot take the step suggested by the applicant comprised within the proposed declaration at 15(b). I repeat the point that there has been no challenge to the legislation itself and as such I cannot take the matter any further.

[60] Ofgem has been flexible in terms of the exact nature of the contemporaneous evidence required. This is not a case where a rigid approach has been adopted. The

scheme must be administered in a lawful manner. There was some sympathy expressed for the applicant during the hearing and as such I am confident that further assistance will be provided by Ofgem if requested and that all may not be lost. However, I must decline to make the declarations sought within this application for judicial review.

Conclusion

[61] Accordingly, whilst I consider that the applicant did mount an arguable case, I dismiss the case on the merits. I will hear the parties as to costs.