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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 GREENBELT NI LIMITED FOR JUDICIAL REVIEW

-v-

DEPARTMENT FOR ECONOMY

_____

McCloskey J

Introduction

[1] Greenbelt NI Limited ("the Applicant") has been granted leave to challenge the decision of the Department for Economy ("the Respondent"), dated 15 May 2017 –

> *"…. to refuse an appeal in respect of – and thereby refuse accreditation of a facility – under the Renewable Heat Incentive Scheme Regulations (NI) 2012."*

The thrust of the Applicant's case is that the impugned decision is vitiated by the Respondent's failure to take into account certain material information.

The RHI Scheme

[2] The Renewable Heat Incentive Scheme ("the RHI Scheme") is statutory in nature, being governed by the Renewable Heat Incentive Scheme Regulations (NI) 2012, as amended ("the Regulations"). This measure of subordinate legislation derives from section 113 of the Energy Act 2011 which empowered the Respondent's predecessor to make regulations –

> *"(a) Establishing a scheme to facilitate and encourage renewable generation of heat in Northern Ireland, and*

(b) About the administration and financing of the Scheme."

"GEMA" denotes the Gas and Electricity Markets Authority, a body corporate established under section 1 of the Utilities Act 2000. Section 114(1) of the Parent Statute provides:

> "*GEMA and a Northern Ireland authority may enter into arrangements for GEMA to act on behalf of the Northern Ireland Authority for, or in connection with, the carrying out of any functions that may be conferred on the Northern Ireland Authority under, or for the purposes of, any scheme that may be established under section 113.*"

The Respondent is encompassed by the definition of "Northern Ireland Authority".

[3] The key provisions of the Regulations are the following:

Regulation 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 7 and 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; or*
>
> *(c) for carrying out a process.*
>
> *(3) Subject to Part 7, the Department must pay participants who are producers of biomethane for injection periodic support payments."*

Regulation 4

> "*(1) A plant meets the criteria for being an eligible installation (the "eligibility criteria") if –*

(a)regulation 5, 6, 7, 8, 9, 10 or 11 applies;

(b)the plant satisfies the requirements set out in regulation 12(1);

(c)regulation 15 does not apply; and

(d)the plant satisfies the requirements set out in Chapter 3.

(2) But this regulation is subject to regulation 14."

Regulation 12

"*(1) The requirements referred to in regulation 4(b) are –*

(a)installation of the plant was completed and the plant was first commissioned on or after 1st September 2010;

(b)the plant was new at the time of installation;

(c)the plant uses liquid or steam as a medium for delivering heat to the space, liquid or process;

(d)heat generated by the plant is used for an eligible purpose."

[4] The subject matter of Part 3 of the Regulations is "Accreditation and Registration". There are two key provisions in this context.

Regulation 22

"*(1) An owner of an eligible installation may apply for that installation to be accredited.*

(2) All applications for accreditation must be made in writing to the Department and must be supported by –

(a) such of the information specified in Schedule 1 as the Department may require;

(b) a declaration that the information provided by the applicant is accurate to the best of the applicant's knowledge and belief;

(c) a declaration that the applicant is the owner, or one of the owners, of the eligible installation for which accreditation is being sought.

(3) The Department may, where an eligible installation is owned by more than one person, require that –

(a) an application submitted under this regulation is made by only one of those owners;

(b) the applicant has the authority from all other owners to be the participant for the purposes of the scheme; and

(c) the applicant provides to the Department, in such manner and form as the Department may request, evidence of that authority.

(4) Before accrediting an eligible installation, the Department may arrange for a site inspection to be carried out in order to satisfy itself that a plant should be accredited.

(5) The Department may, in granting accreditation, attach such conditions as it considers to be appropriate.

(6) Where an application for accreditation has, in the Department's opinion, been properly made in accordance with paragraphs (2) and (3) and the Department is satisfied that the plant is an eligible installation the Department must (subject to regulation 23 and regulation 46(3)) –

(a) accredit the eligible installation;

(b) notify the applicant in writing that the application has been successful;

(c) 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;

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

(e) in relation to an applicant who is or will be generating heat from solid biomass, having regard to the information provided by the applicant, specify by notice to the applicant which of regulations 28 or 29 applies;

(f) provide the applicant with a written statement ("statement of eligibility") including the following information –

(i) the date of accreditation;

(ii) the applicable tariff;

(iii) the process and timing for providing meter readings;

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

(v) the tariff lifetime and tariff end date.

(7) Where the Department does not accredit a plant it must notify the applicant in writing that the application for accreditation has been rejected, giving reasons.

(8) Once a specification made in accordance with paragraph (6)(e) has been notified to an applicant, it cannot be changed except where the Department considers that an error has been made or on the receipt of new information by the Department which demonstrates that the specification should be changed."

Regulation 23

"*(1) The Department must not accredit an eligible installation unless the applicant has given notice (which the Department has no reason to believe is incorrect) that, as applicable –*

(a) no grant from public funds has been paid or will be paid or other public support has been provided or will be provided in respect of any of the costs of purchasing or installing the eligible installation; or

(b) such a grant or support was paid in respect of an eligible installation which was completed and first commissioned between 1st September 2010 and the date on which these Regulations come into force, and has been repaid to the person or authority who made it.

(2) In this regulation, "grant from public funds" means a grant made by a public authority or by any person

distributing funds on behalf of a public authority and "public support" means any financial advantage provided by a public authority.

(3) The Department must not accredit an eligible installation if it has not been commissioned.

(4) The Department may refuse to accredit an eligible installation if its owner has indicated that one of the applicable ongoing obligations will not be complied with.

(5) The Department may refuse to accredit a plant which is a component plant within the meaning of regulation 14(2)."

In passing, Regulation 26 makes provision for the grant of "*preliminary accreditation*" to a person who proposes to construct or operate an eligible installation which has not yet been commissioned, subject to certain requirements and limitations.

[5] Part 4 assembles a series of provisions under the rubric of "Ongoing obligations for participants". These make clear that one of the central aims of the statutory scheme is "*the use of solid biomass to generate heat*". Consistent with this, there are significant restrictions on the permitted use of fossil fuel. There is a series of general obligations which all participants must observe.

Regulation 33

"*Participants must comply with the following ongoing obligations, as applicable –*

(a) they must keep and provide upon request by the Department records of type of fuel used and fuel purchased for the duration of their participation in the scheme;

(b) they must keep and provide upon request by the Department written records of fossil fuel used for the permitted ancillary purposes specified in Chapters 1 and 2;

(c) they must submit an annual declaration as requested by the Department confirming, as appropriate, that they are using their accredited RHI installations in accordance with the eligibility criteria and are complying with the relevant ongoing obligations;

(d) they must notify the Department if any of the information provided in support of their application for accreditation or registration was incorrect;

(e) they must ensure that their accredited RHI installation continues to meet the eligibility criteria;

(f) they must comply with any condition attached to their accreditation or registration;

(g) they must keep their accredited RHI installation maintained to the Department's satisfaction and keep evidence of this including service and maintenance documents;

(h) participants combusting biogas must not deliver heat by air from their accredited RHI installation to the biogas production plant producing the biogas used for combustion;

(i) they must allow the Department or its authorised agent reasonable access in accordance with Part 9;

(j) participants generating heat from solid biomass must comply with the regulation specified by the Department in accordance with regulation 22(6)(e);

(k) they must notify the Department within 28 days where they have ceased to comply with an ongoing obligation or have become aware that they will not be able so to comply, or where there has been any change in circumstances which may affect their eligibility to receive periodic support payments;

(l) they must notify the Department within 28 days of the addition or removal of a plant supplying heat to a heating system of which their accredited RHI installation forms part;

(m) they must notify the Department within 28 days of a change in ownership of all or part of their accredited RHI installation;

(n) they must repay any overpayment in accordance with any notice served under regulation 47;

(o) they must, if requested, provide evidence that the heat for which periodic support payments are made is used for an eligible purpose;

(p) they must not generate heat for the predominant purpose of increasing their periodic support payments;

(q) they must comply with such other administrative requirements that the Department may specify in relation to the effective administration of the scheme."

Alertness to certain of the definitions in **Regulation 2** is required:

"'date of accreditation'", in relation to an accredited RHI installation, means the later of –

(a) the first day falling on or after the date of receipt by the Department of the application for accreditation on which both the application was properly made and the plant met the eligibility criteria; and

(b) the day on which the plant was first commissioned;

"date of registration", in relation to a producer of biomethane for injection, means the first day falling on or after the date of receipt by the Department of the application for registration on which the application was properly made;

"the Department" means the Department of Enterprise, Trade and Investment;

"eligibility criteria" has the meaning given by regulation 4;

"eligible installation" means a plant which meets the eligibility criteria;

"eligible purpose" means a purpose specified in regulation 3(2); "

[6] The "*tariff start date*" is defined by Regulation 2 as –

"*tariff start date" means the date of accreditation of an eligible installation or, in relation to a producer of biomethane, the date of registration."*

The "*tariff lifetime*" is defined as:

> "*The period for which periodic support payments are payable for that installation.*"

Periodic support payments are governed by **Regulation 36**. It suffices to note the first three paragraphs:

> "*(1) Periodic support payments shall accrue from the tariff start date and shall be payable for 20 years.*
>
> *(2) Periodic support payments shall be calculated and paid by the Department.*
>
> *(3) Subject to regulation 42(5) and paragraph (7) the tariff for an accredited RHI installation shall be fixed when that installation is accredited.*"

[7] There are three further features of the statutory regime to be noted. The first is that of "Reviews" under Part 10.

Regulation 50

> "*(1) Any prospective, current or former participant affected by a decision made by the Department in exercise of its functions under these Regulations (other than a decision made in accordance with this regulation) may have that decision reviewed by the Department.*
>
> *(2) An application for review must be made by notice in such format as the Department may require and must –*
>
> *(a) be received by the Department within 28 days of the date of receipt of notification of the decision being reviewed;*
>
> *(b) specify the decision which that person wishes to be reviewed;*
>
> *(c) specify the grounds upon which the application is made; and*
>
> *(d) be signed by or on behalf of the person making the application.*
>
> *(3) A person who has made an application in accordance with paragraph (2) must provide the Department with such*

information and such declarations as the Department may reasonably request in order to discharge its functions under this regulation, provided any information requested is in that person's possession.

(4) On review the Department may –

(a) revoke or vary its decision;

(b) confirm its decision;

(c) vary any sanction or condition it has imposed; or

(d) replace any sanction or condition it has imposed with one or more alternative sanctions or conditions.

(5) Within 21 days of the Department's decision on a review, it must send the applicant and any other person who is in the Department's opinion affected by its decision a notice setting out its decision with reasons."

The second is the publication of procedural guidance under Part 11.

Regulation 51(1)

"*The Department must publish procedural guidance to participants and prospective participants in connection with the administration of the scheme.*"

Finally, paragraph 1(1) of Schedule 1, regulates the provision of information by prospective participants to the Department. Paragraph 1(1) provides:

"*This Schedule specifies the information that may be required of a prospective participant in the scheme.*"

The detailed list which follows in paragraph 1(2) has two particular components in the context of the present challenge.

"*(2) The information is, as applicable to the prospective participant –*

……

(k) Evidence which demonstrates to the Department's satisfaction the installation capacity of the eligible installation;

……..

(w) *Such other information as the Department may require to enable it to consider the prospective participant's application for accreditation or registration.*"

The Departmental/GEMA Statutory Arrangements

[8] These arrangements are enshrined in a formal instrument made pursuant to section 114(1) of the 2011 Act (*supra*). They create a dichotomy of "*conferred functions*" and "*retained functions*". The definition of "*functions*" is, per regulation 2, "*the duties and powers conferred on DETI under the Regulations*". In short, GEMA carries out on behalf of the Department all conferred functions, while the Department reserves to itself the retained functions. In the present context it suffices to highlight that one of the retained functions is that contained in Regulation 50 (the review procedure).

The Statutory Guidance

[9] This is contained in two hefty volumes. By the date of publication, March 2016, "GEMA" had become known as "OFGEM". The subject matter of Volume 1 is "Eligibility and How to Apply". The "Executive Summary" contains the following informative passage:

> "*The Northern Ireland Renewable Heat Incentive (NIRHI) is a financial incentive scheme designed to increase the uptake of renewable heat technologies and reduce the UK's carbon emissions. Broadly speaking, the scheme provides a subsidy per KWHTH of eligible renewable heat generated from accredited installations and a subsidy payable to producers of biomethane for injection ….*
>
> *The scheme supports non-domestic renewable heat installations and the production of biomethane for injection into the gas grid.*"

Accreditation is dependent upon OFGEM being satisfied that an application (a) meets the eligibility criteria and (b) is properly made (see paragraph 2.1). The text continues (paragraph 2.3):

> "*In order to gain accreditation for an installation, an applicant will have to demonstrate to OFGEM that an installation meets the NIRHI eligibility criteria ….*"

Paragraph 2.9 states:

> "*Accreditation can only be received once an eligible installation has been commissioned.*"

Per paragraph 2.13:

> "*You must ensure that the information you submit is accurate.*"

By paragraph 2.14:

> "*Once you have submitted your application and your identity and bank details have been verified, OFGEM will then review all the information before making a decision as to whether the installation can be accredited. In some cases, they will need to contact you for further information to enable them to verify eligibility.*"

[10] Within Volume 2 of the statutory guidance, there is a discrete section, chapter 12, dealing with "Dispute Resolution". Given its bulk and importance, this is reproduced in the Appendix to this judgment. In very brief compass:

(i) OFGEM can be required to review any decision made by it in the exercise of the functions conferred upon that agency by the instrument noted in [8] above.

(ii) It is explicitly provided that this is additional to the statutory review function exercisable by the Department under Regulation 50 (one of the reserved functions). The former is accorded the distinguishing taxonomy of "*formal review*".

(iii) It is expressly contemplated that the formal review will be the first remedy pursued by the dissatisfied party, in the hope that it will obviate the need to resort to the statutory review.

(iv) The OFGEM formal review will entail the reconsideration of all information previously provided, the consideration of "*further information*" supplied and the examination of all representations made by the interested party.

(v) The provision of "*further information*" may be either spontaneous or upon request by OFGEM.

(vi) Every review request is allocated to an officer who will "*…. aim to reach a decision within 20 working days ….*" .

(vii) A statutory review may be requested where the interested party is dissatisfied by the outcome of the formal review.

(viii) The statutory review "…. *will be based on all the evidence, information and representations submitted by the affected person to the original decision maker or OFGEM's (Formal Review Officer). In addition, OFGEM may request on DETI's behalf such information and declaration relating to information within the affected person's possession as DETI require to determine the review.*"

(ix) DETI aspires to complete its statutory review within a period of 30 days.

(x) The possible outcomes of the statutory review include affirmation, revocation or variation of the impugned decision.

The Underlying Decisions

[11] There are three underlying decisions, namely:

(i) The OFGEM initial decision, dated 15 August 2016, made on behalf of the Respondent, refusing the Applicant's application for accreditation.

(ii) The subsequent OFGEM formal review decision, dated 06 February 2017, affirming its original decision.

(iii) The Respondent's statutory review decision, dated 15 May 2017, concurring with the original OFGEM decision.

[12] Certain material dates and events are conveniently rehearsed at this juncture:

(i) On 15 November 2015 the Applicant submitted its completed online application for accreditation under the RHI Scheme.

(ii) On 22 February 2016 OFGEM requested the Applicant to provide further specified information.

(iii) On 21 March 2016 the Applicant's agent responded on their behalf, the response taking the form of an amended online application form.

(iv) On 15 August 2016 OFGEM notified its refusal decision.

(v) By a letter dated 29 August 2016 the Applicant purported to provide OFGEM with clarification and further information, including certain documentary attachments (new documents

provided for the first time). By the same letter, the Applicant requested a "*formal review*".

(vi) By an email dated 24 October 2016 the Applicant purported to provide certain further information and clarification:

> "*… you queried why invoices for January/February/March 2016 were not issued until 4th April 2016 …*
>
> *A delay like this is a typical occurrence in the implementation and bedding in of a new project. We wanted to ensure that the following criteria were being satisfied:*
> - *that the quality of the product was to the standard required by the purchasing party* [and]
> - *that the volumes and method of delivery was* [sic] *satisfactory to the purchasing party …*
>
> *It was agreed between the parties that invoices would be issued once these teething issues were resolved and we got the all clear to commence invoicing at the start of April.*"

(vii) By its letter dated 06 February 2017 OFGEM informed the Applicant that it was affirming its original decision.

(viii) By letter dated 02 March 2017 the Applicant requested a statutory review.

(ix) By its letter dated 15 May 2017 the Respondent, pursuant to (ix), affirmed the original OFGEM decision.

[13] The first of the two OFGEM decisions contains the following passage:

> "*Your application for accreditation was rejected for the following reasons: pursuant to Regulation 23(4) …….. OFGEM may refuse to accredit an eligible installation if its owner has indicated that one of the applicable ongoing obligations will not be complied with. It is our opinion that your installation is not compliant with Regulation 33(p) ……. The submitted schematic and site images demonstrate that wood chip drying is the only heat use at this site ….*
>
> *As the wood chip is only being dried for the purpose of combustion within this installation and other installations at this site, and those other installations are in turn being used to dry wood chips for use in this installation and*

> *others, it is our opinion that the installation is used solely for the purpose of generating heat for the predominant purpose of increasing periodic support payments. Based on your description of the installation, its uses and supporting documentation, it is our opinion that you will be unable to comply with Regulation 33(p).*"

[14] The Applicant's response, as noted in [12](v) above, was to write a letter which contained further information, attached certain new documents *(infra*) and requested a formal review. This letter, first, acknowledges the following statement in the completed online application:

> "*The wood chip is being dried for use to feed the biomass boilers to dry wood chip. The wood chip, when used, is transported to the feed hopper and is at ambient temperature when used.* ***It is envisaged that wood chip will be produced for sale for commercial purposes, but as of yet no sales of wood chip have been made from this site.***"
>
> [Emphasis added.]

Pausing, the above passage was the Applicant's response to OFGEM's request for further information, which included the following:

> "*Please confirm if the wood being dried is used/fed to the system or sold to customer. If so, please confirm …… if the wood being dried is cooled before they are fed into the boiler. Please provide evidence that the drying was for commercial purpose. This may be in form of invoice (showing the dried product was the subject of a commercial transaction), website, photos ….*"

The response (quoted) was made on 21 March 2016.

[15] Continuing, the Applicant's formal review request states:

> "*This statement was correct at the time of application as the plant had only been commissioned and no sales of wood chip had been made at that point. However, your determination assumes the dried wood chip is used to fuel the drying floor plants exclusively and totally ignores the statement 'it is envisaged that wood chip will be produced for sale for commercial purposes' which clearly indicates the commercial aspect of the site. Subsequent to the initial application, the site has produced for sale, up to end of June 2016, 542.93 tonnes of 25% moisture content wood*

> *chip. This wood chip has been sold to Irish Wood Chipping Services Limited and we also have a Memorandum of Agreement with this organisation to supply 1,500 tonnes …. on an annual basis. We attach to this correspondence evidence of sales since January 2016 to date and also the Memorandum of Agreement …*
>
> *In addition, we are seeking to develop additional markets and are targeting that the facility will have the capacity to produce up to 4,000 tonnes per annum….*
>
> *In summary, it can clearly be demonstrated that the sole purpose of this facility is to dry wood fuel as dictated by our current supply and ongoing obligations, thereby reinforcing the eligible use of generated heat for the production of fuel for commercial purposes which is in the spirit of the ongoing obligations of a compliant NIRHI installation.*"

[16] This letter had seven attachments. The first is a document entitled "Wood Chip Supply Contract", identifying the contracting parties as the Applicant and Irish Wood Chipping Services Limited and describing the contract as one "*for the supply of solid dried wood chip*" to the latter. The contract period is stated to be of three years, commencing on 01 January 2016. The document contains the signatures of two persons describing themselves as "*Director*" of the two contracting agencies. It is dated 03 November 2015 viz 12 days before the Applicant submitted its application for scheme accreditation.

[17] Each of the remaining six documents is a "*Sales invoice*" in the name of the Applicant and addressed to the other contracting party. The first three invoices are all dated 04 April 2016. The remaining three bear dates from the months of May, June and July 2016. The "*Description*" in the first invoice is:

> "*Dry wood chip (MC 25%) …. January 16: 71.86 tonnes …. Contract price £80/tonne.*"

The remaining five invoices have the same format, with differing content. The first three invoices, while issued on the same date, specify goods provided during the months of January, February and March 2016. The second three invoices specify goods provided during the immediately preceding month. The total amount allegedly invoiced and paid is approximately £43,000.

[18] The formal review of OFGEM is encapsulated in the following passages:

> "*As stated in your formal review request, you envisaged that the site would be used for commercial purposes, but at point of application you have no evidence to show that*

> *the site was commercially viable. To evidence the commerciality aspect, you have supplied invoices as part of your formal review letter which clearly states the earliest invoice as 06 April 2016, whilst your application is dated 15 November 2015 …*
>
> *For OFGEM to determine eligibility of the commercial nature of the site, the invoices would need to have been produced at point of application and had to relate to commercial use prior to the application ….*
>
> *On that basis, I am satisfied that the original decision is correct and appropriate based on its individual facts ….*"

The decision maker elaborates thus:

> "*The information that was supplied in support of the applications stated that the wood drying activity would be cyclical as opposed to commercial use or use for space or water heating. Therefore, it was right to conclude that if RHI support was provided for the activity, it would be subsidising heat that was produced for the predominant purpose of increasing RHI payments. There was no other purpose or utility identified in drying the wood. That, too, is addressed in the regulations in the form of an ongoing obligation (regulation 33(p)) that would not have been complied with in this case ….*
>
> *In addition, there was no evidence that heat generated by the installations would be used for an eligible purpose.*"

[19] Next the decision addresses the new evidence supplied with the Applicant's request for a formal review:

> "*It was only on 15 September 2016 …. that any evidence of eligible heat use was supplied. The evidence that was supplied was in the form of a contractual arrangement dated 03 November 2015 and a series of invoices apparently in relation to wood drying pursuant to those contractual arrangements that had commenced by, at the latest, January 2016 ….*
>
> *Had this information and evidence been supplied with the applications, or had it been supplied whilst the applications were receiving consideration by OFGEM, the concerns in relation to eligible heat use and hence the*

> *basis on which the applications were eventually rejected may not have arisen.*"

Referring to the date of the OFGEM refusal decision, 06 May 2016, the decision maker states emphatically:

> "*The evidence that was supplied to OFGEM in relation to heat use in fact suggested that no eligible heat use was taking place. The Regulations require that OFGEM should assess an application that is submitted to it on the strength of the evidence and information supplied – and this is what our decision was based on.*"

Next, twice using the adjective "*inconsistent*", the decision maker notes (a) the disparities between the information supplied with the original application and the further information provided in March 2016, when requested and (b) the disparities between the information supplied on each of the aforementioned dates and the new information accompanying the review request of September 2016. Finally, the decision maker reiterates:

> "*An eligible heat use should be capable of taking place at the time that an application is made …*
>
> *The Regulations specifically link the eligibility of an installation to the heat demand that it will meet and the strength of this requirement would be diluted if a proposal of future or intended heat use was sufficient.*"

[20] The third of the underlying decisions is that contained in the Respondent's letter dated 15 May 2017: see [12](x) above. This is the decision under challenge. It was preceded by a letter to the Applicant, dated 10 April 2017 stating *inter alia*:

> "*The statutory review will be based on all the evidence, information and representations submitted …. to OFGEM ….*"

The ensuing review decision expresses the purpose of the exercise in these terms:

> "*…. to consider a decision made by OFGEM in relation to the above numbered applications, in the light of the Regulations* ***and all other available evidence****, and conclude whether the original decision maker erred in coming to the conclusion not to allow the applications.*"
> [Emphasis added.]

[21] The Respondent's statutory review decision states *inter alia*:

> "*OFGEM were under a duty to perform their role on the basis of the information supplied at the time of application. OFGEM, as a matter of good practice, may seek further information where there was ambiguity or lack of clarity in the original application ….*
>
> *The panel concluded that, in this case, no such ambiguity existed. The intended purpose was clearly stated and while the information provided may, in hindsight, have been incorrect, it was not unclear. OFGEM were therefore under no duty to seek further clarity and could not have been expected to do so …..*
>
> *The panel concluded that the applicant provided clear detail within their applications of intended use – a use that on the clear terms provided was not an eligible use …. [as it] … would prevent the applicant from complying with their ongoing obligations as per regulation 33(p) ….*
>
> *The panel concluded that OFGEM therefore acted reasonably in rejecting the applications based on the information available … when their decision was made …*
>
> ***The later provision of information which may have suggested a use that did not fall foul of the Regulation 33(p) does not of itself invalidate the earlier decision** ….*
>
> *In light of the facts of the case the panel agreed unanimously that OFGEM's decision was therefore both reasonable and correct on the evidence provided at the time of application and therefore agreed unanimously to confirm OFGEM's original decision.*"
>
> [My emphasis.]

Consideration and Conclusions

[22] The decision which the Applicant challenges is the third of those outlined above. I consider that properly analysed, the Applicant's challenge has two central elements, one factual the other legal. The factual component is that the Respondent failed to take into account certain of the information provided by the Applicant to OFGEM. The legal component is that this failure (if established) vitiates the Respondent's decision in two respects, namely it gives rise to a breach of the 2012 Regulations and frustrates the Applicant's legitimate expectation generated by the

statutory guidance and correspondence that all material submitted would be considered.

[23] The case developed by Mr Harwood QC in argument resolves to two core contentions. The first is that the Respondent erred in law in treating the decision which it was reviewing as the first OFGEM refusal decision rather than its second formal review decision. In consequence the Respondent failed to take into account the new evidence provided by the Applicant in the OFGEM review process initiated in September 2016. Mr Harwood's second core contention has two central components. The first is that the statutory guidance generated a legitimate expectation on the part of the Applicant that new evidence provided by it would be considered and that any such evidence would, in principle, be capable of remedying defects in the application originally submitted. The second is that the Respondent failed to give effect to this expectation by refusing to consider the new evidence provided to OFGEM.

[24] On behalf of the Respondent Mr McLaughlin (of counsel), in an equally lucid and concise argument, developed the following inter-related submissions. The function of the Respondent under Regulation 50 is one of review, to be contrasted with a full blown merits appeal or rehearing; "review" should have a constant and consistent meaning in both the Regulations and the statutory guidance; any new information provided as part of either of the permitted review processes is to be evaluated and weighed by the decision maker, rather than simply swallowed; there is a clear distinction between an (impermissible) heat producing enterprise and a (permissible) commercial or industrial use; a statutory review decision under Regulation 50 involves the exercise of discretions whether to consider new information and, if yes, the weight (if any) to be attributable thereto; and the crucial date is that upon which the initial accreditation decision was made. Finally Mr McLaughlin submits that the new information was considered by the Department and was found to be insufficiently persuasive.

[25] I take as my starting point the following. It is clear from the language of Regulation 22(6) that the Department (in this statutory context, the Department's agent, OFGEM), must first consider whether an accreditation application has been "*properly made*" in accordance with Regulation 22(2) and (3), per Regulation 22(6). This is the first prerequisite of accreditation under the RHI Scheme. The second prerequisite is that the Department must be "*… satisfied that the plant is an eligible installation ….*". The word "*satisfied*", by well established principle, connotes that the Department will form an evaluative judgement, the corollary being that the applicable judicial review standard will normally (though not invariably) be that of Wednesbury irrationality. Self-evidently, each of these assessments must be made at the time of deciding whether to accede to the accreditation application.

[26] The initial, delegated decision making function of the Department's agent OFGEM under Regulation 22 cannot be divorced from the Department's non-delegated review function under Regulation 50. The two are joined by a statutory

bond. The first step in the Regulation 50 analysis seems to me uncontroversial. The function is one of review. The legislature has, presumptively, purposely opted for the model of review rather than appeal in a context where there is a long established and recognised distinction between these two mechanisms. The real question, in my view, is: what is the Department (a) obliged, as a matter of legal duty and (b) empowered, as a matter of legal discretion to consider in exercising its statutory review function? The answer must lie in the terms of Regulation 50, including the powers of decision conferred on the Respondent by Regulation 50(4). A further insight into the correct answer is provided by Regulation 51(1) which makes clear that the statutory guidance to be published is purely "*procedural*" in nature; thus it will properly guide interested parties to how the Respondent will make its review decision under Regulation 50(4), but cannot properly alter or emasculate the statutory review decision making options or its fundamental character of review. This analysis is consistent with the elementary principle that guidance of this kind is subservient to the statutory regime under which it is made. In the event of any conflict or disharmony the statute must prevail.

[27] I accept, on the current state of development of the law, that guidance of the kind made under Regulation 51(1) is capable in principle of engendering legitimate expectations. Specifically, the expectation engendered is that in the absence of a compelling reason in law to act otherwise the guidance will be observed: see in particular Re McFarland [2004] UKHL 17 at [24] per Lord Steyn and Lumba v Secretary of State for the Home Department [2011] UKSC 12 at [20], per Lord Dyson JSC. But this doctrinal approach cannot detract from the immediately preceding analysis in [26] and is best expressed in the principle that an asserted legitimate expectation which is confounded by statute falls at the first hurdle: see De Smith's Judicial Review, 7th ed, 12.062 – 068. The reason is that the asserted expectation is shorn of legitimacy to the extent that it cannot be characterised an expectation at all.

[28] Logically, the statutory guidance must be considered at this juncture. Its first curiosity is that it establishes two layers of review, namely a "*formal review*" by OFGEM and, at a second stage, the Respondent's statutory review under Regulation 50. The relevant section of the statutory guidance – Chapter 12 – has a clearly identifiable rationale, being reflective of long established government policy of promoting dispute resolution which avoids resort to litigation. Furthermore, the guidance being statutory in nature it falls to be construed with an appropriate degree of strictness, bearing in mind in all times that its essential character is that of guidance rather than prescriptive regulation.

[29] In my view the exercise of examining the statutory guidance as a whole, considered particularly in its statutory context, yields the conclusion that Chapter 12 is expressed in somewhat ambitious and less than cogent terms. It is not sufficiently cognisant of its statutory parent and the limitations therein. This is best illustrated in its extensive 'formal review' regime, which finds no justification or pedigree in the Regulations. I consider that Regulation 50 was clearly designed to be exhaustive of the right of review. Multiple layers of review cannot have been the

underlying legislative intention, the more so when Chapter 12 appears to impose no numerical restriction. Furthermore, while the statutory guidance uses the open-textured language of "*reconsider*", "*in the normal course of events*", "*the most appropriate decision in the circumstances*" and the facility of providing "*further evidence, information or representations*", none of this can have the legal effect of distorting or diluting the operation of the parent statutory model.

[30] When one turns to consider the Respondent's statutory review function under Regulation 50, the focus of one's gaze is inevitably directed to the statement in paragraph 12.22 of the statutory guidance:

> "*The statutory review will be based on all the evidence, information and representations submitted by the affected person to the original decision maker or OFGEM's FRO* [Formal Review Officer]."

The words *"based on"* cannot in my view either undermine the parent statutory model or commit the Department to any particular outcome. Rather, this uncluttered statement simply proclaims that the review exercise will consider all previously generated information.

[31] I consider the critical question to be: did the legislator envisage that the review function under Regulation 50 would be so expansive so as to empower the Respondent to revoke the initial OFGEM decision on the basis of highly significant new information not available to OFGEM? I answer this question in the negative. The clear intent of the statutory regime is that OFGEM will have available to it all information bearing on the individual application by the date of its decision <u>at latest.</u> As the Regulation 50 mechanism clearly envisages an exercise entailing neither a merits appeal nor a rehearing *de novo,* its main focus will inevitably be on the information available to the initial decision maker at the time of making the statutory decision viz the decision which has legal effects and consequences. In short, the crucial statutory word is **"review".**

[32] While this analysis does not preclude the consideration of new information at the Regulation 50 review stage, I consider that where the new material trespasses beyond mere clarification or modest elaboration or infilling it cannot operate to vitiate the initial decision. This approach is in my judgement clearly implicit in Regulation, being fully harmonious with the concept and essence of <u>review</u>.

[33] Giving effect to the foregoing analysis, the <u>factual component</u> in the first of the Applicant's two permitted grounds of challenge becomes the first issue to be determined by the Court. It entails the following question: did the Respondent, in making the impugned decision, take into account all of the new information provided by the Applicant to OFGEM? This is a question of law for the court, given that it requires an exercise of construing the relevant decision making

materials, in particular the Respondent's letter of 15 May 2017 embodying the impugned decision: see Re McFarland (*supra*).

[34] It is incumbent upon the court to construe the letter of decision in a fair and balanced way. On the one hand, the letter enshrines the Respondent's decision in the exercise of a statutory function namely Regulation 50 and, moreover, has legal effects and consequences. Furthermore, the evidence establishes that the letter was written with the benefit of legal advice. On the other hand, a decision making instrument of this kind falls to be construed with a certain degree of latitude as it does not equate precisely with the reasoned judgement of a judicialised agency or a legal instrument such as a deed or contract.

[35] Approached in this way, the crucial submission of Mr Harwood QC is the suggestion that the author of the impugned decision of 15 May 2017 disregarded the new information provided by the Applicant to OFGEM in the informal review process, digested in [16] – [17] above. In submitting that this new evidence was disregarded, Mr Harwood contends that the essential error consisted of "*… treating the decision as being reviewed as the first OFGEM decision rather than the formal review decision*". In my judgement, absent a ruling of the court that any relevant portion of the statutory guidance is *ultra vires* the enabling power – which, in the Applicant's favour, I decline to formally make - the duty imposed on the Respondent in exercising its review function under Regulation 50 is to take into account both the initial OFGEM decision and, where one exists, any ensuing OFGEM "formal review" decision. This I consider to be the public law duty in play, unaffected by any parsing of phrases such as "*a decision*" and "*made by the Department in exercise of its functions under these Regulations*" in Regulation 50. This flows from the proposition that a formal review decision is a material consideration to be taken into account.

[36] I consider that the Department's impugned decision of 15 May 2017 falls to be evaluated as a whole and in its full surrounding context. Phrases such as "*all other available evidence*", "*the original decision maker*" and "*the original decision*" must be balanced with those of "*the Formal Review Officer*", "*the later provision of information*" and "*further evidence*". Approached in this way, in my judgement, the impugned decision of the Respondent had a particular focus on the initial decision of its agent OFGEM, while simultaneously taking into account the formal review decision and the evidence generated in the formal review process. The Applicant's contention to the contrary is confounded accordingly.

[37] Given the Court's analysis that all of the information provided by the Applicant was considered by the Department in making the impugned decision both grounds of challenge must fail. The Applicant's challenge is defeated by the principle enshrined in Re SOS Application [2003] NIJB 252 at [18] – [19]. In short, there is neither sufficient evidence, nor evidence warranting the inference, that the information in question was ignored.

[38] This analysis, in turn, points up the important distinction between considering the new information and giving effect to it. The Applicant's real complaint, properly exposed, is of the latter species. It is unsustainable as the new information went well beyond the limitations identified in [32] above. This is what the Department was in substance saying in its decision and I consider that it was correct in law to do so. It was expressing its agreement with OFGEM that the application presented to OFGEM did not satisfy the statutory requirement of "eligible purpose". The later rescue attempt undertaken by the Applicant was not permitted by the statutory model as it strayed beyond the narrow confines of review. Nothing in the merely subsidiary Guidance can affect this analysis.

[39] Both grounds of challenge are further and in any event defeated by the unmistakable realities relating to the timing and content of the new information provided by the Applicant for the first time when it triggered the formal review process in September 2016. The Respondent's characterisation of this further information as giving rise to (mere) "*inconsistency*" may be considered polite and diffident. The new information, on any showing, significantly altered the application registered at the outset and raised many questions. Mr Harwood's optimistic submission based on the premise – rejected by the Court – that the avoidance of the central legal infirmity advocated on behalf of the Applicant would inevitably have resulted in the grant of accreditation to his client must founder. Regulation 50 cannot have been intended to result in the reversal of an initial accreditation refusal in such stark circumstances. Furthermore it is far from clear that the Applicant has addressed this issue, namely the abrupt and unheralded appearance of this highly significant new evidence, fully and candidly in its affidavit evidence.

Disposal

[40] For the reasons given the application for judicial review is dismissed.

APPENDIX 1

DEPARTMENT OF ENTERPRISE, TRADE AND INVESTMENT

"NON-DOMESTIC NORTHERN IRELAND RENEWABLE HEAT INCENTIVE: GUIDANCE"

VOLUME 2, CHAPTER 12

"Chapter Summary

This chapter provides guidance ……..

…….

12.26 …… The Northern Ireland Ombudsman."

[INSERT ENTIRE CHAPTER 12]