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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

2017 No. 11901/01

IN THE MATTER OF AN APPLICATION BY THE RENEWABLE HEAT ASSOCIATION NORTHERN IRELAND LIMITED AND ANOTHER FOR JUDICIAL REVIEW

AND IN RE THE RENEWABLE HEAT INCENTIVE SCHEME (AMENDMENT) REGULATIONS (NORTHERN IRELAND) 2017 MADE ON 24 JANUARY 2017 BY THE DEPARTMENT FOR THE ECONOMY

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COLTON J

INTRODUCTION

[1] On 22 October 2012 the Department of Enterprise, Trade and Investment made The Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012 in exercise of the powers conferred on it by Section 113 of the Energy Act 2011.

[2] The Regulations provided for the payment of a set tariff for a fixed period of 20 years to participants in what was known as the Renewable Heat Incentive Scheme ("RHI") in respect of installations which had been accredited under the Regulations. The purpose of the scheme was to encourage the use of renewable energy consumption. Participants were provided with a financial incentive to convert from the use of heating installations which used fossil fuels to ones which use biomass fuels. The Regulations applied to non-domestic use.

[3] On 1 April 2017 the Department for the Economy made the Renewable Heat Incentive Scheme (Amendment) Regulations 2017 which amended the 2012 Regulations and were again made in exercise of the powers conferred on the Department by Section 113 of the Energy Act 2011. The effect of the 2017 Regulations was to change the way in which tariffs would be calculated by providing for "*tiering*" which resulted in a lesser rate being paid after a defined usage and by the introduction of a "*cap*" on the amount of heat usage eligible for payment under the scheme. This resulted in a reduction in the amount of tariff payable to the second applicant and for the majority of those accredited under the 2012 Regulations.

[4] The first applicant is an organisation which represents owners of accredited installations under the 2012 Regulations. The second applicant (DA) is an individual who owns four medium sized biomass boilers (99kWh) which were accredited under the 2012 Regulations. They challenge the legality of the Department's decision to make the 2017 Regulations on numerous grounds.

[5] Before considering each of the grounds of challenge it is necessary to set out the background to the introduction of the 2017 Regulations. I do not propose to set out a comprehensive critique of the history of the Renewable Heat Incentive Scheme. That is the task of a different inquiry. Rather I set out the background so that the context of the dispute can be understood and to highlight those matters which ultimately inform the court's determination of the issues in this judicial review.

[6] I would like to place on record my appreciation to counsel and solicitors involved in this case for the manner in which it was prepared and presented. Mr Gerald Simpson QC appeared with Mr Richard Shields for the applicants. Mr Tony McGleenan QC appeared with Mr Paul McLaughlin for the respondent. The court was presented with excellent written and oral submissions. The respective parties were well served by their lawyers.

BACKGROUND/CHRONOLOGY

THE DIRECTIVE

[7] The genesis of the scheme lies in the Renewable Energy Directive 2009/28/EC which imposed legally binding obligations upon Member States to ensure that by 2020 they achieved targets for the total amount of energy consumption derived from renewable sources. The methods permitted by the Directive for Member States to achieve the target include the use of financial incentives (Article 3(3)).

[8] Within the United Kingdom each of the devolved administrations agreed a separate target taking account of the renewable energy consumption levels within each area and the potential for change. In Northern Ireland a target of producing 10% of its heat from renewable sources by 2020 was included within the strategic

energy framework approved by the Executive. In order to achieve these targets the Department introduced both a Non-Domestic Renewable Heat Incentive Scheme and a Domestic Renewable Heat Incentive Scheme.

[9] To facilitate achievement of the UK's renewable energy target under the Directive, the UK Department of Energy and Climate Change ("DECC") was allocated a budget of £860m by Her Majesty's Treasury ("HMT") to support the introduction of incentive schemes throughout the UK during the spending review period 2011-15. HMT provided the NI Executive with a funding allocation of £25m over the same period to support the introduction of a RHI Scheme for Northern Ireland. This budget equated to approximately 3% of the total UK budget. This allocation was made to Northern Ireland in addition to its block grant. However the funding of the scheme subsequently proved to be a vexed issue. From the outset HMT made it clear that it intended to cap the amount of annually managed expenses (AME) provided to support the scheme. This meant that any excess in respect of the amount provided would have to be paid for from the Northern Ireland block grant. It is evident from what followed that the Department lost sight of this and the resulting financial implications were an important factor in the decision to introduce the 2017 Regulations.

THE CONSULTANT'S (CEPA) REPORT

[10] Having secured funding from HMT the Department commissioned a report from consultants Cambridge Economic Policy Associates Limited ("CEPA") to produce a recommendation on the most appropriate form of renewable heat incentive for Northern Ireland.

[11] The report considered a number of options including the introduction of a "GB RHI", which uses the rates proposed for the GB RHI or a bespoke "NI RHI". The GB scheme had been devised by placing a value upon the costs associated with introducing new installations and spreading them evenly over the estimated lifetime of the technology (20 years). A subsidy was then calculated which was payable by way of an annual tariff.

[12] At 6.7 the report sets out the following:

> "**NI RHI Subsidy Levels**
>
> *As set out at the start of this chapter, arguably the most important question for any subsidy is the level at which it is set. We describe how we have come up with our proposed levels in this section and how these compare to the GB approach and rates.*
>
> *We have looked at a number of approaches to setting the subsidy levels for an NI RHI, including what rates would*

be set by the methodology used by DECC for industrial and commercial heat users but using NI specific input assumptions. This methodology assumes that those users require a 12% return on the additional capital cost of renewable heat technologies, and require on-going support for any difference in operating, fuel or other on-going costs between the renewable heat technology and the counterfactual. It also includes an allowance for any upfront "hassle" costs; these are spread evenly, without discounting, over the lifetime of the technology. Our assumption is that 12% is effectively the weighted cost of capital that companies require to justify the additional spending needed for a renewable heat project. As such, it includes their financing costs, the required equity return based on the risk, and any assumed time preference."

[13] The report then goes on to set out recommended tariffs for various installations. The installations were "*banded*" depending on their size range in kWs. In respect of non-domestic biomass boilers the size ranges were between 20-100 kWs and 100-1000 kWs, with a specific tariff for each boiler. The proposed tariffs for the 20-100 kWs range were to be significantly higher than for the 100-1000 kWs range. Significantly, unlike the GB scheme, the recommendation for Northern Ireland was for only one tier of payment. The reason for this was set out as follows:

"**6.7.1 Tiering**

The rates shown include two "tiers" for some technologies. This is an approach taken by the GB RHI, where technology has received one rate the ('Tier 1' rate) for an output up to a certain annual limit (15%) and then a second, lower, rate (the 'Tier 2'rate) for any additional output. Tiered incentive rates for investors with high load factors were calculated to limit the subsidy to any incremental fuel expense should they breach the DECC tiering threshold of 15% load factor.

We considered tiering for the NI RHI rates, using the DECC approach. However when setting the NI recommended levels for this report, the incremental fuel costs was higher than the subsidy rates in all cases. Therefore no tiering is provided in the rates in this report."

[14] As matters developed this proved to be a controversial recommendation.

[15] In coming to its recommendations the report makes some assumptions about the cost and performance levels of biomass boilers. Crucially for this case, when

dealing with commercial/public small non-domestic boilers the assessment was made on the assumption of an installation of a 20kw boiler with a load factor of 17%. The load factor is the period during which the boiler is operative.

[16] The applicants point out that it is significant that the report clearly envisaged that Agri-food and poultry sites would be potential sites for the use of renewable heat.

CONSULTATION

[17] In July 2011 the Department launched a consultation document entitled "Development of the NI Renewable Heating Initiative".

[18] The document indicated that the key principles of the proposed NI RHI were as follows:

- *"The NI RHI will be available to all those in the non-domestic sector … and will support new renewable heat installations, commissioned after 1 September 2010; ….*

- *Payments will be made on a quarterly basis over 20 years, tariff levels will be "grandfathered" and payments guaranteed for 20 years.*

- *DETI will undertake a formal review of the NI RHI (starting in January 2014) with any amendments to the scheme in place for 1 April 2015."*

[19] The rationale for the tariffs was explained in the consultation document in the following way:

> *"3.36 The Department has developed tariffs for the Northern Ireland RHI using similar methodology to that used by DECC in deciding the tariffs for the GB RHI. The tariffs have been designed to bridge the gap between existing heating systems and the renewable heat alternative, with consideration given to the capital costs, operating costs, and non-financial 'hassle' factors that are involved in replacing existing heating systems with renewable heating technologies.*
>
> *3.37 In each case, except for solar thermal, tariffs have been designed to provide a rate of return of 12% over the lifetime of the technology. DETI believes that this rate of return should provide investors with sufficient incentive to install renewable heat technologies ….*

> *3.39 …. In practice existing oil customers switching to renewable heat will receive a 12% rate of return through the RHI. …*
>
> *3.40 The tariffs are determined largely by the assumptions taken on the cost and performance of heating technologies and the price of the various fuels (electricity, gas, oil and biomass etc) to 2040. These assumptions are included in economic appraisal and should be considered alongside the proposed tariffs.*
>
> *3.56 DETI acknowledges that in order to have the necessary certainty and confidence for investments in renewable heat to be made, there also needs to be certainty over tariff levels in the coming years. DETI is therefore committed to the principle of 'grandfathering', where support levels are guaranteed. In practical terms this means that any changes to tariff levels (higher or lower), which result from planned reviews, only affect new projects accredited on or after the date at which new support levels are introduced."*

[20] Finally at 3.58:

> *"The introduction of an NI RHI is dependent on an amendment to the 2011 Energy Bill. This amendment would provide DETI with powers similar to those held by DECC through Section 100 of 2008 Energy Act.*
>
> *3.59 The final proposal, following public consultation, would be subject to State aid approval by the European Commission, approval by the Department of Finance and Personnel (DFP) and support from the Northern Ireland Assembly."*

[21] DETI conducted an analysis of the consultation responses on 3 October 2011.

THE ENERGY ACT 2011

[22] On 18 October 2011 the Energy Act 2011 commenced.

[23] Pursuant to Section 113, Parliament conferred upon the Department power to make Regulations establishing a scheme for the purposes of meeting the NI renewable energy obligations and also for its administration and financing. The relevant empowering provisions are as follows:

"(1) The Department of Enterprise, Trade and Investment may 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.

(2) Regulations under this section may, in particular—

(a) make provision for the Department or NIAUR to make payments … in specified circumstances, to—

(i) the owner of plant used or intended to be used for the renewable generation of heat …

(b) make provision about the calculation of such payments;

…

(f) make provision about the enforcement of obligations imposed by or by virtue of the Regulations (which may include a power for the Department or NIAUR to impose financial penalties);

…

(9) Regulations under this section may—

(a) provide for a person to exercise a discretion in dealing with any matter;

(b) include incidental, supplementary and consequential provision;

(c) make transitory or transitional provisions or savings;

(d) make provision generally, only in relation to specified cases or subject to exceptions (including provision for a case to be excepted only so long as conditions specified in the Regulations are satisfied);

> *(e) make different provision for different cases or circumstances or for different purposes."*

[24] The explanatory notes to the 2011 Act contain the following commentary on the power to make provision for calculating payment:

> *"Sub-section (2)(b) provides that the Regulations can make provision about the calculation of the NI RHI payments described in sub-section (2)(a). This is a broad and flexible provision allowing the Department to take account of different circumstances in setting the level of payments to various parties."*

NOTIFICATION FOR STATE AID

[25] On 20 December 2011 DETI submit an application to EU for State Aid approval.

[26] Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) provides a prohibition upon Member States providing aid which distorts or threatens to distort competition.

[27] Article 107(2) TFEU identifies a number of areas where aid is compatible with the internal market and 107(3) identifies a number of areas where it "may be compatible" including:

> *"107(3)(c) …. Aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest."*

[28] Article 108 TFEU sets down a procedure for Member States to notify the Commission of proposals to grant aid and for the Commission to determine whether that aid is compatible with the internal market. Article 108(3) imposes a notification obligation upon Member States, in the following terms:

> *"108(3) The Commission shall be informed, in sufficient time to enable it to submit its comments of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."*

[29] The State Aid Notification sets out the background to the Department's proposals. In relation to RHI tariffs it contains the following:

> *"40. The RHI tariffs have been calculated to cover the cost between traditional fossil fuel heating systems and renewable heat alternatives. The tariffs account for the variances in capital costs, and operating costs, as well as seeking to address non-financial 'hassle' cost. The tariff is generated against a counter factual position of heating oil, this is due to the fact that Northern Ireland is primarily dependent on oil and most of those switching to renewable heat will be oil consumers.*
>
> *41. Tariffs vary depending on the type and size of technology to ensure that financial support is targeted for the specific installation and so over compensation is avoided. Tariffs are paid for 20 years (the life time of the technology) and are 'grandfathered'; however they will be amended on a yearly basis, for existing installers and new schemes to reflect the rate of inflation."*

[30] In relation to the use of the word "grandfathered" a footnote provides:

> *"Provides certainty for an investor by setting a guaranteed support level for projects for their life time in a scheme, regardless of future reviews."*

[31] In discussing RHI payments the notification says:

> *"46. RHI payments will be on a quarterly basis and are determined by multiplying the applicant's actual (metered) heat output with the relevant tariff level. Under the RHI only 'useful heat' is deemed eligible; this is defined as heat that would otherwise be met by fossil fuels, this excludes deliberately wasting or dumping heat with the sole purpose of claiming incentive payments.*
>
> *47. In circumstances where beneficiaries are suspected of wasting heat just to claim incentives DETI, or another enforcement body, will have the power to investigate. It is, however, expected that the risk of wasting/dumping heat in the commercial sector will be much less than in the domestic sector as RHI payments will be only one of many factors in deciding to run a renewable heat technology."*

[32] The notification confirms, in relation to reviews, that:

"52. The NI RHI will have scheduled reviews built into the scheme to allow DETI to ensure that the scheme remains fit for purpose and value for money for the duration. The scope of these reviews will include analysis of tariffs (either to be reduced or increased), the appropriateness of technologies (remove existing technologies or add new innovative ones) and the assessment of effectiveness and success. The RHI scheme will therefore be subject to re-notification to the Commission as required."

[33] The notification sets out the basis for the tariff calculation and the figures are those contained in the original CEPA report.

[34] The rate of return is confirmed as having been set at 12%. In terms of grandfathering it is confirmed that:

"The outcome of future reviews will not impact on existing installations already commissioned and receiving payments under the scheme ie tariffs will be 'grandfathered'. In practice this means that investors will receive the same level of tariff (barring the amendments relating to inflation detailed below) for the lifetime of their installation, this applies even if tariffs are altered (increased or decreased as part of a review)."

CEPA ADDENDUM REPORT

[35] On 16 February 2012 CEPA produced an addendum report which has the effect of changing the tariff for 45-100 kW boilers from 1.3 pence k/wh to 5.9 pence k/wh. Again there was no recommendation that there be any tiering of the tariffs. The rate proposed and the "*banding*" of the tariff for 45-100 kW boilers were to be hugely significant in the context of this case. The report did recognise the potential risk in relation to banding in this way. At 3.1.1 the following appears:

"**Biomass banding**

The biomass bandings (less than 45 kW and above 45 kW) have been criticised by respondents to the consultation as being too broad. Respondents requested the same or similar biomass banding as in place in GB.

The GB biomass banding between small and medium non-domestic is set at 200 kW. The rationale used for this banding is that the boilers above 200 kW tend to

predominantly run on woodchips compared to wood pellets and the load factors generally increase for larger boilers. However, it should be recognised that in reality there is no specific point where the £/kW decrease dramatically. The net result of this is that any banding mechanisms will result in 'gaming' where consumers look to undersized boilers where possible."

As matters developed this proved to be prophetic. As a result of the banding subsequently introduced by the 2012 Regulations there was a clear disincentive to install a boiler higher than 100 kW. In many cases, if more than 100 kW of heat energy was required applicants installed a number of boilers which were less than 100 kW so that the heat generated could obtain the higher rate. This is demonstrated by the fact that of the 1,788 99 kW and less boilers applied for before 18 November 2015, 1,294 (72%) were at sites with more than one boiler on the scheme. In a number of cases, more than 10 boilers were installed and accredited at a single site meaning that the applicants could avail of the higher tariff of 6.5p per kWh for all of the heat generated by each of the boilers. The operation of the scheme is dominated by pre-2015 small/medium Biomass boilers.

[36] Because of the addendum report from CEPA the Department submitted an addendum to the State Aid notification on 20 February 2012. The application set out the proposed bands and tariffs and pointed out at 22 that "*the bands, as above, do not follow those in place in GB because the average boiler size in Northern Ireland is expected to be smaller than in GB. Therefore a tailored tariff to reflect the Northern Ireland market is expected to generate a greater uptake from consumers*."

BUSINESS CASE

[37] In March 2012 DETI prepared a business case for the proposed Renewable Heat Incentive Scheme for Department of Finance and Personnel ("DFP") approval. The proposal is based on the CEPA reports. The case indicated that the approach to the appraisal followed the NIGEAE guidelines and included input from DETI economists who were content with the appraisal. In discussing the proposed levels of support the business case states that "*tariffs vary depending on the type and size of technology. To ensure the financial support is targeted for the specific installation and so over-compensation is avoided. Tariffs are paid for 20 years (the lifetime of technology) and/or 'grandfathered', however they will be amended on a yearly basis, for existing installers and new schemes, to reflect the rate of inflation*".

[38] Crucially the business case repeats the assumptions and calculations of the CEPA report. The technology assumptions for medium biomass tariff were assumed on the basis of a load factor of 17% on a boiler size of 50 kW and a fuel cost of 4.39p.

[39] Here, hiding in plain sight was the fundamental flaw that led to the Department's decision to introduce the 2017 Regulations.

[40] Firstly, the load factor of 17% proved to be completely unrealistic, secondly the size of the boilers at 50 kW was equally unrealistic – with the vast majority of boilers used being 99 kW and thirdly, as was apparent on the face of the business case, the fuel cost of 4.39p was actually <u>less</u> than the proposed tariff of 5.9p. In proposing a tariff of 5.9p for biomass boilers between 20 kW and 100 kW the seeds were laid for the subsequent problems encountered by the Department.

[41] In accordance with the CEPA report the business case did not recommend tiering. In this regard the case states:

> "*Tiering is used to ensure that technology is not 'overused' just to receive an incentive. It works by dropping the paid tariff after the technology reaches its optimum use for the year; this is deemed at 1314 kW hours (15% of annual hours). After this level is reached the Tier 2 tariff is paid. Tiering is not included in the NI scheme because in each instance the subsidy rate is lower than the incremental fuel costs.*"

Put simply the latter assertion was plainly incorrect.

[42] The business case confirms that payments will be made by the scheme administrator on a quarterly basis for the lifetime of the technology (maximum 20 years). It confirmed that tariffs were to be "*grandfathered*" so beneficiaries will receive a consistent level of support over the lifetime of the installation with the only revision being adjustments for inflationary pressures.

[43] There is a reference to the scheduling of reviews to ensure the scheme remains fit for purpose.

[44] It was recommended that the scheme would be administered by the Office of Gas and Electricity Markets (OFGEM). The case did identify potential risks which were set out as follows:

(i) Incorrect subsidies set, either too high or too low;

(ii) Lack of uptake;

(iii) Harm to other sectors;

(iv) Failure of renewable heat supply;

(v) Insufficient budget for administration of future payments;

(vi) Failure to meet EU and Executive set targets;

(vii) Failure to receive State Aid approval;

(viii) Inadequate resource to deliver project/separate key functions including staff;

(ix) Instances of fraud;

(x) Failure of administration of RHI.

The case stated that:

> "*These risks will be monitored and managed as part of the risk registrar with additional risks added if required.*"

[45] The DETI economists commented that "*the approach adopted represents value for money and it is the most effective way of allocating the resources provided by HMT for the purpose of a Northern Ireland RHI.*" Returning to risks the following is recorded:

> "*The main risk of the RHI is that the tariff levels are not sufficient to encourage uptake or that they are too generous (very unlikely) and hence uptake is such that there is insufficient budget. OFGEM will provide regular management reports which will enable uptake to be carefully monitored and forecast expenditure. The RHI will be reviewed in 2014 (and at regular intervals thereafter) and tariff levels may be adjusted for new installations, if appropriate.*"

[46] Regrettably that review never took place. The case confirms that the rate of return on the capital involved would be 12%.

[47] The case further looked at the question of risks in Chapter 10. In terms of **risk of incorrect subsidy level**, the case states that:

> "*10.3 Probably the most obvious risk is that the subsidy levels proposed for the RHI are either too high or too low. In the former case those installing renewable heat will be over-subsided and less heat will be developed per pound than under more Optimal subsidy levels. In the latter, renewable heat will not be deployed to the extent expected.*
>
> *10.4 The normal method of dealing with this risk is firstly to have carefully analysed and researched data in developing the tariffs. The tariffs have been developed by CEPA and AEA Technologies, subject to a public*

consultation and then subsequently reviewed by CEPA and AEA. Departmental Economists have also assessed the tariffs and the substance behind the calculations and have deemed them appropriate.

10. In addition it is planned to have regular, planned, reviews of subsidy levels after a number of years of experience of the subsidy. This will provide an opportunity to amend tariffs if required and ensure they remain appropriate given potential changing market conditions. It is currently proposed that the first review will begin January 2014 with any required changes implemented by 1 April 2015. This timescale ensures issues can be rectified but does not disturb confidence in the market."

[48] The risk chapter deals with the potential risk of not receiving State Aid and refers to the two applications that had been made. In terms of risk of insufficient budget for administration of future payments Chapter 10.10 states:

"There may be the possibility of a higher than expected uptake leading to overspends in annual budget and higher administration costs. This will be mitigated with on-going engagement with key stakeholders to assess uptake and monitor energy costs and also to liaise with OFGEM to assess uptake levels and expected spend against profiled budget. The Department has also been liaising with DECC finance team regarding future financing and with HMT relating to the budget for existing commitments."

The reference to financing with HMT illustrates that the Department had failed to appreciate that any excess in expenditure from the HMT allocation would be taken from the Northern Ireland block grant.

[49] The requirement to seek funding approval from DFP beyond March 2015 was overlooked.

STATE AID APPROVAL

[50] On 12 June 2012 EU State Aid approval was granted.

[51] The key reasoning within the EU Commission's approval notification was the following:

(i) The primary objective of the NI RHI Scheme was environmental protection and a contribution towards achieving the UK's renewal energy target set by Directive 2009/28/EC.

(ii) The scheme will only permit tariff payments for production of "*useful heat*", namely heat which would otherwise be met by fossil fuels. It was understood by the Commission that the tariff would eliminate any incentive for deliberately wasting heat in order to receive payments.

(iii) Tariffs were calculated in order to deliver a discounted cost of heat over the relevant time period which would be lower than a non-renewable alternative. The discounted cost calculation took account of initial capital costs, "*hassle costs*", operational expenses, fuel costs and an annual return of 12% on capital.

(iv) Compatibility of the scheme with State Aid rules was assessed by reference to the Commission's guidelines on State Aid for environmental protection, which prohibited over compensation. Cost calculations were based upon estimates which may result in an over or under estimation in specific cases, but would avoid "*systematic over compensation*" and represented a fair approach.

(v) Consultants had recommended that the tariffs should provide a rate of return in the region of 8%-20% in order to incentivise conversion. The NI authorities had chosen the rate of 12%, which was at the lower end of the range and considered to be reasonable.

(vi) Production costs would be monitored throughout the life time of the installations (20 years) and subject to schedule reviews, including the area review in the case of significant changes in production costs.

(vii) The EU Commission analysed estimated production costs and was satisfied that the total tariff payments did not exceed the difference between existing and renewable heat production costs.

(viii) The UK authorities committed to monitor and to adapt the scheme in order to avoid over compensation.

The respondent says that the approval of a 12% return and the avoidance of overcompensation were central to the Commission's approval.

THE 2012 REGULATIONS

[52] Having obtained the relevant approvals the DETI Minister introduced draft Regulations to the Assembly which were passed by affirmation resolution.

[53] The 2012 Regulations establish an incentive scheme to facilitate and encourage the renewable generation of heat and make provision regarding its administration.

[54] The Regulations provide that "*periodic support payments*" shall be paid to participants who are owners of accredited RHI installations. The Regulations set out the criteria for eligible installations. An owner of an eligible installation can apply for accreditation and if the Department is satisfied that the plant is an eligible installation it must provide accreditation, notify the applicant, enter the applicant's name on a central registrar and provide a statement of eligibility which should include 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 the time of repayments.

(v) The tariff lifetime and tariff date.

[55] The Regulations provide that an application is not "*properly made*" unless it contains all of the information in Schedule 1 which includes a description of the purposes for which the heat will be used, the "*industry sector*" and the details of the applicant's business. The applicant must also sign a declaration that the information provided is true to the best of their knowledge and belief. There are a series of ongoing obligations imposed on participants. These include submitting an annual declaration that the plant continues to be used in accordance with eligibility criteria, notifying the Department if there are any material changes to the information supplied at the time of accreditation and not generating heat for the predominant purpose of increasing periodic support payments. The Regulations also provide a range of enforcement powers which includes powers to withhold periodic support payments, to suspended periodic payment and to permanently withhold or reduce a participant's periodic payment in the cases of non-compliance with the obligations. Accreditation or registration can also be revoked and there are powers of inspection.

[56] Fundamentally once an installation has been accredited, the Department must make periodic support payments in accordance with the tariffs set out in Schedule 3. The tariffs are those which were contained in the second CEPA report and set out in the business case to DFP.

[57] For the purposes of these proceedings the key provisions are set out in Regulation 36 as follows:

*"**Payment of periodic support payments to participants***

36.-(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) The tariffs –

(a) for the period beginning with the commencement of these Regulations and ending with 31st March 2013, are the tariffs set out in Schedule 3; and

(b) for each subsequent year commencing with 1st April and ending with 31st March, are the tariffs applicable on the immediately preceding 31st March adjusted by the percentage increase or decrease in the retail prices index of the previous calendar year …"

THE OPERATION OF THE SCHEME

[58] Thereafter the scheme was promoted by the Department and by organisations such as the College of Agriculture, Food and Rural Enterprise (CAFRE), Agri-food and Business Institute, Ulster Farmers Union and parts of the banking sector. By way of example on 7 January 2013 the Minister for the Department wrote to the Ulster Bank "*to encourage you to look favourably on approaches from businesses that are seeking finance to install renewable technologies*". The letter indicated that:

"The rate return has been set at 12% for all technologies incentivised under the NI RHI (barring solar thermal which has a rate of return of 6%). These rates of return reflect, amongst other things, the potential financing costs of the investment. Tariffs are 'grandfathered' providing certainty for investors by setting a guaranteed support level for projects for their lifetime in a scheme, regardless of future reviews. However they will be amended on a yearly

> *basis, for existing installers and new schemes to reflect the rate of inflation*."

The letter goes on to say:

> *"The Government support on offer through the incentive scheme is reliable, long term and offers a good return on investment. If you find it useful DETI officials would be happy to arrange a seminar for finance institutions to explain further the current and proposed financial mechanisms."*

[59] In October 2013 the second applicant ("DA") installed 2 x 99 kWh boilers in his poultry farm. In his affidavit he explained that he had been a farmer since he was 24 years old and along with his father had maintained a poultry farm in County Antrim for over 20 years. As part of that business he supplies birds to Moy Park which is one of Northern Ireland's largest private sector companies.

[60] Prior to 2014 DA explains that he had two chicken sheds on his farm. Each of these sheds was direct fire heated using propane gas (LPG). In or around August 2013, he was investigating the feasibility of upgrading the heating system in the sheds from direct fire heated to a hot water heating system. Initially he had envisaged using an LPG hot water heating system but when he made enquiries of a number of installers, he was advised that it would be possible to move to a biomass hot-water system that was fuelled through burning wood pellets.

[61] He decided to install 2 x 99 kWh biomass boilers in December 2013.

[62] He expanded the farm in 2015 and erected an additional chicken shed with an additional 2 x 99 kWh biomass boilers. This required a planning process which was initiated in December 2014. Planning consent was applied for in January or late February 2015 and work commenced in July 2015; two further biomass boilers were installed in August 2015 to heat the new chicken shed.

[63] He points out that he invested substantial sums as a result, which required significant financing. At paragraph 22 of his affidavit he says as follows:

> *"In October 2013 my father and I obtained a loan of £63,000 from the Ulster Bank to assist with the capital expenditure required for our initial investment in the RHI Scheme; the total investment cost approximately £120,000 but I paid for the balance through savings. … In 2015 I renegotiated the terms of this loan with the Ulster Bank to reflect my parents beginning to step away from the business."*

As a result of a renegotiated loan with the bank the balance payable from the initial loan of £63,000 was reduced to £42,000 on 7 December 2015.

[64] In respect of the farm expansion and erection of the additional chicken shed and two biomass boilers in August 2015 he obtained a loan from the Ulster Bank in the sum of £350,000 but only drew down £330,000. He says that:

> "*Prior to committing to these loans and the relevant repayment terms I assessed the business needs and possible future income, taking into account the RHI tariff payments, the rates stated by OFGEM and the Department over the entire 20 year period to satisfy myself that this was a prudent investment*".

[65] In respect of boilers 1 and 2 DA applied for and received accreditation in January 2014. The application form seeking accreditation identifies capital costs of £32,000 per boiler plus £5,000 indirect costs with usage of 50 hours per week. In respect of boilers 3 and 4, he applied for and received accreditation in October 2015. In respect of that application the capital costs are identified as £42,000 (£21,000 per boiler).

[66] In this regard the respondent points out that the loan drawn down for £63,000 was "*for general business purposes*". In relation to the loan in August 2015, the bank loan was "*to assist with the development of a new boiler unit together with the biomass installation* …." The significance, according to the respondent, is that the payments are in effect being used to finance DA's business, and not the capital costs associated with the burning of the fuel.

[67] As DA points out, in lending the money the bank were obviously cognisant of the tariff payments. Clause 14.1.8 of the 2015 loan agreement provides that the loanee must "*provide evidence of the commissioning certificate from a biomass installer, confirming boiler is registered as eligible for RHI payments within 6 weeks of receipt of the first batch of birds*."

[68] In respect of the accreditation of each of the boilers, DA received a letter confirming that the relevant installation had been accepted into the Northern Ireland Renewable Heat Incentive (NIRHI) Scheme. Each installation was given an effective accreditation date. By way of example in respect of the accreditation granted in January 2014, the letter from OFGEM states:

> "*The effective accreditation date is 10/01/2014 from which support payments for eligible heat will start. It is also the date on which future dates for taking meter readings and submitting periodic data is based.*
>
> *This letter contains important information and you should also familiarise yourself with NIRHI Guidance Volume 2. It details your ongoing obligations as a participant in the NIRHI Scheme, as well as providing more information on periodic data submission and payments.*

> <u>*Tariff and Payments*</u>
>
> *Your starting tariff in line with the published rates will be 6.10 p/kWh. This rate will be subject to change, based on the retail price index (RPI)(RPU) adjustments, which are updated 1 April each year and published on the NIRHI website.*
>
> *Your tariff lifetime is 20 years from the date of accreditation. You will stop receiving tariff payments under the NIRHI on 10 January 2034."*

[69] The second applicant contends that this commitment could not be clearer and argues that he would not have entered into the scheme, nor would he have obtained the loan from Ulster Bank had this commitment not been given.

[70] On 26 March 2015, DETI Energy Division sought clarification from DFP on budget allocations for RHI. This arose because in the years 2011/2012/2013/2014, there was a significant underspend of the budget allocation from HMT; only £2.1m of the £13m AME. There was a significant uptake in the scheme in 2014/2015 which resulted in a total expenditure of £7.9m against an allocation of £12m, leaving a total underspend of £15m over the 4-year period. However, because of the increasing numbers of accreditation the projected annual level of expenditure was estimated as £16m in 2015/2016 and £22.5m in 2016/2017. According to the Department this was to prove a serious under-estimation because of the significant number of new applications for biomass heating systems, linked to the Moy Park expansion, to the extent that the potential final annual expenditure on the RHI Scheme overall would reach £50m. Subsequent figures prepared by the Department indicate that the actual expenditure for 2016-17 was £45.4m and the forecasts for the following years based on the 2012 tariffs continuing would be £50.6m (2017-18); £52.1m (2018-19); £56.6m (2019-20) and £58.2m (2020-21), resulting in a cost £135.3m to the NI Executive.

[71] Because of the escalating costs the DETI Energy Division sought clarification from DFP on budget allocations for RHI on -

(i) whether or not prior year underspend from the initial £25m AME allocation could be carried forward to future years;

(ii) what the RHI budget allocation for 2015/2016 was likely to be; and

(iii) what maximum annual budget allocations from 2016/2017 onwards would be.

[72] On 19 May 2015 DFP advised that there would be a cap on the budget allocation of £12.8m and that in line with previous correspondence from HMT, the RHI budget was not treated as standard AME and overspends would have consequences for Resource DEL budgets.

[73] After this process of clarification it became apparent that the need for DFP approval to continue the scheme beyond March 2015 had not been sought before the original approval period (2011/2012–2014/2015) ended. DETI Energy officials had wrongly assumed that, like the domestic scheme, approval for the non-domestic scheme had been secured until the scheme closure in March 2020. Concerns about rising expenditure became acute in July 2015 and as a result the Minister agreed in early September 2015 that a tiered tariff for biomass systems (which accounts for 97 percent of installations) should be introduced. This was followed by a public announcement on 8 September 2015 and draft 2015 Regulations were laid before the Assembly and approved on 7 November 2015 (the Renewable Heat Incentive Schemes (Amendment) Regulations (Northern Ireland) 2015). The key point arising from these Regulations for the purposes of this application was that they introduced a tiering system and a cap on the heat eligible for tariff payments to all installations accredited after that date, in line with the GB scheme.

[74] On 27 October 2015 DETI submitted a business case to DFP for amendments and for retrospective approval for the payments after the original approval period expired.

[75] In December 2015 DETI commenced an internal audit investigation into the system of control over the non-domestic RHI Scheme.

[76] On 21 December 2015 DFP confirmed that retrospective approval would not be given for expenditure in the period April to October 2015.

[77] On 13 January 2016 HMT wrote to DFP in respect of the RHI Scheme advising that expenditure above allocation would come from the Northern Ireland Executive budget.

[78] On 18 February 2016 the RHI Scheme was suspended to new entrants by the enactment of The Renewable Heat Incentive Schemes (Amendment) Regulations (Northern Ireland) 2016.

THE COMPTROLLER AND AUDITOR GENERAL (CAG) REPORT

[79] In June 2016 the Comptroller and Auditor General published the audit for DETI for the year 2015/2016 and he qualified the accounts for two reasons:

- Expenditure amounting to £11.9m was incurred without the necessary approvals in place for the non-domestic Renewable Heat Incentive (RHI) Scheme and was therefore irregular; and

- He was unable to obtain enough evidence to be assured that expenditure on the non-domestic RHI Scheme amounting to £30.5m had been incurred for the purposes intended. This was due to the fact that he did not consider that the systems in place to prevent or detect abuse of the scheme were adequate.

[80] The report makes sorry reading for DETI.

[81] In relation to the re-approval from DFP, it was the auditor's opinion that:

> *"Had the need to receive re-approval from DFP been identified when it should have been, then this would have provided an important opportunity to review the scheme and amend it to include cost control measures. As it was this potential opportunity was missed."*

[82] The auditor reports that the explanation for this from DETI lay in a combination of staff changes and administrative oversight. Subsequent to the requirement for re-approval being put in place, there were multiple staff changes. The key information was not passed on from departing staff to their successors.

[83] The auditor was highly critical of the level of control over the spending incurred on the non-domestic RHI Scheme. Oversight was inadequate to prevent or detect abuse of the scheme. Oversight and management of the scheme was unsatisfactory. It appears that the Department left the monitoring of the non-domestic RHI Scheme almost entirely to OFGEM. He described the failure of the Department to consider tiering as "*a critical mistake*". He also comments on the absence of a system known as degression which allows the tariff paid to reduce in response to an increase in demand.

[84] He analyses the figures which were presented in the original business case and points out that there was:

> *"An unacceptably high rate of return for businesses taking advantage of a non-domestic RHI Scheme in Northern Ireland."*

It was his opinion that this should have been identified and prevented when the scheme was being designed.

[85] The conclusions are scathing and provide a good summary of the critical errors surrounding the design and implementation of the scheme.

> ***"CONCLUSIONS***
>
> *59. The operation of this scheme over the last few years and its future budgetary implications give rise to a number of significant concerns. These include that the scheme:*
>
> - *Was not designed to include any viable cost controls despite the clear indication in April 2011 that this would not be funded without limit by HM Treasury.*
>
> - *Did not take the opportunity in 2013 to mirror the GB scheme and introduce some cost control measures at that time.*

- *Did not take account of changes to underlying costs since 2012 and therefore was over generous in incentivising renewable heat.*

- *Could not be changed quickly when it became apparent that demand was rising quickly.*

- *Was not approved by DFP in April 2015 and resulted in irregular expenditure. If the need for this approval had been identified at the right time then it could have been the catalyst for a wider review of the scheme.*

- *Has at least facilitated the possibility of funding that is at best not in line with the spirit of the scheme and at worst possibly fraudulent (though there is no prima facie evidence of fraud at present).*

- *Was not properly monitored and controlled by the Department who solely relied on the work being done by OFGEM.*

- *Did not identify the risks of overspending at an earlier stage even though AME allocations had been previously advised. This has led to an impact on the Northern Ireland block grant which is likely to be measured in hundreds of millions of pounds.*

> *60. This scheme has had serious systemic weaknesses from the start. The fact that the Department decided not to mirror the spending controls in Great Britain has led to a very serious on-going impact on the NI budget and the lack of controls over the funding has meant that value for money has not been achieved and facilitated spending which was potentially vulnerable to abuse. I am very concerned about the operation of this scheme and it is an area which I expect to return to in the very near future."*

THE DETI INTERNAL AUDIT REPORT

[86] On 4 August 2016 the DETI internal audit report was published. It echoed much of what was said in the Auditor General's report.

[87] By this stage a clear picture emerges of a scheme with systemic weaknesses in its design and totally inadequate oversight and supervision. In this regard the report notes again the impact of staff changes which resulted in a "*loss of the*

organisational knowledge from those staff involved in the initial implementation of the scheme". The report is particularly critical of the failure to, at the very least, establish a Budget Monitoring Committee as had been originally planned.

[88] In evaluating the scheme the report addresses the issue of State Aid approval. It points out that one of the key aspects of the Commission decision on State Aid compliance was that the scheme must not allow for overcompensation of scheme beneficiaries. As such the level of compensation offered was specifically designed to cover the cost differential between a renewable heat alternative and a traditional fossil heating system, plus an appropriate rate return set at 12% to incentivise installations. At the time of the report, Energy Division did not have up-to-date information to allow it to assess whether the average value of award was still in line with that envisaged in the original business case and State Aid notification. The audit considered that there was some evidence to indicate that the average value of award in 2015/16 was significantly greater than that in the first years of the scheme. In its conclusion on this section of the report the audit:

> "*Is of the opinion that when introducing funding schemes it is important that those schemes are regularly monitored to ensure that the initial assumptions around VFM and the return on investment to applications are still valid. In the case of the non-domestic RHI scheme it is important that such an evaluation of continued value for money is urgently completed.*"

[89] On this issue in terms of risk it reports:

> "*As there have been significant changes to capital, operating in barrier costs of renewable technologies there is a potential risk that the scheme participants are being overcompensated at current tariff rates. If overcompensation has taken place then the Department may be in breach of State Aid Regulations.*"

[90] Its final recommendation on this issue was that:

> "*Notwithstanding that the RHI Scheme has been closed, the Department should ensure that the evaluation of the scheme is carried out as soon as possible. The evaluation should consider the extent to which the scheme has met its overall policy objectives and whether individual awards under the scheme are consistent with the original Business Case, State Aid approval and represents a reasonable return on investment.*"

THE PWC REPORT

[91] In September 2016 PWC Accountants, published a report "Project Heat" which was requested by the Department to carry out the following:

> *"(a) To express an 'explicit opinion' on whether or not there is evidence to substantiate the allegations of the NI Scheme having been 'abused', with participants not operating within the Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012 ("NI Regulations").*
>
> *(b) A review of the processes and controls in place to administer the NI Scheme.*
>
> *(c) A programme of on-site inspections to identify the potential instances of non-compliance with the NI Scheme.*
>
> *(d) To consider if the NI Regulations and related guidelines, are, by design, sufficient to ensure that only heat generated for a valid and necessary purpose is eligible for support under the NI Scheme.*
>
> *(e) To make recommendations to the Department on the way forward to improve the governance of the administration of the scheme."*

[92] In its review of the scheme, legislation and guidance it identified the obvious flaws in the scheme which have already been set out. These are perhaps best summarised as follows:

> *"3.22 Based on analysis performed in May 2016 on behalf of the Northern Ireland Audit Office the cost at the date per kWh of energy produced by a small biomass boiler was established to be 4.01p, significantly less that the current equivalent tariff rate of 6.4p.*
>
> *3.23 Due to the fact that the NI Scheme has no upper limit on the amount of heat generated that would attract support payment or a tiered tariff system (prior to November 2015), there is clear incentive under the NI Scheme for successful applicants, whose applications pre-date the revisions made in November 2015, to generate heat over and above that which was 'useful or useable'.*
>
> *3.24 Tiered tariffs and/or a cap on the amount of heat generated qualifying for support payments, are key cost controls and their absence from the introduction of the NI Regulations significantly increased the risk associated with the NI Scheme, leaving it vulnerable. Based on the documentation made available it is not clear why such a*

control was not implemented by the Department; such criteria were recommended to the Department during its public consultation process.

3.25 It is also not clear why the Department failed to review such a significant and inherently risky scheme despite many recommendations and indeed commitments to do so, in particular relating to tariff rates. As a result of this it appears that the tariff rates have, in fact, over subsidised participants since the introduction of the NI Scheme."

[93] In dealing specifically with the issue of banding and the use of 99 kW rated boilers the report states at 5.34:

"The use of multiple boiler installations was found to be relatively common in the sites inspected (see table immediately below). The existence of the higher tariff level for 99 kW rated boilers, relative to a significantly lower tariff level for larger rated boilers (great than 100 kWs), appears to have led to the artificial proliferation of this size of boiler. Installations on the sites where multiple small boilers are being used, rather than a few number of large boilers, without any supporting rationale other than to possibly take advantage of the higher tariff payable for heat generated by smaller boilers were mainly classified as category 3's."

[94] From the point of view of the second applicant in particular it is important to note that the report also records that:

"5.70 Generally poultry farms demonstrated a good use of biomass generated heat, with increased productivity and also improved animal welfare.

5.71 Many of the poultry farms inspected were broiler farms. These can be judged to be relatively lower risk."

[95] The risk refers to risk of abuse.

[96] In relation to mushroom farming the report states:

"5.74 A number of mushroom farms were visited. These do not require large amounts of heat as the mushrooms need an ambient temperature no higher than 18 degrees centigrade. There is the potential for simultaneous heating

and cooling in the air handling units when dehumidifying but since the maximum humidity required is around 85% then in practice this will be only be for a small amount of time."

[97] The authors of the report inspected 80 sites with 295 biomass boilers accredited in August and September 2016. All of these sites had boilers (installations) registered before the tariff change on 18 November 2015. According to the report:

> "**5.94** *Less than half (46.77%) of the total installations inspected were categorised as generating heat for an eligible purpose within the intentions of the NI Scheme.*"

THE DETI RESPONSE AND THE PATH TO THE 2017 REGULATIONS

[98] Unsurprisingly the pattern which was emerging resulted in very significant public concern, reflected by the attendance of the Permanent Secretary and DETI officials before the Public Accounts Committee on 28 September 2016, 12 October 2016 and 9 November 2016.

[99] What emerges from the transcript of these sessions was that the Department fully accepted the criticisms of the scheme and their failure to provide sufficient oversight and management. There is express reference to the fact that in relation to the failure to identify that the scheme did not have open-ended funding was as a result of the fact that "*somehow or other, that consciousness was lost, which is unacceptable*" – Dr Andrew McCormick – on behalf of the Department for the Economy at the meeting on 29 September 2016.

[100] Against this background on 14 December 2016 the DETI Minister submitted a paper to the Executive Committee for approval. The introduction sets the context:

> "*1. This paper outlines some of the options under consideration for proposed changes to the Northern Ireland Non-Domestic Renewal Heat Incentive (RHI), with the aim of controlling future costs associated with the scheme. I have made it clear both publicly and to the Permanent Secretary that action on this issue is the absolute top priority of the Department. The aim is to:*
>
> - *Ensure compliance with the terms of the State Aid approval of the scheme; and*
> - *Ensure a proper balance between the rights of scheme participants, and the public interest of meeting the requirements of the Renewable Energy*

Directive without unreasonable cost to public finances."

The paper records the history of the scheme performance and tariff changes resulting in the 2015 Regulations and the 2016 Regulations which resulted in the suspension of the scheme.

The report then looks at the issue of overcompensation and states:

> *"10. The Department is conscious that the RHI Scheme must operate within the terms and conditions of its State Aid approval (SA. 34140) and the European Commission Guidelines on State Aid for Environmental Protection.*
>
> *11. As detailed in Section 3.2.1 of the Commission's State Aid approval to the Northern Ireland Scheme is based on scheme participants receiving an average return of 12% over the lifetime of the technology.*
>
> *12. The Commission approval reads:*
>
> > *'…The Commission notes that this (the discount rate of 12%) is the same rate used in the mainland UK scheme. Under the assessment of that scheme, the UK authorities submitted a detailed report from an independent consultant which concluded that the necessary rate of return to incentivise renewable heat production ranges between 8% and 22%. The chosen rate of 12% is at the lower end of that range and it can be considered reasonable …'*
>
> *13. Recent analysis carried out by the Department shows that participants with 99 kW biomass installations on the flat 6.5p kWh tariff (pre 18 November 2015) could be set to receive rates of return in excess of 100% if payments continue over the years. This far exceeds the 12% rate of return approved by the Commission.*
>
> *14. In comparison the maximum rate of return for a heating system installed after 18 November 2015 is 19%. Although higher than 12% this was within the 8% to 22% range referenced in the Commission's approval as necessary to incentivise renewal heat production.*

> *15. Officials discussed the issue with the European Commission on 7 December and that engagement is guiding the next steps we are taking."*

Paragraph 18 of the papers states:

> *"While the Department accepts that some installations have a legitimate basis for 24/7 use (for example, poultry farms), it is now evident that a tiered tariff should have been employed from the outset (as was the case with the RHI Scheme in the rest of the UK) to avoid over compensation and remove any perverse incentive to waste heat to increase payments."*

[101] In relation to budgetary pressures the papers states:

> *"19. The Commission's approval reads 'as regards the budget of the notified measure, the UK authorities have allocated a budget of GBP £25m from 2011 to 2015 specifically to renewable heat in NI. The budget is expected to increase by GBP £5m per year from 2015 until 2020, which would imply approximately a total of about GBP £184m in funds from the scheme to be paid until 2020'."*

[102] According to the paper "*total RHI expenses over 20 years is currently forecast to be £1.2bn if no action is taken*".

[103] The paper concluded that the Department is urgently taking forward action to address the weaknesses identified, improve the scheme's value for money and reduce future costs. This included addressing issues of governance and control, audit and enforcement and cost controls.

[104] On 9 January 2017 the Deputy First Minister resigned against the background of the public controversy surrounding the scheme.

[105] On 11 January 2017 DETI put a business case to DFP re amending the scheme. The case addressed the deficiencies in the scheme which at this stage have been well rehearsed. The key issues identified included overcompensation, unaffordable commitments, undesirable behaviours, poor value for money and very significant public concern. The objective of the business case was described as follows:

> *"3.2 Over and above the primary objective to bring the scheme, using legally defensible means, back within its budgetary envelope, there are a range of other objectives, often interlinking, that it will be important to achieve or significantly improve upon within any revised approach.*

One such objective was 'a revised approach that is sustainable in legal and State Aid terms'."

[106] The key objective of the case was to undertake "*a legally defensible course of action that, starting in FY2017-18, can remove the perverse incentive to produce excessive heat*".

[107] A number of options for action were set out. Option 1 was "no action"; Option 2 was to move all the pre-November 2015 tariff medium biomass boilers to the tariffs introduced in November 2015; Option 3 was that all biomass boilers receive a payment of 1.5p kWh with payments capped at 4032 hours per annum after which no payment is made for heat generated; Option 4 was to cease or suspend the scheme and its payments to medium biomass boilers until a lasting solution is developed and Option 5 was to introduce an arbitrary reduction on tariffs combined with tiering and capping.

[108] Option 2 was considered to be the best value, practical approach for 2017/18 and the indications were that this approach would substantially manage costs back towards the £22.3m AME allocation in that year. The case identified the risks associated with each of the options and recognised that there were legal risks. It recognised that the original scheme was designed so that the tariffs would be "*grandfathered*". It was anticipated that there would be legal challenges to any reductions in the pre-November 2015 tariff levels. It was anticipated that part of the response to this type of challenge would be to argue that the initial tariffs were well beyond the publicly stated intentions of the scheme and the imposition of the post November tariff is a reasonable interim approach as those tariffs were in line with the intent of the scheme on return to participants. It was recognised that changes affecting pre-2015 tariff installations "*are not grounded in logic associated with the publicly stated original intent of the scheme and there would be concern that this source of legal defence would not be available to defend any such course of action*".

[109] It was anticipated that, in the event of an interim solution along the lines suggested being implemented, there could be a challenge on one of two main possible grounds, legitimate expectation and/or right to property under Article 1 Protocol 1 of the European Convention on Human Rights.

[110] In terms of assessing the merits of the proposed option the case describes the key legal arguments that support the proposed intervention as including that;

- The expected rates of return were repeatedly and prominently set out at the launch of the scheme, and no one can reasonably argue that the excessive rates of return that are now in place could have been legitimately expected.

- In particular, the rates of return are far in excess of the amounts underlying the approved position under State Aid.

- The payments affected by the change are expected future income – a type of 'property' that the courts are less protective of than current existing assets.

- The reduction in the tariff is clearly and demonstrably in the public interest because otherwise there will be a loss of other public benefits from much better use of public expenditure and it cannot conceivably be in the public interest for participants to be incentivised to generate excessive heat.

- The proposed approach provides a sustained reasonable level of return on the investments made.

- It is planned that there will be a full consultation with all applicants in the course of the next few months to develop a permanent and fair solution – which could if necessary correct any 'rough edges' in the approach commenced for 2017-18.

[111] The case also noted that the changes, if implemented, would require a fresh notification to the European Commission.

[112] The approach adopted in the business case was in effect to impose tariff changes on those installations accredited prior to 2015. The tariffs were to be changed on an interim basis for one year so that the Department could analyse the effects of the imposition of the proposed interim tariff changes. The object was to put in place a scheme that would reinstate the original anticipated rate of returns when the scheme was originally designed.

[113] The conclusions of the report were summarised as follows:

> *"10.1 The key objective of this business case is to undertake a legally defensible course of action that, starting at FY2017-18 can return the overall domestic and non-domestic RHI Schemes to a position where they no longer are spending significantly in excess of their combined AME allocations.*
>
> *10.2 In effect the current position is that there are too many installations on too high a tariff and the level of commitments are already well beyond the AME allocation for the NI RHI Schemes. This has led to a situation where the annual, combined, cost of the domestic and non-domestic RHI Schemes are running at circa £50m per annum. Clearly the continuation of the current approach is unaffordable, unsustainable and unacceptable.*

> *10.3 The favoured approach for 2017-18, option 2, aims to substantially reduce or eliminate the excessive impact on the block of the cost of the RHI Scheme, whilst at the same time is deliverable and reduced risk of legal challenge than the alternative `do something' options. As further information becomes available the approach will be refined to ensure that best value options are maintained for the longer term. That will include, and parallel to option 2 being implemented a comprehensive inspection programme, compliance measures, enforcement, annual reviews, capture of more comprehensive information (including on usage) and consultation of the way forward. That work, on enforcement, could have a material effect on the cost of the scheme over and above the cost reductions modelled in this business case."*

[114] On 13 January 2017 the DETI Minister requested the Assembly Business Committee to schedule a debate on the draft 2017 Regulations. On the same date he wrote to the Chair of the Economy Committee enclosing the draft Regulations along with the explanatory memorandum and explaining that:

> *"You will appreciate the importance of taking the draft Regulations forward as a matter of urgency. Due to very pressing timescales it has therefore not been possible to consult the Committee on the content of the draft Regulations."*

[115] On 16 January 2017 the DETI Minister and the Permanent Secretary appeared before the Committee for the Economy.

[116] The official Hansard transcript of the meeting indicates that the Minister and Permanent Secretary made the case for the 2017 Regulations along the lines contained in the business case. The transcript reflects the unorthodox circumstances in which the committee met. The Regulations were being laid before the Assembly in the face of an undoubted emergency with the collapse of the political institutions imminent. This meant that the Regulations had not gone through the normal scrutiny process and the questioning from the Committee members reflected this.

[117] At the committee hearing the Minister stressed that the 2017 Regulations were very much an interim measure. He said in this regard:

> *"… But there is a very good reason why we are today bringing forward Regulations that have a commencement clause and a sunset clause; in effect, it will be for a one year period. That is entirely to stem the flow of public money to the scheme – to turn off the tap – and it significantly does*

> *that for a one year period. It gives us some space to do what we would ordinarily do, which is to consult, and we will launch a consultation on what the future long-term solution should be to the issue. It will look at a range of options. It will take on board the views of the 1,800 people who are affected by this, and obviously, others who want to input into it. That will give us space to look at a range of issues that have been coming up even in the last 24 or 48 hours. I am charged with stemming the flow of public money. The Regulations do that, and they create room for the Department to launch a consultation, take views, test those views, go through the proper process and, in due course, put in place a long-term solution to the RHI problem. That, hopefully, gives you a bit of a feel for what the Regulations do, the associated costs, a flavour of the legal opinion we have and why we were taking this approach."*

[118] In the course of the presentation reference was made to the Department's obligations under State Aid.

[119] The case for change was encapsulated in the Minister's comments to the effect that:

> *"The Regulations will allow the scheme to continue but in a way that is consistent with its original intention, particularly in respect of seeking to live within the annually managed expenditure (AME) envelope that comes from Whitehall to fund the RHI Scheme."*

[120] The focus was to reduce what were described as "*excessive returns*" to the expected return in accordance with State Aid approval of around 12%.

[121] The committee members raised some of the points raised on behalf of the applicants in this judicial review and were clearly concerned about the manner in which the Regulations had been introduced, summarised by the Deputy Chairperson's comments when he said:

> *"Now we are in the last minute just before we were due to make one of the most important decisions that Northern Ireland would make – a decision that has significant and severe consequences – and we are making it without appropriate communication, consultation or documentation."*

After the administrative officials had left the committee meeting the minutes record that "*The committee agreed to note the draft 2017 Regulations*."

[122] Later that day (16 January 2017) the Minister laid the Regulations before the Assembly.

[123] The official Hansard report of the proceedings indicates that before the Minister moved the motion to approve the Regulations a point of order was taken in relation to Standing Order 43 which requires Statutory Rules which are to be laid before the Assembly "*where practicable*" to be reported upon by either the appropriate committee or the Examiner of Statutory Rules.

[124] The Speaker took the view that reporting by the committee and the Examiner "*had not been practicable*" and whilst this was far from ideal the Minister did speak to the draft Regulations.

[125] What followed was a by now familiar presentation by the Minister setting out the basis for the Regulations which were met by challenges from members about the way in which the scheme was originally designed, together with concerns about how it operated and about how the proposed changes were being presented. Reflecting this dissatisfaction, a motion to adjourn the consideration of the Regulations until Monday 23 January 2017 was carried.

[126] On 18 January 2017 the Examiner sought further information from DETI on the operation of the scheme at present, and how that will change, and the impact upon present participants. In particular the Examiner sought advice on what was communicated to any participants about the scheme as they joined the scheme.

[127] In response the Department officials provided the relevant guidance documents available on the OFGEM website, application forms for the RHI Scheme and sample letters issued upon successful accreditation on the scheme.

[128] The Examiner was also provided with a copy of the EU State Aid approval. From the correspondence it is clear that the Examiner was concerned about the engagement of Article 1 Protocol 1 rights, any public interest objectives and the issue of proportionality.

[129] On 20 January 2017 the Examiner provided a report on the Statutory Rules.

[130] The report of the Examiner lucidly examines the legal issues that arise in relation to the Regulations and which have been canvassed in this application.

[131] In particular it considered the issue as to whether the proposed changes were in breach of rights secured by Article 1 Protocol 1 of the Convention. The report notes that any interference with rights secured under Article 1 Protocol 1 must be

subject to the conditions provided by law. The report opines that Section 113 of the Energy Act 2011 provides the Department with the statutory power to make the Regulations and notes that there is no statutory duty placed upon the Department to consult in relation to its powers under Section 113.

[132] However, the report acknowledges that a duty to consult may exist in circumstances where there is a legitimate expectation that such consultation will take place. In relation to a lack of consultation concerning these Regulations the report notes that the Department has stated its intention to consult on changes to the RHI Scheme. The Regulations propose a change under the regime for a period ending on 31 March 2018. The report acknowledges that whilst it may be asserted that urgency has precluded consultation in this case, and that the change in the rights of participants in the RHI Scheme is limited in its duration, it is unlikely that such an approach could be justified in the case of further or continuing changes to the scheme.

[133] It notes that the Department considers that the present RHI Scheme strikes a poor balance between the public interest and private interests and that it considers the terms of the RHI Scheme do not presently serve the objectives of the 2011 Act, encourage poor use of energy, have severe implications for public spending and do not reflect the requirements of the European Commission State Aid approval.

[134] It notes the State's wide margin of appreciation and looks at the issue of proportionality between the means employed to meet the Department's legitimate aims and the aims to be realised. It indicates that the availability of compensation may have relevance in assessing whether a fair balance has been struck between the public interest objective and the rights of the individual. The final view is set out in 6.19 as follows:

> "*Given the limited opportunity for scrutiny of the Regulations, the Assembly and Committee may not be able to reach a definitive view as to whether these Regulations will in fact interfere with the Article 1 Protocol 1 rights of any person. It may be considered that the public interest objectives of the Department fall within the wide margin of appreciation afforded to the State and that the stated objectives of the Department in making these Regulations may be considered to be a legitimate public interest objective. Further, if a legitimate expectation to the continuation of the payments of the original 2012 tariff were to be established for any person, or indeed all affected participants, it may be argued that these Regulations, limited in their period of application, are nonetheless a proportionate means of achieving that legitimate public interest objective.*"

[135] In the meantime on 19 January 2017 the committee again considered the draft Regulations. The committee received an oral briefing by Assembly Legal Services and adjourned, seeking further information. The committee met again on 23 January 2017. At that meeting the members were briefed and undertook a question and answer session with the Examiner of Statutory Rules. (By this stage the committee had received the report of 20 January 2017).

[136] The committee again "*noted*" the Regulations.

[137] Later on 23 January 2017 the Regulations were debated and affirmed in the Assembly.

[138] In concluding his by now familiar presentation the Minister states:

> *"… The way in which these Regulations have come forward is not ideal. I would far prefer full scrutiny and more time to take them through the house in the normal way. The imminent dissolution of the Assembly has necessitated the approach I have adopted. I was planning to do it conventionally but circumstances have dictated otherwise."*

[139] Subsequently EU State Aid approval for the 2015 and 2017 Regulations was confirmed on 21 March 2017. The Regulations thereafter came into effect on 1 April 2017.

[140] The report by the Comptroller and Auditor General for Northern Ireland dated 30 June 2017 again qualifies the accounts for the Department of the Economy (DETI's successor). It repeats its concerns about the RHI Scheme. It restates its concern at the extent of the use of multiple boilers in the 20-99kW range which allowed applicants to claim a considerably higher level of subsidy payments than would have been payable for installations with a single boiler of a more appropriate size greater than 100kW. It looks at the issue of potential excessive returns.

[141] It notes the 2017 Regulations and the fact that they are in place for one year and subject to a judicial review challenge. It notes the Department's estimates that a huge reduction in the cost of the scheme will be achieved by the new scheme reducing the annual cost to £2m compared to £30m at the time of the previous annual report.

[142] It concludes that:

> *"50. The Department has made some progress in addressing the issues arising from my report last year. In particular the tiering of the tariff subsidy rate and longer term consultation and a reasonable rate of return from the*

> *scheme will have a big impact on cost. This is dependent on the outcome of various legal challenges.*
>
> *51. However I continue to have significant concerns about the operation of this scheme and the serious systemic weaknesses and controls that have facilitated the possibility of funding that is at best not in line with the spirit of the scheme and at worst is fraudulent. The proposed physical inspection of all scheme installations will provide some evidence about the scale of any abuse and how the Department respond to enforcement where any abuse is identified will be very important."*

[143] The report provides a clear demonstration that the introduction of tiering in November 2015 was having the desired corrective effect.

[144] For boilers applied for after 18 November 2015, a tiered rate was used so that the higher rate of 6.5p per kWh was only available for the first 15% of hours used in a year before dropping to 1.5p per kWh. There was also a maximum cap of 400,000 kWh. The majority of boilers installed after 18 November 2015 were 199 kW boilers and the relevant figure for 2016-2017 demonstrated that the majority used the boilers for less than 20% of the hours in a year and only one user above 50%.

THE APPLICANTS' CHALLENGE

[145] The applicants' challenge the 2017 Regulations on the following grounds:

- The 2017 Regulations are *ultra vires* the Energy Act 2011;

- The 2017 Regulations are an unlawful interference with the applicants' property and contractual rights, both at common law and under Article 1, Protocol 1 of the European Convention;

- The 2017 Regulations have breached the substantive legitimate expectation enjoyed by the applicants to periodic payments at a tariff fixed at the date of accreditation for a tariff period of 20 years;

- The 2017 Regulations have breached the legitimate expectation of consultation and a legitimate expectation that a regulatory assessment would be carried out before the implementation of Regulations such as the 2017 Regulations.

- The 2017 Regulations are in breach of the Northern Ireland Assembly Standing Order 43 and *ultra vires;*

- The 2017 Regulations are Wednesbury unreasonable/irrational.

THE *VIRES* ISSUE

[146] A central contention of the applicants is that the 2017 Regulations are *ultra vires* the enabling Energy Act 2011. This argument is based on the fundamental common law principle that unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation. It is argued that this principle applies equally to delegated legislation.

[147] Commenting on this principle Bennion on Statutory Interpretation, 6th Edition Section 100, states as follows:

> "*The same principles apply to a question as to the retrospective operation of delegated legislation as apply to Acts. However in the case of delegated legislation not only must the wording of the instrument itself be considered, but that of the Act under which it was made. Furthermore the doctrine of ultra vires needs to be taken into account.*"

The author goes on to state:

> "*Since the principles regarding retrospectivity are based on public policy, it follows that they apply equally to delegated legislation. However the legislative intention needs to be gathered by considering both the enabling Act and the instrument made under it. If retrospectivity is beyond the power conferred by the Act, the doctrine of ultra vires comes into play. The courts are even more reluctant to accord delegated legislation a retrospective operation and will require a `clear provision' in the enabling Act conferring power to that effect*".

[148] In support of the latter comment the author refers to the case of *R (On the application of Friends of the Earth Ltd) v Secretary of State for Energy and Climate Change* [2012] EWCA Civ 28 at [43].

[149] The applicants rely on the principles set out in the *Friends of the Earth* case, which bear careful consideration in the context of this application. *Friends of the Earth* involved consideration of a scheme introduced by the Secretary of State for Energy and Climate Change in GB which provided for the payment of a Feed In Tariff ("FIT") to enable electricity supply companies to make payments to small scale producers of low carbon electricity.

[150] The scheme was introduced in April 2010 under a power conferred upon the Secretary of State in Section 41 of the 2008 Energy Act. The judgment describes the conferring power as enabling the Secretary of State "*to introduce what might loosely be described as the delegated legislation (although it is a congeries of legislation and licences*

made under the legislation)". In effect Section 41 enabled the Secretary of State to make modifications to licences under which electricity was produced and supplied. Under Section 41(2) the Secretary of State was entitled to modify licences – (for the purpose only of -)

> *"(a) Establishing, or making arrangements for the administration of, a scheme of financial incentives to encourage small scale low-carbon generation of electricity …*
>
> *(3) Modifications made by virtue of sub-section (may include -)*
>
> > *(a) provision requiring the holder of a supply licence to make a payment to a small scale low carbon generator or to the Authority for onward payment to such a generator in specified circumstances;*
> >
> > *(b) provision specifying how a payment under paragraph (a) is to be calculated;*
> >
> > *(c) provision for the level of payment under paragraph (a) to decrease year by year in accordance with a formula published, or to be published by the Secretary of State;*
> >
> > *(d) provision about the circumstances in which no payment, or a reduced payment, may be made to a small-scale low carbon generator;*
> >
> > *(e) provision about the circumstances in which a payment may be recovered from a small-scale low-carbon generator;"*

[151] Section 41 (sub-section (7)) provides that:

> "*The power conferred by sub-section (1) –*
>
> …
>
> *(b) may be exercised differently in different cases or circumstances;*
>
> *(c) it includes a power to make incidental, supplemental, consequential or transitional modifications*".

[152] Although the FIT scheme and RHI scheme differ in practice, the similarity between Sections 113 and Section 41 is apparent.

[153] The FIT scheme is made by way of modifications to a licence, the RHI scheme by way of regulation. Under the former the payment relates directly to the business itself, namely the generation of electricity. Under the latter the payment relates to the usage of heat which is used in the course of the participant's business.

[154] Under Section 41 the Secretary of State established a scheme whereby electricity supply companies paid a tariff to generators of small-scale low-carbon electricity. Because the cost of installation of solar PV equipment per unit of electricity generated was high compared with other low-carbon generation technologies a tariff level was set at a higher level than for other technologies to provide an incentive to generators by such means.

[155] The introduction of the FIT scheme was made by the process of modification to licences pursuant to Section 41. In short the scheme provided for the payment of a tariff in respect of an accredited FIT installation with payment being calculated according to a formula from an eligible date for a guaranteed period of 25 years. The tariff was fixed subject to fluctuations in accordance with the retail price index.

[156] By February 2011 the Secretary of State became concerned that larger small-scale solar PV projects would take a disproportionate amount of the funding available and engaged in a consultation process and modification which led to changes in the tariff rates in respect of large scale solar installations with effect from 1 August 2011. Those changes did not have any retrospective effect and were akin to the 2015 Regulations adopted by the Department in Northern Ireland.

[157] The dispute in the *Friends of the Earth* case arose when the Secretary of State initiated a consultation process with a view to introducing further modifications to this scheme which would have had the effect of not only reducing tariffs from 1 April 2012 but also would have the effect of reducing the tariffs in respect of installations which were accredited between 12 December 2011 and 31 March 2012. From 1 April 2012 onwards they would only receive the new reduced tariff for the remainder of the 25 year period.

[158] The rationale behind the proposed modification was that the adoption of solar PV had been unexpectedly successful. In the first 18 months of the FIT scheme the take-up was almost double that which had been anticipated for the first 2 years. Solar PVs were the largest number of installations under the FIT scheme. There had been a substantial increase in the period before October 2011, with the rate of increase accelerating in the weeks leading up to publication of the proposals. Another factor contributing to the increase was the fact that the costs of installing solar PV systems had fallen substantially, from about £13,000 to £9,000 for 4kW. As a consequence the tariffs available were providing higher rates of return than the 5-7% anticipated in the consultation document of 2009, which led to the initial modifications. The Secretary of State was concerned that solar PV generators would

be overcompensated and the FIT scheme budget would be breached, limiting the availability of funds to other technologies and future generators. In short, the tariffs for solar PVs were threatening the extent to which the FIT scheme could be afforded.

[159] The question before the Court of Appeal was whether or not it was within the power conferred on the Secretary of State by the Energy Act 2008 to make a modification which reduced the tariff in respect of installations becoming eligible for payment prior to the coming into force of the modification.

[160] The court took the view that the question depended upon the true construction of the 2008 Act and a proper analysis of the FIT scheme made under it.

[161] Having analysed the scheme in question the Court of Appeal in the judgment of Moses LJ identified the following features.

(i) The rates of FIT payment were set out in a payment rate table.

(ii) The rate is fixed by reference to the year in which a specified installation became eligible for payment.

(iii) There is no reference within the scheme to any adjustment of that fixed rate other than in accordance with the fluctuations of RPI.

(iv) The only reference to any substitution to the published rates is in respect of years following FIT year 2, after the modifications introduced on 21 July 2011. There is no suggestion that the power to substitute the rates after that date could be exercised in any way which would reduce the rate payable in respect of installations which became eligible in FIT years prior to the substitution coming into effect. Were that the case the detail of the modification would be positively misleading.

(v) The periods on which the payments at the published rates are to be paid starts with the date the installation became eligible and lasts for a maximum period of 25 years.

[162] The Court of Appeal took the view that the concept of a rate of payment fixed during the period of generation by reference to the date the installation became eligible for payment is fundamental to the scheme. It provides an assurance as to the rate of return to an owner who has paid a capital sum prior to the installation coming into operation subject to an adjustment in accordance with RPI. In the words of Moses LJ at paragraph [40]:

> *"That the scheme provides for a fixed rate of return during their period of generation is crucial to resolution of this appeal."*

[163] In this regard he referred to the explanatory note to the 2008 Act which included the following:

> *"155. The purpose of a feed-in tariff system would be to incentivise households, businesses and community groups to generate low-carbon electricity. This can be achieved by making a fixed payment for each kilowatt hour of electricity generated from an eligible low-scale carbon source, to be passed on to such a generator … We would expect this to encourage potential generators to make the necessary upfront capital investment in generating equipment, because they would have increased certainty of the payback from their investment."*

[164] In this case the respondents point out that there is no such similar explanatory note in the 2011 Act.

[165] In any event the Court of Appeal could not rely on the identification of the concept of a fixed rate upon the explanatory note although the note did underline the concept. The court focussed on whether or not the proposed modifications had a retrospective effect.

[166] Analysing the FIT scheme the court came to the conclusion at paragraph [42] that:

> *"Modification of the FIT payment rate in respect of installations becoming eligible prior to the modification, would have a retrospective effect. Because the scheme fixes a rate by reference to the year the installation becomes eligible, reduction of that rate (apart from fluctuations in RPI) would have a retrospective effect. In accordance with the scheme, as I have analysed it, an owner whose solar PV installation becomes eligible for FIT payments in FIT year 2, is entitled to the rate identified in the FIT payment rate table for a maximum period of 25 years. He is entitled to payment at that rate on request to the licensee. That entitlement arises on the eligibility date. Any modification of the rate, apart from fluctuations due to RPI, takes away the owner's entitlement under the scheme to payment at the fixed and predetermined rate."*

Because it would have such retrospective effect the Court of Appeal took the view that '*such legislation would only be valid if the empowering provision contained in Section 41 of the 2008 Act authorises such an effect.*' – See paragraph [43]."
The judgment continues:

"Just as there is a presumption against retrospective operation in the construction of statutes, so there is a presumption in relation to the construction of a statute delegating legislative powers. Indeed, the authors of De Smith's Judicial Review 6th Edition suggest that the presumption is even stronger in relation to the powers conferred by delegated legislation … Absent a clear provision conferring power to make retrospective delegated legislation, the assumption of such a power offends the legality principle.

[44] In Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816, Lord Nicholls adopted the principle expressed by Staughton LJ in Secretary of State for Social Security v Tunnicliffe [1991] 2 All ER 712 at 724;

> *`The true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.'*

That underlying standard of fairness was invoked by Lord Rodger (196). He sought to steer the courts away from application of what he described as 'the somewhat woolly label of vested rights'.

[45] Lord Rodger drew a distinction between the retroactive operation of legislation and prospective changes to existing rights. Retroactive changes change the law in relation to events which have taken place in the past (187) retrospective changes alter existing rights, but only in relation to the future. The presumption against altering vested rights in the future is weaker than in relation to retroactive change (195). The proposed changes in respect of installations becoming eligible before the modifications come into effect do not really fall into either category. They are more akin to the category of prospective change. Nonetheless, anyone choosing to achieve eligibility in relation to installation between 12 December 2011 and 1

February 2012 gains a right to a fixed rate by reference to FIT year 2 for 25 years.

[46] Although it is weaker, there remains a presumption against the alteration of existing `vested rights' that is, those rights which once acquired fairness demands should not be altered. Such rights are described by Lord Herschell in Abbott v Minister for Lands [1895] AC 425 at 431 … as those of which beneficiaries avail themselves before the law has changed"(196).

[167] The Court of Appeal rejected the Secretary of State's contention that there was no unfairness because potential applicants were warned of impending changes and that any other provision could result in a surge in installations which would defeat the purpose of achieving a more realistic return of between 5-7%. Moses LJ goes on:

"[48] The Secretary of State's defence fails to have proper regard to the nature of the rights conferred by the scheme in the FIT year in which an installation becomes eligible. An owner of an installation is entitled to payment at a rate fixed by reference to and from the year in which the installation becomes eligible. He is entitled to that fixed rate throughout the period of generation from the moment of commencement up to the maximum specified. On incurring capital expenditure in the purchase and installation of a solar PV an owner acquired, under the scheme, a right to a rate of return fixed for 25 years, subject to fluctuations of RPI. The proposed modification has retroactive effect. If it comes into force on 1 April 2012 it takes away that pre-existing right of 25 years of payments at 43.3p per kW hour and substitutes for it a right to that sum only for a few months and thereafter at the lower rate proposed at 21p per kW hour. The power asserted by the Secretary of State is a power to vary the rate after an installation has achieved eligibility and thus after the rate has been fixed for 25 years, subject only to RPI. That is a retrospective alteration of the scheme which confers what, pace Lord Rodger, may be described as a vested right to a fixed rate.

[49] The effect of the warning in the proposals, on which the Secretary of State relies, cannot, in my view alter the nature of the powers conferred by Section 41. Either Section 41 confers a power retrospectively to alter fixed rates of return or it does not. The warning cannot enlarge the power conferred by Section 41. The Secretary of State cannot arrogate to himself the power to introduce delegated legislation with retrospective effect merely by announcing an intention to introduce such

legislation. Either there is statutory authority or there is not. The warning makes no difference.

[50] I should re-emphasise that there is plainly power by modification of the original modification to vary fixed rates in respect of installations which have become eligible only after any modification comes into effect. But this case is concerned with the retrospective alteration to a fixed rate. It is contended that such a power of modification exists within the context of the express statutory purpose of establishing or making arrangements for the administration of a scheme of financial incentives to encourage small-scale low-carbon generation. (Section 41(2)(a)). Whilst it is true that the section contemplates provision specifying how a payment is to be calculated, that it may be decreased and that provision may be made as to the circumstances in which no payment or reduced payment may be made, it is notable that Section 41 makes no reference whatever to the power to decrease the rate of return, other than in accordance with a formula.

[51] It is not impossible but it would be curious to contemplate a statutory provision which envisages a scheme for financial incentives to capital investment to encourage small-scale electricity generation in which the return could be varied once the capital expenditure had been incurred. It is in that context that the presumption against retrospective operation is so important. Were there to be a power to introduce, by modification, such a scheme one would expect it to be clearly shown. On the contrary there is no reference to that possibility. The reference in the section specified how a payment is to be calculated, to the decrease by a formula and to circumstances in which no payment or a reduced payment is to be made would be positively misleading if there exists a wide general power to vary rates after expenditure on installation has incurred. The explanatory notes show that the author took a fundamentally different view of the power for which the Secretary of State now contends in their reference to a fixed payment and the certainty of return from the upfront capital investment.

[52] In those circumstances, I conclude that there was no power contained within Section 41 to introduce a modification which reduced the rate fixed by reference to an installation becoming eligible prior to the modification. It also would take away an existing entitlement without statutory authority."

[168] In conclusion he states:

> *"[55] The quest, in my view, is to identify a clear parliamentary intention to take away an existing entitlement to a fixed rate of return for capital investment incurred by a small-scale low-carbon generator. The question, I respectfully suggest, is not whether the proposed modification may have a significant adverse impact on those proposing to install small solar systems once the proposal was announced, but rather whether Parliament conferred a power to make a modification with such a retrospective affect. It did not."*

[169] On 20 March 2012, the Supreme Court refused permission to appeal the judgment of the Court of Appeal.

[170] The applicants contend that if the principles set out in this judgment are applied to the circumstances of this case a similar result should ensue. Both cases involved a statute which enabled the establishment of a scheme which provided payments as incentives for the use of a particular form of energy. Both schemes set out criteria in respect of eligibility and accreditation and provided for a fixed tariff for a fixed period of time from a fixed date of eligibility. In the *Friends of the Earth* case it was a combination of rules and modifications to licences. In RHI it was by means of statutory Regulations. The effect of both was the same and created a clear entitlement to individuals.

[171] In both cases an attempt was made to introduce new rules which would have the effect of reducing the applicable tariff from a certain date for the remaining tariff period. The Court of Appeal took the view that such changes, by taking away a pre-existing right to fixed payments over a specified period of time, amounted to a retrospective alteration of the scheme. It took the view that were there to be a power to introduce such a scheme one would expect it to be clearly shown. The applicants say that Section 113 provides no power to the Department in this case to vary the tariffs set out in the 2012 Regulations.

[172] In short the applicants say that the respondent does not have the statutory authority to make the 2017 Regulations.

[173] The respondent counters that the applicants state the relevant principle too broadly. It is argued that a proper analysis of the case law on this issue, including the decision in the *Friends of the Earth*, case indicate that the true principle is based upon an assessment of "fairness". The court must determine whether any retrospective effect of the 2017 Regulations would operate with such unfairness to individuals that Parliament could not have intended that effect.

[174] This issue was comprehensively considered by the House of Lords in the case of *Wilson v First Country Trust Ltd (No 2)* [2004] 1 AC 816 which was referred to in the

Friends of the Earth judgment. The court was considering the effect of the Human Rights Act on a loan agreement entered into under the Consumer Credit Act 1974.

[175] This involved consideration of retrospectivity and Section 4 of the Human Rights Act 1998. In the *Friends of the Earth* judgment Moses LJ referred to Lord Nicholls adopting the principle expressed by Staunton LJ in the *Tunnicliff* case. Having referred to that principle Lord Nicholls in the *Wilson* case says that:

> "*Thus the appropriate approach is to identify the intention of Parliament in respect of the relevant statutory provision in accordance with this statement of principle." (Paragraph 19).*

Dealing with this matter Lord Hope says:

> *"[98] There is the general presumption that legislation is not intended to operate retrospectively. That presumption is based on concepts of fairness and legal certainty. These concepts require that accrued rights and the legal effect of past acts should not be altered by subsequent legislation. … The concepts of fairness and legal certainty carry much greater weight when it is being suggested that rights or obligations which were acquired or entered into before 2 October 2000 should be altered retrospectively".*

In his judgment dealing with retrospectivity Lord Scott says at paragraph 153:

> "*There is, therefore a common law presumption that a statute is not intended to have a retrospective effect. This presumption is part of a broader presumption that Parliament does not intend a statute to have an unfair or unjust effect … The presumption can be rebutted if it sufficiently clearly appears that it was indeed the intention of Parliament to produce the result in question."*

On the issue of retrospectivity the leading judgment is that of Lord Rodger. He deals with `*the presumption against the retroactive operation of legislation*' at paragraph 186:

> *"186 At common law there is a presumption that a statute does not have `retrospective effect'. The statement in Maxwell on Interpretation of Statutes, 12th Edition, page 215 is frequently quoted;*
>
> > *`Upon the presumption that the legislator does not intend what is unjust rests the leaning against giving certain statutes a*

retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the act or arises by necessary and distinct implication.

The very generality of this statement rather obscures the fact that it uses the term `retrospective' to describe a range of different effects, some more and some less extreme. It is therefore important to identify what it is about any particular provision that is said to be `retrospective'."

In this context he goes on to analyse specific types of provisions. The first relates to "*statutes making prospective changes to existing rights*". In this regard at paragraph 188 he says:

> "*Retroactive provisions alter the existing rights and duties of those who it may affect. But not all provisions which alter existing rights and duties are retroactive.*"

[176] At paragraph 192 concerning this issue he says:

> "*Since provisions which effect existing rights prospectively are not retroactive, the presumption against retroactivity does not apply. Nor is there any general presumption that legislation does not alter the existing legal situation or existing rights; the very purpose of acts of Parliament is to alter the existing legal situation and this will often involve altering the existing rights for the future.*"

He then considers "*the presumption against interference with vested rights*" in the following way:

> "*193. Often, however a sudden change in existing rights would be so unfair to certain individuals or businesses in their particular predicament that it is to be presumed that Parliament did not intend the new legislation to affect them in that respect.*"

[177] He refers to passages in a number of cases and at paragraph 194 says:

> *"Dickson J here makes the important point that this presumption applies to all legislation which affects vested rights, whether the legislation affects them retroactively or only prospectively."*

The judgment continues:

> *"195. More often, the presumption falls to be considered in relation to legislation which alters rights only for the future. Since it more likely that Parliament intended to alter vested rights in this way than that it intended to make a retroactive change, in practice the presumption against legislation altering vested rights is regarded as weaker than the presumption against legislation having retroactive effect.*
>
> *196. The presumption is against legislation impairing rights that are described as `vested'. The courts have tried without conspicuous success, to define what is meant by `vested rights' for this purpose. Although it concerned a statutory rule resembling Section 16(1)(c) of the Interpretation Act 1978, the decision of the Privy Council in Abbott v Minister for Lands [1895] AC 425 is often regarded as a starting point for considering this point. There Lord Herschell LC indicated, at p431, that to convert a mere right existing in the members of the community or any class of them into an accrued or vested right to which the presumption applies, the particular beneficiary of the right must have done something to avail himself of it before the law is changed. The courts have grappled with the idea in a series of cases which Simon Brown LJ surveyed in Chief Adjudication Officer v Maguire [1999] 1 WLR 1778. It is not easy to reconcile all the decisions. This lends weight to the criticism that the reasoning in them is essentially circular; the courts have tended to attach the somewhat woolly label `vested' to those rights which they conclude should be protected from the effect of the new legislation. If that is indeed so, then it is perhaps only to be expected since, as Lord Mustill observed in L'Office Cherifin des Phosphates v Yamashitav Shinnihon Steam Ship Co Ltd [1994] 1 AC 486, 525A, the basis of any presumption in this area of the law `is no more than simple fairness, which ought to be the basis of every general rule'."*

He then considers "*presumption that legislation does not affect pending proceedings*" which is not relevant here. He further examines statutes altering matters of pure

procedure when he again quotes from Lord Mustill's judgment *L'Office Cherifin* and he said:

> *"Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute effects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances on which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the Statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say."*

[178] Having considered these various subheadings he concludes:

> *"201. On Lord Mustill's approach an appropriate test might be formulated along these lines; would the consequences of applying the statutory provisions retroactively, or so as to affect vested rights or pending proceedings, be `so unfair' that Parliament could not have intended it to be applied in these ways? In answering that question a court would rightly have regard to the way the courts have applied the criterion of fairness when embodied in the various presumptions."*

[179] The issue as to whether or not the respondent has legal authority to make the 2017 Regulations is a finely balanced one. As in all matters of statutory construction the task is to determine the intention of Parliament as expressed in Section 113 of the Energy Act 2011.

[180] I consider that the appropriate test is indeed that set out by Lord Rodger in paragraph 201 of *Wilson*. The primary criterion is fairness. Before applying the test I return to the statute itself. There is nothing in Section 113 which limits the power of the Department as to how it is to make provision about the making of or the calculation of payments under the scheme. The only constraint in the act relates to the categories of person to whom payments should be made. Neither are there any

temporal constraints under Section 113. The 2012, 2015, 2016 and 2017 Regulations are all exercises of that power.

[181] It is to be noted that the comparable powers under which the GB RHI Scheme was established, namely Section 100(2)(a), empowers the Secretary of State to make Regulations giving persons "*entitlements to payments in specified circumstances*". The concept of an "*entitlement*" is omitted from the 2011 Act. I do not consider that Section 113(9), which provides that Regulations may "*include incidental, supplementary and consequential provision*", avails the respondent in this case. I do not consider that this provision would enable the Department to make substantive changes to the circumstances in which payments can be made and the calculation of such payments. Rather, they relate to procedural or administrative matters that arise from the exercise of the powers exercised under 113(2).

[182] The rule making power at issue in this case is a broad one and in respect of the calculation of payments, unqualified. I agree with the commentary contained in the explanatory note to the 2011 Act that it is a "*broad and flexible provision*".

[183] Returning to the test as formulated by Lord Rodger the issue in this case is whether the 2017 Regulations, in so far as they have a retrospective effect, are "*so unfair*" that Parliament could not have intended that the Department had the power to make them.

[184] In considering this issue the court must have regard to the various common law presumptions in relation to retroactive or retrospective legislation. In particular the court also has regard to how the Court of Appeal in England and Wales applied these presumptions in its analysis of the scheme under consideration in the *Friends of Earth* case.

[185] Like the applicants in the *Friends of the Earth* case, the second named applicant and those whose installations were accredited between 22 October 2012 and 17 November 2015 (herein after referred to as the affected participants) were entitled to a specific payment identified in the 2012 Regulations (apart from fluctuations in RPI) for a maximum period of 20 years. The entitlement arises on the eligibility date. Any change to that figure, apart from fluctuations due to RPI, takes away the owner's entitlement under the scheme to payment at that fixed and predetermined amount. It is correct to say that there is a valid distinction between the retroactive operation of legislation and prospective changes to existing rights. The retrospective changes at issue in this case alter existing rights, but only in relation to the future. It is correct therefore that the operation of the changes under the 2017 Regulations are prospective in nature. The significance of this difference is that the presumption against altering vested rights in the future is weaker than in relation to retroactive change. Notwithstanding that such a presumption is weaker, the Court of Appeal in *Friends of the Earth* took the view that there remained a presumption against the

alteration of existing "*vested rights*", that is those rights which once acquired, fairness demands should not be altered.

[186] The Court of Appeal decided that the nature of the right conferred by the FIT Scheme was such that it could not be altered unless such a power was clearly shown in the enabling legislation. The essential elements of the rights conferred which were fundamental to the court's decision were the fact that the entitlement to a fixed payment arose at the time of accreditation for a fixed period. It commented that, whilst it would not be impossible, it would be curious to contemplate a statutory provision which envisages a scheme for financial incentives to capital investment to encourage small-scale energy generation in which the return could be varied once the capital expenditure had been incurred.

[187] The affected participants in this case can make a similar argument.

[188] The respondent contends that both the scheme and the enabling statutory provision in the *Friends of the Earth* case are significantly different from those applicable to the RHI Scheme. In relation to the statute the enabling provision for the FIT Scheme is Section 41 of the Energy Act 2008.

[189] Under sub-section (1) the Secretary of State has the power to "*modify*" conditions of licenses under which electricity is supplied and distributed.

[190] Under sub-section (2) the Secretary of State may exercise this power for the purpose of …

> *"(a) Establishing, or making arrangements for the administration of, a scheme of financial incentives to encourage small-scale low-carbon generation of electricity;"*

[191] This is broadly similar to the Department's power to make Regulations in relation to establishing a scheme to facilitate and encourage renewal generation of heat in Northern Ireland under Section 113(1).

[192] Sub-section (3) provides that modifications made by the Secretary of State may include:

> *"(a) Provision requiring the holder of a supply licence to make a payment to a small-scale low-carbon generator, or to the authority for onward payment to such a generator in specified circumstances".*

[193] As in Section 113, the provision relates to "*payments*", "*in specified circumstances*".

[194] Sub-section (3)(b) provides that the Secretary of State may make "*provision specifying how a payment under paragraph (a) is to be calculated*" – a similar provision to Section 113(2)(b).

[195] Sub-section (3)(c) provides that the Secretary of State may make "*provision for the level of payment under paragraph (a) to decrease year by year in accordance with a formula published, or to be published by the Secretary of State;*"

[196] There is no equivalent provision in Section 113 and in my view this is an important distinction between the sections. In coming to its conclusions the Court of Appeal placed particular emphasis on Section 41(3)(c). Thus at paragraph 50 of the judgment Moses LJ states:

> "*Whilst it is true that the section contemplates provisions specifying how a payment is to be calculated, that it may be decreased and that provision may be made as to the circumstances in which no payment or reduced payment may be made, it is noticeable that Section 41 makes no reference whatever to the power to decrease the rate of return, other than in accordance with a formula.*" (my underlining)

[197] In its judgment the Court of Appeal refers to the power to modify as "*what might loosely be described as the delegated legislation*". In truth I do not consider that much turns on this distinction. Doubtless Parliament will have intended that both the rule-making power and the modification would be exercised in accordance with the enabling statutory provision and commensurate with the principles of statutory construction and public law principles.

[198] The respondent points out that an important difference between the two schemes is that the FIT Scheme provides payment for the production of the energy itself. The RHI Scheme is designed to incentivise conversion to the use of renewable energy sources. The generation of heat itself is not the business. The payments relate to the usage of alternative heating sources to support some other business. This is an important consideration in the Department's reasons for making the 2017 Regulations to which I will return later.

[199] In the court's view the powers granted by Section 113 are not so narrow as to preclude the Department from making the 2017 Regulations. This is primarily because of the broad and unqualified enabling power provided in the section. As to whether the retrospective effect of the Regulations is prohibited on the basis of the intention of Parliament, as per Lord Rodger, this turns on the question as to whether their effect would be "*so unfair*" that Parliament could not have intended it to be applied as envisaged in the Regulations.

[200] In this regard I do not consider that I am bound to come to the same conclusion as the Court of Appeal in *Friends of the Earth*. Echoing Lord Mustill's speech in *L'Office Cherifien*:

> "*Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case*."

[201] In looking at the question of fairness I consider that I should assess <u>the consequences</u> of the retrospective effect of the Regulations. An assessment of the fairness of the Regulations involves a consideration of the context and circumstances in which they were made and the consequences for those affected.

[202] The Court of Appeal decided in the *Friends of the Earth* case that the unfairness visited on the applicants was such that Parliament could not have intended that the Secretary of State was entitled to make the proposed modifications. It did so in the context of Section 41 and the particular scheme. It did not engage in the type of detailed inquiry undertaken in this application, although it was aware of the budgetary factors influencing the Secretary of State's decision.

[203] Budgetary factors were clearly a hugely significant factor in the introduction of the 2017 Regulations but there were other significant issues in play which were absent in the *Friends of the Earth* case.

[204] The differences in the relevant enabling statutes, the differences in the schemes themselves and the context in which the 2017 Regulations were made are such that the court need not come to the same conclusion as the Court of Appeal in the *Friends of the Earth* case.

[205] However I make it clear that the starting point in the consideration of fairness in this case is that the 2012 Regulations created clear and specific entitlements to those who were accredited under the scheme. They were not relying on Government policies or ministerial statements but on unambiguous statutory Regulations. Thus there are strong private interests created under the 2012 Regulations. In addition to the private interests arising there is also a strong public interest in ensuring that citizens can rely on Government commitments given through statutory Regulations. This is particularly so when citizens acting on reliance of the Regulations incur capital expenditure on heating installations.

[206] Even though the presumption against prospective changes for existing rights is weaker than the presumption against legislation having retroactive effect, the rights granted under the 2012 Regulations could only be altered in the most exceptional circumstances and would require special justification.

[207] The task for this court is to consider whether or not such exceptional circumstances exist and whether or not the Department can establish sufficient special justification. If it can, the 2017 Regulations are not *ultra vires* the enabling statute. In such circumstances the 2017 Regulations would not operate in a manner which is so unfair that it could not have been intended by Parliament.

[208] The applicants' case is not based solely on the *vires* arguments. In making the 2017 Regulations the Department is undoubtedly subject to normal public law constraints. In this regard the applicants also rely on arguments based on breaches of substantive and procedural legitimate expectations, A1 P1 rights and "Wednesbury unreasonableness".

[209] A determination of the issues raised by the applicants involves overlapping considerations of fairness, the balancing of interests and proportionality. In the remainder of this judgment, in addition to the *vires* argument, I propose to discuss what rights the applicants enjoy under the scheme, whether there have been breaches of any rights, whether any such breaches can be justified in law and what remedies, if any, to which the applicants are entitled.

ARTICLE 1 PROTOCOL 1

[210] The applicants say that the 2017 Regulations constitute a breach of the affected participants' rights under Article 1 Protocol 1 of the ECHR.

[211] Of the applicants, only DA can claim such a breach as the first applicant is not the owner of any accredited installation and therefore has no A1 P1 rights.

[212] A1 P1 provides:

> *"(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

[213] The respondent disputes that the second applicant enjoys a "possession" within the meaning of A1 P1. This argument is based primarily on the principle that a possession within the meaning of A1 P1 does not include a right to acquire possessions. A mere prospective loss of future income is not a possession.

[214] This principle has been considered by the Court of Appeal in England and Wales in *Breyer Group & Others v Department of Energy and Climate Change (DECC)* [2015] EWCA Civ 408 in which the court extracted this principle from a consideration of Strasbourg and domestic jurisprudence. That decision focussed on the distinction between "*marketable good will*" and "*the capacity to earn future profits*". The court held that the former, since it could be capable of being capitalised as a form of asset with a monetary value, could be protected as opposed to an expected stream of future income which cannot be or is not capitalised. The application of the principle must be seen in the context of the "possession" under discussion. It was clear that the court considered that "*existing enforceable contracts were capable of constituting a possession within A1 P1*".

[215] In determining this matter the court is obliged to consider the legal position under the 2012 Regulations.

[216] There can be no doubt that, absent the 2017 Regulations DA is entitled to a payment at a pre-determined rate. It is correct to say that that payment is contingent upon him fulfilling certain conditions but I do not consider that this materially affects the nature of his entitlement in the context of determining whether or not it is a possession. I do not accept the submission of the respondent that the "*possession*" which DA enjoys under the scheme is in fact the boilers he has installed and which are accredited. The scheme establishes an entitlement to payments. It is those payments which are provided for under the 2012 Regulations. That is the way in which the scheme has been set up. The determining issue is not whether the payments will be received in the future but whether the 2012 regulations create an entitlement to the payments. Whilst the legal basis of that entitlement is not contractual in the legal sense, as has been found by Deeny J (as he then was) in his consideration of this scheme - see *Doran and Another; in the matter of a decision of the Department for the Economy and the Minister for the economy in connection with the Renewable Heat Incentive Scheme (No:2)* [2017] NIQB 24, there is no doubt that the applicant would have been in a position to seek a declaration that he was entitled to a payment under the 2012 Regulations if that payment were withheld in breach of those regulations. He enjoys an identifiable and assertive right to payment under the 2012 Regulations and the right to that payment is, in my view, a possession within the meaning of A1 P1.

[217] That the law contemplates future payments as being possessions under A1 P1 is clear from decisions such as *the application by Denise Brewster for Judicial Review (Northern Ireland)* [2017] UKSC 8 (future pension rights held to be capable of being a possession) and *Stec v UK* [2005] ECHR 924 (future welfare benefits).

[218] Has there been an interference with DA's possessions?

[219] In considering interference under A1 P1 the ECHR in the case of *Sporrong and Lonnroth v Sweden* [1982] 5 EHRR 35; at paragraph 61 said that the article comprised 3 distinct rules.

> *"The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph".*

[220] In the court's view there is no doubt that there has been an interference with DA's possessions. The issue is whether or not the 2017 Regulations constitute a "*deprivation*" or "*control*" of the possessions.

[221] I have concluded that the interference is in the nature of a control rather than a deprivation of those possessions.

[222] His right to payment has not been extinguished. He will continue to receive payments in respect of his usage of heat but those payments have been controlled by the use of a tiering mechanism and a capping mechanism. The 2012 Scheme has been amended, not abolished or suspended, and that amendment is on an interim basis for one year.

SUBSTANTIVE LEGITIMATE EXPECTATION

[223] The applicants contend that under the 2012 Regulations they enjoyed a legitimate expectation that those accredited under the 2012 Scheme would continue to receive the payments set out in the Regulations for a 20 year period, subject to compliance with their obligations under the Regulations.

[224] On this issue, as was the case with the A1 P1 issue, only the second applicant, DA, can have a substantive legitimate expectation. The first applicant is not a participant in the scheme and was formed after the scheme was closed to new entrants.

[225] The doctrine of legitimate expectation has recently been considered by the Court of Appeal in *Finucane v Secretary of State for Northern Ireland* [2017] NICA 7 as follows:

> ***"Principles governing legitimate expectation***

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

(1) Legitimate expectations derive from a promise that is clear, unambiguous and devoid of relevant conditions, the initial burden to prove this lying on the person so asserting …

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

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

[71] Public authorities typically, and central Government par excellence, enjoy a wide discretion when it is their duty to exercise a public interest. …

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

[73] It is not essential that the applicant should have relied on the promise to his detriment but it is a relevant consideration in deciding whether the adoption of a policy is in conflict with the promise and amounts to an abuse of power. The denial of the expectation is less likely to be justified as a proportionate measure where there has been an unambiguous promise, where there is detrimental reliance, and where the promise is made to an individual or specific group. Such considerations are pointers not rules …

> *[74] When conducting the balancing exercise to establish whether a refusal to honour the promise is an abuse of power, the degree of intensity of review will vary depending upon the character of the decision. The more the decision challenged lies in the macro political field, the less intrusive will be the court's supervision. Here abuse of power is less likely since within it changes of policies, fuelled by broad conceptions of public interests, may more readily be accepted as taking precedence over the interests of the group which enjoyed the expectation generated by the earlier policy.*
>
> *[75] Judgments on such matters are paradigmatically for the Government to make. It must deal with the extraordinary complexities of domestic and foreign entanglements which make up the patches on a reality that may have shifted over the passing years. In addition there are the crises of the moment to be dealt with. …"*

[226] In the court's view DA did enjoy a legitimate expectation that was clear, unambiguous and devoid of relevant conditions. This expectation is based on the Regulations themselves which was underlined by the clear and express terms in the written correspondence issued to him as an accredited participant in the scheme. The "*grandfathering*" principle was central to the scheme. The fact that statutory regulations are instruments which are subject to change does not, as the respondent argues, deprive the commitment to DA of the requisite unconditional nature.

[227] In assessing the nature of the expectation I also take into account that, unlike Finucane, the court is not dealing with a government policy, promise or practice, rather it is dealing with a commitment expressed in statutory regulations which carry a greater weight. As a basic constitutional starting point the public is entitled to expect that government regulations are in fact lawful. The respondent argues that any expectation of DA to ongoing payments at the 2012 rates for 20 years in all circumstances is not a "*legitimate one*", because a legitimate expectation cannot be founded upon a commitment to engage in unlawful conduct.

[228] In this case, the unlawful conduct relied upon is non-compliance with EU state Aid rules requiring the scheme to operate in line with the Commission's approval.

[229] Whether the continuation of the 2012 Scheme would constitute "*non-compliance*" with EU state rules is very much a moot point. The Commission has made a final decision approving the 2012 Regulations. It did so having been made fully aware of the actual rates to be paid under the scheme and that the "*grandfathering*" principles would apply to those payments. It is correct that it did so on the understanding that the objective was to provide a rate of return of 12% on the

capital investment to those participating in the scheme. However, it too, had available to it the flawed calculations upon which the actual figure was agreed. It approved the scheme fully sighted of these figures. There is a live legal issue as to whether or not the Commission could successfully use its enforcement powers against the State or beneficiaries under the scheme, given that it has made a final decision. This issue is discussed more fully later in the judgment.

[230] The respondents arguments concerning the Department's entitlement to change regulations and the potential breach of EU State rules can be taken into consideration in assessing whether it may still lawfully interfere with DA's legitimate expectation.

[231] In accordance with the principles it is also relevant that DA has acted in reliance on the expectation. He has entered into financial arrangements with his bank and has arranged his business affairs on the basis of the expectation. In accordance with the principles set out in *Finucane* this is a "*pointer*" towards protecting DA's expectation.

[232] In these circumstances the onus shifts to the respondent to justify the frustration of DA's legitimate expectation. To quote *Finucane*:

> "*To depart from the promise would only be unlawful if to do so would be so unfair as to amount to an abuse of power and even then the court would consider whether or not it is appropriate to exercise its discretion to grant the remedy.*"

[233] This chimes with the judgment of Lord Wolff in *Ex p Coughlan* [2001] QB 213, quoted with approval by Laws LJ in *Bhatt Murphy (A Firm) and Others v The Independent Assessor* [2008] EWCA Civ 755 at paragraph 32:

> "**57***(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interests relied upon for the change of policy.*"

[234] Once again the issue comes down to one of fairness. The court comes back to the test formulated by Lord Rodger when considering the *vires* issues. The court is on similar ground when considering the issue of proportionality in the A1 P1 context. Another way of putting the question of fairness is that any departure by the respondent from DA's established legitimate expectation requires to be objectively

justified as a proportionate measure in the circumstances. It is therefore for the respondent to identify the overriding interest on which it relies to justify the frustration of DA's legitimate expectation in the circumstances of this case. The court must weigh the requirements of fairness against that interest.

PROCEDURAL LEGITIMATE EXPECTATIONS

[235] The applicants contend that they had procedural legitimate expectations in respect of the 2017 Regulations, namely an expectation to consultation and an expectation of a regulatory impact assessment.

[236] For the reasons set out already in this judgment only DA can rely upon this as a ground of challenge. Consultation with the first-named applicant would have been a wholly ineffective exercise since it was only incorporated a matter of days prior to the introduction of the regulations into the Assembly on 13 January 2017.

[237] The enabling statute does not create any statutory duty on the respondent to consult prior to the making of regulations. The relevant procedure is prescribed by Section 113(8) of the 2011 Act, namely prior approval by affirmative resolution of the Assembly. If such a duty exists it does so under common law principles. The law in relation to this matter was considered by the Supreme Court in *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56. At paragraph 23 of the judgment Lord Wilson says:

> "***The Law***
>
> *[23] A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in R v Devon County Council, ex parte Baker [1995] 1 All ER 73. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.*
>
> *[24] Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation."*

[238] In the other judgment in the case Lord Reed focussed on the requirements that a consultation once required should be fair. In discussing the common law principles he said:

> *"The common law imposes a general duty of procedural fairness upon public authorities exercising a wide range of functions which affect the interests of individuals, but the content of that duty varies almost infinitely depending upon the circumstances. There is however no general common law duty to consult persons who may be affected by a measure before it is adopted. The reasons for the absence of such a duty were explained by Sedley LJ in R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWCA Civ 1139; … A duty of consultation will however exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation. …"*

[239] Any duty to consult at common law is therefore generated upon considerations of fairness. In that context is DA's interest under the 2012 Regulations sufficient to found an expectation that he would be consulted in relation to change in his entitlements to payments under the 2017 Regulations?

[240] As part of the consultation process DA argues that the Department should have conducted a Regulatory Impact Assessment. That requirement is, they say, underlined by the Northern Ireland Better Regulation Strategy. This strategy is an approved NI Executive policy.

[241] He relies on that part of the strategy concerning notification period and guidance on implementation for all new legislation affecting business. The effect of the strategy is to ensure that businesses are provided with guidance at least 12 weeks before legislation affecting them comes into operation. The focus is on businesses being warned in advance of potential changes, to provide guidance in relation to those changes so as to ensure that they have adequate time to prepare for the implementation of the new legislation.

[242] The strategy does permit for an implementation period of less than 12 weeks where the situation requires urgency in the public interest.

[243] I was not referred to any other policy documents in relation to impact assessments.

[244] The strategy also indicates that … *"it may well be appropriate to screen it out at the Impact Assessment Screening stage …"*. *"Screening"* is the process which helps to

determine whether a full impact assessment may be required and also when no further action is necessary.

[245] On behalf of the respondent Mr McMurray points out that a full RIA was carried out by the Department prior to the introduction of the 2012 scheme. During August 2016 the Department was working on possible policy options for reform of the 2012 Regulations. This included work by the Department's economists for tariff options. He avers that the Department also began work on a RIA, an equality screening and a rural proofing exercise for any amended scheme. At that time, it was anticipated that a full public consultation would also take place prior to the introduction of any amending regulations. This work was ongoing during the autumn of 2016, but it was ultimately not completed as a result of political developments which hastened the introduction of the 2017 Regulations. He argues that it was not possible to complete the impact assessment exercise in order to conduct a public consultation prior to the commencement of the 2017 Regulations. In the court's view the rights of DA under the 2012 Regulations, together with the practice of prior consultation for the 2012 Regulations were sufficient to found an expectation of consultation. The nature of the interference was such that fairness required a process of consultation. The substantial dispute between the experts engaged by the applicants and the respondent's evidence demonstrates there was much that potential consultees could have said about the new regulations.

[246] I am not persuaded that that consultation as a matter of law would have required a regulatory impact assessment. The original 2012 Regulations were the subject of an RIA. The Executive itself approved urgent action by the Department to address weaknesses in the RHI Scheme and so approved the course of action which led to any departure from its own policy on conducting RIA. The Regulations were also supported by the Department's business case which considered the economic impact of a range of tariff options on both participants and the wider economy. The business case was considered and approved by the Department of Finance in January 2017. The Regulations were introduced following consideration by the NI Assembly and the Economy Committee. Thus, there has been substantive compliance with any requirements to assess regulatory impact.

[247] I do not consider this point to be fundamental to the outcome of the case. If the 2017 Regulations are upheld I am satisfied that a regulatory impact assessment will take place as part of the consultation process.

BREACH OF STANDING ORDER 43

[248] The applicants contend that the 2017 Regulations are in breach of Standing Order 43 of the Northern Ireland Assembly Standing Orders and are therefore unlawful and *ultra vires*.

[249] Standing Order 43 provides that every Statutory Rule which is laid before the Assembly shall stand referred to the appropriate committee "*for scrutiny*".

[250] The appropriate committee may either "*scrutinise the instrument itself*"; or delegate to the examiner of Statutory Rules its functions in relation to the technical scrutiny of the instrument. One of the purposes of this scrutiny is to address circumstances where "*it purports to have retrospective effect where the apparent legislation confers no express authority so to provide*" (Standing Order 43(6)).

[251] The order further provides that the committee "*shall where practicable report on an instrument before any resolution or motion relating to that instrument is moved in the Assembly*."

[252] The history in relation to the approval of the Regulations by the Assembly is set out earlier in the judgment (paragraphs 97-138). From this it will be seen that the matter was considered by the Committee for the Economy on two occasions. On both occasions the Minister for the Economy and the Permanent Secretary appeared before the committee. The committee was provided with further information about the regulations and had the benefit of a closed session attended by officials from Assembly Legal Services.

[253] The regulations were considered by the examiner of Statutory Rules on 20 January 2017 under her powers to discharge functions delegated to her by the appropriate Assembly committee.

[254] The examiner's report expressly drew the attention of the Assembly and the committee to the issue of whether the regulations could impact upon rights secured under Article 1 Protocol 1 of the ECHR. It identified many of the issues raised by the applicants in this judicial review and highlighted the fact that, because of the limited opportunity for scrutiny, the Assembly and committee may not be able to reach a definitive view as to whether the regulations in fact resulted in an interference with Article 1 Protocol 1.

[255] The regulations were the subject of extensive debate before the Assembly in the course of which compliance with Article 1 Protocol 1 was specifically addressed. The Assembly voted to affirm the regulations, fully sighted of the legal issues in relation to interference with the applicant's Article 1, Protocol 1 rights.

[256] It is correct to say that the relevant committee did not provide a report to the Assembly, merely "*noting*" the Regulations. However it did delegate its functions to the examiner who provided a full report to the Assembly.

[257] In these circumstances it seems to me that in fact there has been substantive compliance with the requirements of Standing Order 43. The regulations were passed by the Assembly by affirmative resolution in full knowledge of the

compressed timescale for consideration, the retrospective effect of the regulations and the potential effect of Article 1 Protocol 1 entitlements. I do not consider that this ground would justify impugning the 2017 Regulations or granting any relief to the applicants.

THE RESPONDENT'S JUSTIFICATION

[258] The exceptional circumstances and special justification relied upon by the respondent can be gleaned from the background set out in the initial part of this judgment.

[259] By July 2015 DETI's concerns over rising expenditure under the scheme had become acute. As a means of dealing with this the Minister announced on 8 September 2015 that the Department intended to introduce tiered tariffs and caps in respect of payments for the usage of biomass heat. This resulted in the 2015 Regulations being made on 17 November 2015. The effect of those Regulations was to align the scheme in Northern Ireland to the GB scheme for participants entering the scheme after that date. As forewarned by the Minister the scheme introduced tiered tariffs and a cap on usage.

[260] Of significance between 8 September 2015 and 17 November 2015 there was a dramatic surge in the applications for accreditation under the 2012 Regulations. Undoubtedly some "*spike*" in applications was inevitable given the pending adverse changes for those contemplating conversion but the sheer scale of this increase has had a significant impact on the financial implications for the overall costs of the scheme.

[261] The next step taken to ameliorate the financial implications was the suspension of the scheme to new entrants by enacting the 2016 Regulations on 18 February 2016.

[262] A combination of the Comptroller and Auditor General Audit Report (June 2016), the DETI Internal Audit Report (4 August 2016) and the PWC Report (September 2016) dramatically demonstrate the predicament for the Department.

[263] The reports exposed a fundamentally flawed scheme, based on inaccurate and inadequate financial assumptions. It had been inadequately managed with a lack of oversight and review. It was delivering a rate of return to participants far in excess of the anticipated 12%. It did not have DFP approval for expenditure beyond March 2015. It was estimated that the cost of the scheme would run to £1.2bn and that £.7bn would be available from HMT which would leave £.5bn to come from the Northern Ireland budget. Obviously these figures, if correct, would have huge implications for the Northern Ireland budget.

[264] It was considered there was an issue as to whether or not the scheme as operated under the 2012 Regulations was in compliance with the Executive's State Aid obligations under TFEU.

[265] Unsurprisingly, this state of affairs caused huge public controversy which resulted in a major political crisis. The Deputy First Minister resigned on 9 January 2017 and the Executive and Assembly subsequently collapsed.

[266] It was in this context that the 2017 Regulations were made and ultimately affirmed by the Assembly.

[267] This case was initially listed on 17 May 2017 before Deeny J (as he then was) for the hearing of the *vires* challenge. The hearing of that issue was adjourned to allow the applicants to file further evidence in response to the affidavit of Heather Cousins, dated 10 April 2017, on behalf of the Department who set out the history of the making of the 2017 regulations.

[268] Since that time further affidavit evidence has been filed by both parties including:

- The second affidavit of DA (16 May) (applicants).

- First and second affidavit of Andrew Trimble (31 May and 14 June) (applicants). Mr Trimble is the Executive Chair of the Renewable Heat Association Limited. He has proved to be a committed and energetic leader of the Association, marshalling a significant body of material in his critique of the 2017 Regulations and their impact on the Association's members.

- First affidavit of Stephen McMurray (14 August) (respondent). He is a Director and senior civil servant in the Department of the Economy. Since 19 December 2016 he has been the team leader of, and has responsibility for, the RHI Task Force within the Department.

- Third affidavit of Andrew Trimble (19 September) (applicants).

- Second affidavit of Stephen McMurray dated 4 October 2017 (respondent).

- Third affidavit of DA in response to the second affidavit of Mr McMurray (applicants).

- First affidavit from Elaine Shaw in response to the second affidavit of Stephen McMurray (applicants).

[269] In addition to those affidavits the applicants have served a report from Harbinson Mulholland, Forensic Accounts dated 31 May 2017 together with

addendums dated 13 June 2017, 19 September 2017 and 8 October 2017. They have also served a report from Optimal Economics (Economists) dated 30 May 2017.

[270] The respondent has replied to the contents of these reports via affidavit evidence from Mr McMurray.

[271] In correspondence the Department points out that relevant members of the Task Force who assisted in gathering and preparing the information contained in the affidavits are as follows:

(a) A Senior Principal Economist, within the NI Civil Service, (20 years' experience) whose qualifications include BA (Hons) in Applied Economics (First Class), MSc Finance (Distinction) and a Diploma in Industrial Studies (with a commendation).

(b) A non-executive Director on the Board of the Northern Ireland Authority for Utility Regulation (7 years) with 29 years private sector experience in the field of natural gas, energy efficiency and fuel poverty whose qualifications include BSc (Hons) Pure Applied Mathematics, MSc in Statistics and Operational Research and a Masters in Business Administration.

(c) A Senior Principal Officer within NICS, whose qualifications include BSc (Hon) Physics with Astrophysics (First Class), Post Graduate Certificate in Public Administration (Distinction) and Chartered Institute of Securities and Investment – Investment Operations Certificate (with Merit).

[272] The Department point out that the affidavit evidence of Heather Cousins and Stephen McMurray represent the corporate view of the Department which has been prepared and presented by officials with suitable qualifications to do so.

[273] In the circumstances I do not propose to diminish the weight to be afforded to the Department's evidence based on any lack of qualifications.

[274] The court was therefore presented with a lengthy, detailed and at times complex set of exchanges in relation to the financial implications of the 2012 Scheme and the proposed amended 2017 Scheme.

[275] This court is not best placed to adjudicate on many of the matters in dispute between the parties on the financial issues. However, they are essential to the consideration of this application.

THE FINANCIAL EVIDENCE

[276] The financial evidence focuses on a number of discrete issues. Firstly, what is the likely cost to the Northern Ireland budget of the RHI Scheme in the absence of the 2017 Regulations? Secondly, what is the likely rate of return for the affected participants under the 2012 Regulations, in the absence of the 2017 Regulations? Thirdly, what will be the financial impact of the 2017 Regulations on the affected participants under the 2012 Regulations and the second applicant in particular?

[277] Before discussing the evidence on this point I note that it seems there is an apparent lack of concern about any impact on the HMT grant for the scheme. The matter appears to have been entirely considered on the assumption that any annual payment within the limit of the grant would be acceptable, irrespective of rates of return. The alarm bells (or as Mr Simpson put it "*the lightbulb moment*") only arose in relation to the 2012 Regulations when it became apparent that the HMT grant would be insufficient to meet demand under the scheme. However, it appears that even on the contested figures it is not in dispute that the continuation of the 2012 scheme absent the 2017 amendments would result and has resulted in a demand on the Northern Ireland budget.

[278] In considering the financial evidence in this matter it must be recognised that, by definition, the court is considering estimates which are vulnerable to change so there can be no certainty on future costs and future rates of return.

[279] That said, the starting point for the Department based on the material and information available to it at the time the 2017 Regulations were implemented was that the overall cost of the scheme would be £1.2bn, that the total HMT grant over the period would be £0.7bn and therefore the net cost to the Northern Ireland budget would be £0.5bn - £500m.

[280] The more short term implications are set out in the affidavit of Heather Cousins at paragraph 41 in the following way:

> "*Based upon the number of accredited installations, their past levels of usage and past payments, the Department has estimated that the total cost of the non-domestic RHI scheme in 2016/17 will be £42.3m, compared with the HMT budget of £18.3m. The 2016/17 shortfall will be met by (sic) from Department's budget and is unaffected by the 2017 Regulations. Without any change to pre-November 2015 tariffs, it is estimated that the cost of the scheme in 2017/18 would be £49.7m compared with a HMT approved budget of £22.3m. The estimated projected shortfall of £27.4m for 2017/18 would fall to be met from the Northern Ireland Executive's budget.*"

[281] The report from Optimal Economics relied upon by the applicants in this case challenges the estimated cost of £500m.

[282] Optimal Economics were commissioned by the RHANI to provide a report addressing three principal issues; namely:

(i) The cost to the Northern Ireland budget of the continued operation of the Non-Domestic Renewal Heat Incentive (NI) under the pre-2017 Regulations.

(ii) The economic benefits which had been created by the scheme to date.

(iii) The economic impact of the introduction of the 2017 Regulations.

[283] The report considers that the respondent's estimate of the true scheme costs is misleading for the following reasons:

- The assumptions for future costs should not incorporate inflation. It is pointed out that estimates which incorporate inflation involve making assumptions about highly uncertain variables over a long period. It is also suggested that incorporating inflation is apt to be misleading to someone seeking to understand the comparative significance of a monetary figure. The report recommends assumptions should be made using constant (ie 2017) prices.

- The respondent's figures for plant include up to 200 boiler applications from before November 2015 which have not been accredited and which may not be. The report therefore reduced the number of boilers by 80 on this account.

- The forecast presented by the respondent assumes that all plants stay in operation at the same level for 20 years. It suggests that some degree of attrition is likely and has applied an average attrition rate of 2.5% per annum to the figures.

- The report points out that some boilers will inevitably be removed from the scheme as fraudulent or ineligible use is established. The report makes what it says is a "*conservative assumption*" that approximately 2.5% of the boilers in the scheme will be disqualified on these grounds.

[284] The effect of these proposed reductions is amply demonstrated in the following table:

Table 2.4 RHI Scheme Impact on NI Budget (pre 2017 Regulations)

Assumption	Impact on Cost	Estimated Cost
NIAO/Cousins Assumptions		£500 million
Removing Inflation	-£114 million	£386 million
Allowing for plant which will not be certified	-£29 million	£357 million
Attrition due to plant failure	-£176 million	£181 million
Removal of plant in breach of scheme	-£20 million	£161 million

[285] Thus Optimal Economics argue that the true cost to the Northern Ireland budget rather than £500m will be £161m which they say is 0.07% of the projected NI block grant over 20 years.

[286] They point out that this could be reduced further if two Combined Heat and Power (CHP) plants are not commissioned.

[287] This evidence was considered by Mr McMurray on behalf of the respondent.

[288] He points out that there is little dispute between the Department and Optimal Economics in relation to the estimates for expenditure during the years 2012/2013 to 2016/17; and for the remainder of the current spending review period (ie until 2019/20). The cost to date is significant. The actual expenditure for 2016-17 was £45.4m set against a budget allocation from HMT of £18.2m leaving a cost to the Northern Ireland Executive for that year alone of £27.2m.

[289] The real dispute centres on estimating expenditure from the years 2020/21 onwards.

[290] Dealing with the specific challenges to the expenditure figures Mr McMurray emphatically rejects the suggestion that inflation should not be included. The obvious point is that the 2012 Regulations require that the tariffs be varied annually in line with RPI. On this basis I consider that any future projection should seek to include a figure for potential inflation. I recognise that such a calculation may be difficult and carries inherent uncertainties, but I do not see how the Department could simply ignore the effect of inflation on future expenditure.

[291] Mr McMurray points out that the Department has used the latest guidelines from the Office of Budget Responsibility (OBR) which recommended the use of a 3% RPI inflation figure when estimating future expenditure requirements.

[292] It seems to me that this is an entirely reasonable approach and that the disputed £114m is properly included in the overall estimated cost.

[293] Optimal Economics suggest that £29m should be reduced from the £500m figure to allow for plant which will not be certified. Mr McMurray responds by indicating that the Department's most recent estimate includes an adjustment for all installations which have been withdrawn, rejected or removed from the scheme. It is not clear how many yet remain to be determined. Mr McMurray asserts that there is no basis for the figure of 80 chosen by Optimal Economics. He says it would be inconsistent with accounting guidelines to exclude potential costs without an evidence base.

[294] On this issue the court cannot come to any firm conclusion as to the extent to which the ultimate cost of the RHI Scheme will be affected. Obviously, the figures should include all potential costs but it seems to me some work ought to be done to determine the likely outcome for such accreditation applications. Presumably this should be capable of being determined in the near future. It is likely therefore that there will be some reduction to the overall cost arising from pending applications which are not approved but this cannot be quantified at this stage.

[295] Optimal Economics argue that £176m should be reduced in the overall figure because of attrition due to plant failure.

[296] They point out that the Department's figures are based on the assumption that all plants will stay in operation at the same level for 20 years. Whilst it is accepted that individual plant can operate for 20 or more years some degree of attrition is likely. The UK Office of National Statistics presently assumes that most industrial plants will have a mean life of around 25 years which according to Optimal Economics implies an average attrition rate of 2.5% per annum and this figure has been adopted to produce the figure of £176m. They point out that boilers cannot be replaced under the Scheme so as to attract payments.

[297] The Department accepts that attrition is one of the uncertainties affecting future cost estimates and that it is not included in current estimates, Mr McMurray does not accept the assumed rate of 2.5%. He points out the average life span for industrial plant being 25 years could mean that all plants might operate normally for 20 years before installations began ceasing over the next decade. He said it is not therefore correct to infer 2.5% attrition rate from a 25 years mean life. He also argues that accredited small bio-mass boilers should not be equated to average industrial plant. The RHI Scheme provides a strong incentive to owners to make extensive repairs and to replace core elements of their installations to continue RHI payments. Existing tariffs include an allowance towards repair and maintenance irrespective of the financial incentive and he therefore argues that comparison with average industrial plant is not appropriate.

[298] He also points out that any expenditure reduction due to attrition should be considered in the context of a potential reduction in the overall budget from the UK should the number of accredited boilers reduce on a UK basis. Accordingly, he argues that whilst attrition may reduce the gross expenditure on the NI Scheme it will also impact upon the budget available from HMT.

[299] Mr McMurray on behalf of the Department does recognise that there is likely to be some level of attrition within the scheme over the longer term and concludes by indicating that the Department proposes to include this factor in future tariff reviews, which can be informed by up to date data.

[300] The court is not well suited to come to a determination on this issue. It seems to me the Department is entitled to put forward the figures on the basis of the potential exposure although some caveat could be expressed that there may be some reduction due to this issue. This is a matter well within the ambit of judgment open to the Department.

[301] In support of an argument for reduction in relation to ineligible plant, Optimal Economics point to a PWC report which found that 6% of installations might be in breach of the scheme.

[302] In response Mr McMurray said that there is simply no basis for the assumption that 2.5% of boilers will be excluded. He accepts that reductions may be found in this area but that it is impossible to quantify the extent of any such savings until the findings of future inspections and possible legal proceedings are concluded.

[303] As in the other areas of uncertainty it is simply impossible for the court to come to any conclusion on this issue on the basis of the papers alone. Certainly I would have expected that there will be some savings arising from the enforcement powers available to the Department in respect of fraudulent or ineligible use. However, even on the figures available to me at this stage any such savings in the overall context of £1.2bn cost would be relatively small.

[304] The Optimal Economics report also points out that the £500m figure assumes expenditure on two CHP plants which therefore results in an expenditure estimate of £70m. Since proceedings were initiated in this case I am told that both applications have been refused, but that at least one of the applicants has initiated judicial review proceedings in respect of that refusal. As a result the Department does not consider that it would be appropriate to exclude these plants from the overall costs estimate until the legal challenge has concluded and the situation in respect of the installations is determined by the court.

[305] Whilst I accept that this is a prudent approach from the Department, it does represent another caveat in relation to the potential cost of the scheme.

[306] A further factor which has impacted on the figures is that since these proceedings have been initiated the Department has revised its potential cost to the NI budget **upwards** from £0.5bn to £0.7bn in light of recent guidelines from HMT and future cost projections.

[307] This increase from the previous estimate is primarily due to the recommended use of a higher RPI figure which takes account of the most recent OBR advice.

[308] Overall, in terms of these figures I consider that the Department is right to be prudent in setting out the potential cost of the scheme. It may well be that the obvious lack of management and oversight in the initial years of the scheme has led to an overly cautious approach. The now estimated figure of £0.7bn is probably a "*worst case scenario*". However, even allowing for some adjustments there can be little doubt that the continuation of the scheme in the absence of the 2017 Regulations will have a major impact on the Northern Ireland budget. I consider that the respondent has the better end of the argument in relation to the two major items identified by Optimal Economics namely the figures for inflation and attrition. Therefore the potential overall cost of the scheme if the 2017 Regulations are not in place is likely to be close to the Department's estimate. When conducting any future review prior to the extension renewal or amendment of the 2017 Regulations it may well be that the Department will be in a better position to advise on issues such as attrition or removal of plant in light of up to date information. Any consultation process should include a consideration of the material provided by Optimal Economics so that it can be considered by the Minister, Executive, relevant committee and Assembly.

[309] The report also makes an assessment of the impact on economic activity in Northern Ireland of the investment made through the scheme and an assessment of the likely impact of the application of the tariffs in the 2017 Regulations, assuming that these are maintained after 2018.

[310] It did so on the basis of a survey of RHANI member firms which was conducted in April 2017. Responses were received from 213 businesses with a combined total of 427 boilers which account for over 20% of the total capacity installed in Northern Ireland under the scheme. The majority of respondents were in farming (mainly poultry). It is suggested that the firms surveyed modelled their businesses on the level of tariffs paid and this has resulted in the creation of 1,022 jobs as a direct result of the scheme. The report suggested that the scheme had resulted in £73m of additional business investment on items other than heating plant, an increase of £58m of additional business turnover and a £33m increase in the annual income of Northern Ireland.

[311] The effect of the tariff reductions in the 2017 Regulations, it is argued, will reduce average payment to firms by over 50%. This reduction will have a severe

effect on the business viability of many of these firms. It is suggested that around 2,000 jobs could be lost as a result of the continued application of the 2017 tariffs.

[312] Mr McMurray on behalf of the Department is highly critical of this aspect of the report. He points out firstly that the survey is not representative of the RHI Scheme as a whole as the responses have come primarily from poultry farmers. He describes the results as "*unreliable, inconsistent and appear to significantly overstate the economic impact of the scheme*". By way of example of the suggested tendency to overstate the impact of the RHI is the suggestion that the scheme gave rise to on average a 7% increase in business turnover leading to a 22% increase in employment. Mr McMurray points out that normally employment increases at a slower rate than turnover. He points out that for example, between 2008 and 2015 the annual level of turnover for the firms included in the NI annual business enquiry increased by 12.7% whilst their employment fell by 2% over this period.

[313] When he analyses the figures he points to significant flaws. For example, he says that the average reduction in profits due to the 2017 Regulations also appears to be more than double what would be expected given the number of boilers per business and the average amount of heat generated. Thus, the Optimal Economics report refers to firms with 320 boilers and the combined turnover of £167.5m, 7% of which was attributable to RHI payments. This implies an average RHI payment of £37k which is significantly higher than the level of payment of £22,750 for the average usage of 350kWH. Alternatively, £37k in RHI payments would equate to average use of 560kWH (65% load factor) which is much higher than the average.

[314] He points out that it is inconsistent to suggest the RHI payment resulted in the creation of 1,000 jobs whilst reducing the amount of payments will result in the loss of 2,000 jobs. On this issue he points out that, even if it were accepted that 2,000 jobs were at risk, based on Optimal Economics own figures the total estimated costs would be £808m. This implies a cost per job of £400,000 which is significantly in excess of what would be acceptable for industrial assistance projects.

[315] Optimal Economics have not responded to Mr McMurray's critique but in any event I cannot see how a judicial review court can come to any firm conclusions on this issue solely on the basis of the papers. My impression is that the report overstates the economic benefits of the scheme. More importantly it must be understood that it was never the intention of the RHI Scheme to provide enhanced economic benefits or subsidise businesses. It was designed to bridge the gap between the cost of existing heating systems and the renewable heat alternative with a view to encouraging the use of environmentally friendly fuels.

[316] The report refers to the fact that RHI payments were "*factored in*" to prices agreed with customers.

[317] This aspect of the effect of the tariffs is reflected in other material in the case. By way of example in the affidavit from Elaine Shaw, sworn in the course of these proceedings on behalf of Northway Mushrooms, it is pointed out that the tariffs allowed the firm to reduce its selling price for mushrooms.

[318] This issue is fundamental to the dispute in this case. A primary reason the Department puts forward by way of justification for the changes is that, in effect, what has happened is that the 2012 tariffs were so generous that they are plainly being used to support and sub vent private businesses as opposed to the intended purpose of providing financial support to promote the use of renewable sources of energy. They say that this has resulted in huge "*over compensation*" and has meant that the scheme is in effect in breach of the State aid regulations and the purpose for which they were intended. It is undoubtedly the case that many businesses who are participants in the "2012" scheme have planned and, in many cases, expanded their businesses on the basis that a certain level of income is guaranteed. The question is whether or not the Department is entitled to take steps to correct this.

[319] Suffice to say that it is not the role of this court to make an assessment of the economic impact of the 2017 Regulations on the economy. This is a macro-political issue to be considered by the relevant policy makers.

[320] There have been lengthy exchanges on paper between Harbinson Mulholland and Mr McMurray. That debate focuses on the likely rate of return which participants will achieve under the RHI Scheme and the impact of the 2017 Regulations on the rate of return.

[321] In this context it should be remembered that the object of the 2012 Regulations was to deliver an annual return on capital of 12%. This was the basis upon which the tariffs were calculated and the basis upon which State aid was approved. Obviously, variations could be expected for individual participants given the way the scheme was delivered but it is the respondent's case that the actual rate of return across the scheme has resulted in annual returns hugely in excess of the anticipated 12%, to the extent that it was required to introduce the 2017 Regulations.

[322] Clearly therefore it is fundamental to assess what in fact has happened as a result of the 2012 Scheme and, insofar as it is possible to do so, what is likely to happen in the future if the 2017 Regulations are not implemented. Harbinson Mulholland have prepared their reports based on an assessment of the effects of the Regulations on three businesses; the first being that of DA, the second, Bridge Mushrooms Ltd (BM) and the third, Stepping Stone Timber Products (SSTP).

[323] In relation to the three examples the main headline conclusions are as follows.

CASE STUDY 1 – DA'S BUSINESS

[324]

- Should the 2017 Regulations remain in place, DA will never achieve a positive rate of return and will incur significant losses.

- The 2017 Regulations have adversely impacted upon the ability of DA to meet his loan obligations.

- Excluding the cost of building a new chicken house he could expect a rate of return over 20 years of 14.8% if the 2012 Regulations continue unamended and a loss of 4.5% under the 2017 Regulations.

- In the event that the cost of a new chicken house is included he would expect a rate of return of 3.1% if the 2012 Regulations are continued and a loss of 4.7% if the 2017 Regulations remain in place.

CASE STUDY 2 – BRIDGE MUSHROOMS LIMITED

[325]

- Excluding the cost of the expanded facility (which cost £170,000), a rate of return of 25.5% could be achieved if the 2012 Regulations continue unamended and 9.4% if 2017 Regulations remain in place.

- If the £170,000 facility is included the rate of return under 2012 Regulations unamended would be 8.3% and if the 2017 Regulations remain in place, 1.3%.

CASE STUDY 3 – STEPPING STONE TIMBER PRODUCTS

[326]

- Had the 2012 Regulations remained in place SSTP would not have achieved a positive rate of return on its investment until year 9.

- Under the 2012 Regulations if the expanded facility of £162,000 is not included a return rate of 6.1% can be expected under the 2012 Regulations but a loss of 13.8% under the 2017 Regulations.

- If the expanded facility is included the relevant figures are 2.6% and a loss of 10.9% respectively.

[327] In dealing with these figures it is important to bear two points in mind. Firstly, it may well be the case that these individual experiences are not representative of the scheme as a whole. It is necessary for the court to conduct a scheme wide analysis although studies of particular cases may well be illustrative.

Secondly, all the figures put before me are based on certain assumptions. Therefore any conclusions drawn from the calculations are only as viable as the assumptions underlying them.

[328] Before focussing on the specific case examples I turn to what the respondents say the average figures are in relation to the system as a whole. This is best demonstrated in a table prepared by Mr McMurray which I set out below.

[329] The figures contained therein are based on that for a typical 99 kW boiler, generating 375,000 kWh (which is a 41% load factor – the average of all boilers accredited under the scheme). The estimated operating costs included in the table are taken from the June 2016 CAGNI report and the Tier 2 tariff payment of 1.5p kWh is taken from the 2012 CEPA report.

Table 5: Annual Rate of Return for Typical Boiler under Tiered Tariff

	2017 Regulations	**2012 Regulations**
Annual cost of operating wood pellet boiler (4.01p/kWh)	(14,328)	(14,328)
Annual oil cost not incurred (3.0p/kWh)	10,719	10,719
Annual Hassle/barrier cost	(878)	(878)
Annual net cost of operating biomass boiler	**(4,487)**	**(4,487)**
RHI Tier 1 tariff payment (6.5p/kWh)	8,456	
RHI Tier 2 tariff payment (1.5p/kWh)	3,408	**23,225**
Total RHI payment	**11,864**	
Annual profit	**7,377**	**18,738**
Initial Capital Cost to install biomass boiler	(37,000)	(37,000)
Initial Capital Cost to install oil boiler	8,168	8,168
Initial upfront barrier/hassle cost	(5,364)	(5,364)
Net additional capital cost	**(34,197)**	**(34,197)**
Internal Rate of Return	**21.1%**	**54.8%**

[330] From this report it can be seen that under the 2012 Regulations the average annual rate of return is said to be 54.8% and under the 2017 Regulations 21.1%.

[331] Turning to the case studies contained in the HM report these have been analysed by Mr McMurray and he strongly contests the conclusions. Much of the disagreement depends on the assumptions adopted.

[332] The key and fundamental difference, which is a theme running throughout this dispute, is what is included by way of capital investment in the expenditure items.

[333] Given the nature of the scheme the capital costs against which the annual rate of return should be measured are the costs of purchasing and installing the new boilers.

[334] If one looks at DA, who is also an applicant in this case, according to the application forms for accreditation for his four 99 kW biomass boilers the total cost of acquisition was £106,000 with additional installation costs of £5,000, totalling £111,000.

[335] However, the HM calculation of his rate of return (excluding the costs of the new chicken shed he has built) is based upon a "*total investment*" of £268,290. When one looks at the breakdown of the expenditure items making up the figure of £268,290 it appears to include substantial general construction costs which could not in my view reasonably be associated with the actual installation of the boilers themselves. These clearly fall outside the purpose of the RHI scheme. The assessment of the rate of return should be based on the cost of the acquisition and the installation of the boilers and nothing else.

[336] In the case of SSTP in respect of the four 99 kW biomass boilers which are accredited the capital costs calculated by HM are £152,000 (acquisition) and £16,687 (installation) giving a total of £168,667. However, the rate of return calculated by HM is based upon a "*total investment*" figure of £471,490 which includes an acquisition cost of £228,234 for an additional 99 kWh boiler which has not yet been accredited. Mr McMurray also notes that the calculation excludes the anticipated income likely to be generated by this additional boiler and the costs associated with operating it.

[337] The respondent also challenge the fact that HM have included as a capital cost a figure for "*interest on loans*" in each of the calculations. Given that the 12% rate of return built into the tariff was intended to compensate for any financing costs incurred by the participants when acquiring a new boiler it seems to the court that this figure should not be included.

[338] Furthermore, in situations where the operator has used some of its own funds to finance the acquisition of the installation of the new boiler, HM have included a figure for "*interest on old funds*" as a capital cost. I do not consider that this is appropriate. It assumes that the operator will have retained his money and interest bearing account for 20 years and does not take into account the fact that it has been invested in a capital item estimated to deliver an annual return of 12%. This did not form part of the methodology recommended by CEPA.

[339] Mr McMurray challenged the fact that the HM report did not make any allowance for capital expenditure of a fossil fuel boiler which operators would have incurred in any event. On this issue it can reasonably be argued that this ignores the

fact that participants in the RHI scheme were converting from fossil fuel heating to biomass heating and many will have already purchased a fossil fuel burner. DA points out that poultry farmers are required to have fossil fuel boilers as a "*backup*" heat source and that this cost should not therefore be reduced.

[340] Fundamentally the point made by the respondent on this issue is that the intention of the scheme was to provide a 12% return on the additional capital costs associated with purchasing a biomass boiler, instead of a fossil fuel boiler. The debate again focuses on what was the true purpose of the scheme. The scheme was designed to encourage **conversion**. The key point is that the CEPA methodology recommended for calculating tariffs (in line with the GB approach) which was used by the Department in 2012 and which forms the basis of the Commission approval of State aid approved deductions of the cost of a fossil fuel boiler.

[341] A further dispute relates to the fact that HM have included an annual upfront "*hassle cost*" rather than a single upfront cost which was meant to deal with the "*hassle*" experienced at the outset when operators had to plan for, acquire, install and seek accreditation for an installation.

[342] Mr McMurray finally makes the point that the HM report incorrectly underestimates the cost of current fossil prices which of course affects the tariff calculation since it relates to the difference between biomass and fossil fuels costs. Obviously the costs of the two fuel types will fluctuate from year to year. However, Mr McMurray notes that in the HM case studies the fossil fuel price is 1.1p kWh for DA and SSTP whereas for BM it is 3.7p kWh. He points out that the actual price of fossil fuels has fallen substantially since 2012 when CEPA initially reported. The most recent figures for 2016-17 actually suggests that the prices for heating oil, wood pellets and woodchip are broadly comparable.

[343] Just as HM has chosen a low figure for the calculation of fossil fuels Mr McMurray argues that it has put forward figures for biomass fuel costs of DA and SSTP which are significantly greater than the cost of fossil fuels, notwithstanding the apparent convergence of prices for these fuels. Analysing the three case studies he points out that in BM fossil fuels are 85.1% of biomass fuel costs whereas the relevant figure for DA is 30.5% and for SSTP 25.4%. A greater difference in price will result in a lower rate of return.

[344] Having made these points and carried out the comparison Mr McMurray sets out his calculations for the rates of return in the following table.

Table 10: Comparison of Harbinson Mulholland and Department for the Economy analysis of the 3 Case Studies (Accounting Rate of Return)

	2012 Regulations		2017 Regulations	
	HM	DfE	HM	DfE
DA	14.8%	91.2%	-4.5%	26.7%
Bridge Mushrooms	25.6%	53.5%	10.5%	24.0%
Stepping Stone Timber	6.1%	88.1%	-13.8%	13.6%
Average	**15.5%**	**77.6%**	**-2.6%**	**21.4%**

[345] From this it will be seen that the respondent suggested an average rate of return of 77.6% under the 2012 Regulations with an average rate of return of 21.4% under the 2017 Regulations.

[346] HM responded by firstly challenging the rate of return calculation for a typical user.

[347] The starting point for the revised calculation by HM for the average user is that the initial capital cost of a biomass boiler is the average of £50,000 and £54,153. This was taken from early Department calculations and is allegedly supported by the actual cost incurred by DA. In fact the average actual initial capital cost is £37,000 which is based upon the average capital cost actually experienced by operators as reported to the Department by operators during the accreditation process. The Department figure is therefore not an estimate. It is also in line with the average capital costs experienced by SSTP (approximately £42,000 per boiler) and BM (approximately £34,000 per boiler). It is also in line with the capital costs reported by DA as part of his accreditation applications (£111,000 for four boilers).

[348] The HM supplementary report does provide further information in relation to the alleged capital expenditure by DA in relation to the installation of the boilers. Having considered the additional material it seems to me that this does not significantly advance the case made. There is a lack of detail in terms of the amounts claimed. For example £65,000 is claimed for "CHP Mechanical". Much of the amounts referred to seem to relate to wider infrastructure not specifically related to the installation. Again there is a dispute about whether or not the costs of the fossil fuel boilers should be reduced from the calculations. In relation to operating costs, HM have based their figure by reference to a July 2015 CAFRE report which estimates the additional costs as being in the range of 0.7-1.5p/kWh. HM have used the figure at the highest end of this range.

[349] The figures used by Mr McMurray rely upon the updated figures which are prepared by CAFRE in 2016. Again there is a difference of view as to whether or not the hassle costs should be on an annual basis, although this has not impacted greatly on the overall figures.

[350] As to the case studies HM in its supplementary report focuses upon the rate of return which is likely to be experienced under the 2017 Regulations.

[351] Based on HM's methodology as set out in the supplementary report Mr McMurray calculates that all three participants would continue to receive a rate of return well above the target level of 12% should the 2012 tariffs continue. That is:

- DA 16.6%
- BM 26.6%
- SSTP 29.3%
- Average 24.2%.

[352] Thus he points out that the rate of return will be well in excess of 12% notwithstanding the remaining differences of approach between the Department and HM. There remain issues in relation to the capital costs, additional fuel costs and the different methodology used by HM which he describes as "*accounting rate of return*" as opposed to the methodology used for calculating the tariff in the CEPA report which he describes as "*the internal rate of return*".

[353] There remains a significant difference between the parties on the effect of the 2017 Regulations in terms of rates of return for the individual case samples and also for the average user.

[354] In addition to the case studies referred to in the HM reports, Mr Trimble also referred that example. That participant relates to a 199 kWh boiler in respect of which she received a payment of £5,200 in 2015/16. The installation costs were £100,000.

[355] Mr McMurray points out that this is a very atypical example. The low amount of money received suggests that only a small amount of heat was generated using this boiler, equating to a load factor of less than 5%. He points out that the average cost of installation for a 199 kW boiler is £63,000 and he therefore suggests that the installation costs of £100,000 are atypical. The first accreditation for any 199 kW boiler on this scheme was on 10 February 2016 and no such boilers were accredited prior to the introduction of the tiered tariffs were 99 kW boilers in November 2015. It does not seem therefore that this example is in any way representative of operations within the RHI scheme.

[356] Thus the Department stands by its calculations for both the average rate of return and the return for the case studies.

[357] The applicants raised a number of other financial matters by way of challenge to the assumptions underpinning the 2017 Regulations. They are critical of the annual usage limit or "cap" and say that this arbitrarily penalises those with a genuine high heat demand. In particular the calculations fail to take account of the

fact that according to the CAFRE report dated 16 July 2015 birdhouses required 30% more heat using a biomass boiler than using LPG.

[358] Mr McMurray responds to these criticisms in his affidavit.

[359] As explained earlier, the 2017 Regulations impose a 400,000 kW annual usage cap above which subsidy will not be paid. The thinking behind this cap is that it discourages unnecessary heat production, encourages use of other heat saving measures (*e.g.* insulation) and provides a further cost control measure. These are all consistent with the objectives of encouraging conversion, not unnecessary heat production and does so in a way which helps ensure value for money.

[360] The figure of 400,000 kW was determined specifically by reference to the anticipated usage requirements of a poultry farm, based on the actual experience of the operation of biomass boilers in a sample of these farms. It followed consultation with CAFRE and was later confirmed by Moypark as being reasonable.

[361] On this basis I have concluded that the figure of 400,000 kWh as an annual usage cap is a reasonable one, subject to my overall consideration of the fairness of the regulations.

[362] The applicants further point out that the 2017 tariffs create an arbitrary unfairness between those who have installed 199 kW boilers and those who have installed 99 kW boilers. The limits imposed by the 2017 Regulations will mean that a 199 kW boiler will receive a greater payment per annum for producing the same amount of heat as a 99 kW boiler.

[363] On this point I note that the vast majority of boilers accredited under the regulations are 99 kW boilers and it is their use which has given rise to the financial issues which the respondents say require the corrections under the 2017 Regulations. It seems to me that this issue is a matter which can be dealt with in the course of an overall review of the working of the scheme.

[364] Finally Mr Simpson highlighted what he described as a *"curious"* iteration of the calculation by which the Department has arrived at its rate of return. In particular he referred to a table in an annex to the Department's business case to DFP. It is right to say that this particular document appears to include a miscalculation which has not been explained. Mr Simpson argues that this demonstrates the need for caution when considering the complex calculations that have been put forward by the respondent. However this is one calculation amongst a vast array of financial information and in my view it does not undermine the basic assumptions underlying the Department's rationale for the 2017 Regulations.

[365] There was a large volume of material produced in the course of the hearing on these issues. I have only summarised the "*headline*" figures and I have attempted to identify the core issues concerning the dispute.

[366] At its heart the differences in the figures can primarily be explained in relation to what capital expenditure can be included in assessing rates of return and the calculations of predicted income based on the respective differences in prices between fossil fuels and biomass fuels.

[367] It is not necessary nor is the Judicial Review Court properly equipped to come to final conclusions on these disputes and come up with actual figures. On the main issues I agree with the respondent's submissions, particularly in relation to the initial capital costs and the most up-to-date information in relation to operating costs which account for the main points of difference in the projected outcomes. On the basis of the material presented to me I am satisfied that absent the 2017 Regulations participants in the scheme will in fact obtain an average rate of return well in excess of the 12% that was anticipated when the scheme was established. This will be close to the 54.8% figure proposed by the respondent. I have also come to the conclusion that the 2017 Regulations are likely to have the effect of aligning the scheme closer to the 12% figure that was initially anticipated. I am also satisfied that, in fact, tariffs are being used to subsidise and support businesses rather than merely contributing to the costs of converting heating systems.

[368] In relation to the specific case studies I prefer the evidence on behalf of the respondent. The correct figures will be close to those set out in paragraph [345].

STATE AID APPROVAL

[369] A prominent aspect of the respondent's submissions relates to the Department's obligation to comply with EU State Aid Rules.

[370] Earlier in this judgment I have set out the background to the State Aid regime. There is no doubt that the Department required approval for the RHI Scheme to comply with its TFEU obligations. On 12 June 2012 the Commission approved the scheme as "*compatible with the common market in accordance with Article 107(3)(c) of the TFEU (aid to promote certain economic activities where the aid does not adversely affect trading conditions to an extent contrary to the common interest) and therefore decided not to raise objections to the notified measure.*"

[371] In granting approval the Commission noted at paragraph 38:

> *"The UK authorities intend to hold the first review of the scheme in 2014, with changes to be implemented in 2015. After that, the reviews will take place periodically according to a programmed schedule. Reviews will in particular be used to monitor the performance of the scheme and the development of*

> *the underlying costs for each technology, so as to ensure that overcompensation is going to be prevented.*
>
> *[39] The UK authorities intend to carry out early reviews in all cases where they become aware of significant changes in the production costs, again to ensure that overcompensation will not take place.*
>
> *[40] When incentive levels are modified in future reviews, the revised levels only apply to the new installations entering the RHI scheme. This `grandfathering' principle, whereby levels are guaranteed for existing installations, is intended to provide investor certainty and is consistent with the mainland UK scheme."*

[372] In that context, on what basis can it be argued that a continuation of the 2012 Regulations, in so far as they apply to the affected participants, should be held to be in breach of State Aid Regulations?

[373] The relevant provisions under TFEU are as follows:

- 108(1) The Commission shall keep under constant review all aid systems existing in Member States.

- 108(2) If, after giving notice to the parties concerned, the Commission finds that aid granted by a State is not compatible with the internal market or that such aid is being misused it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

- 108(3) Member States must notify the Commission of any plans to grant or alter aid to enable the Commission to decide whether it is compatible with the internal market. Member States must not put into effect the proposal to grant or alter aid, until there has been a final decision by the Commission.

[374] Given that the 2012 Scheme has been declared compatible, no question arises in relation to the Commission's enforcement powers under Article 108 because of any failure by the Department to inform the Commission of the scheme.

[375] The rules set out in the treaty provisions are supplemented by more detailed rules within Council Regulation (EU) 2015/1589.

[376] Article 1 provides a definition of various types of aid. Under those definitions the aid provided to the effected participants is "*existing aid*".

[377] "*Unlawful aid*" is defined as "*new aid*", put into effect in contravention of Article 108(3), that is without notification or approval.

[378] "*New aid*" is defined as aid which is not existing aid, including alterations to existing aid.

[379] Under Article 12 the Commission may, on its own initiative, examine information regarding alleged unlawful aid from whatever source. It may also examine any complaint submitted by any interested party.

[380] Article 16 imposes an obligation upon the Commission to decide that a Member State shall take all necessary measures to recover aid from a beneficiary in circumstances where there has been a negative decision in cases of unlawful aid. It is also to be noted that the Commission shall not require recovery of aid if it would be contrary to a general principle of union law.

[381] Article 21 supplements the obligation upon the Commission under Article 108(1) to keep all aid schemes under review. It may require information from a State. Article 21(2) provides:

> *"Where the Commission considers that an existing aid scheme is not, or is no longer, compatible with the internal market, it shall inform the Member State concerned of its preliminary view and give the Member State concerned the opportunity to submit its comments within a period of one month. In duly justified cases, the Commission may extend this period."*

[382] Under Article 22 where the Commission, in light of the information submitted by the Member State pursuant to Article 21, concludes that the existing aid scheme is not, or is no longer, compatible with the internal market, it should issue a recommendation proposing appropriate measures to the Member State concerned. The recommendation may propose, in particular;

> *"(a) Substantive amendment of the aid scheme; or*
>
> *(b) Introduction of procedural requirements; or*
>
> *(c) Abolition of the aid scheme."*

[383] For completeness "*misuse of aid*" is described as aid used by the beneficiary in contravention of Commission approval.

[384] The essence of the Department's case is that the original 2012 scheme is in fact incompatible with the approval granted. This argument is premised on the basis that the approval is conditional on it not providing overcompensation to participants and, in particular, on the intention to deliver a 12% return on capital expenditure under the scheme.

[385] This argument requires a consideration of the actual State Aid approval. The Department says that that approval should be considered in light of the guidelines published by the Commission for the grant of aid for environmental protection purposes. There are two sets of guidelines, one published in 2008 which are referred to in the 2012 decision and subsequent 2014 guidelines. The 2008 guidelines, which concern renewable energy projects, set out the background to the EU interest in allowing State Aid for renewable energy sources. They go on to provide specific guidance on the aid which may be authorised. The approval decision expressly references point 109 of the guidelines which focusses on a requirement to avoid overcompensation but recognises that operational aid can include the additional costs of producing energy from a renewable source compared with the market costs for that energy and can include the cost of depreciating the extra investment over the lifetime of the plant including a "*normal return*".

[386] The actual approval by the European Commission notes that "*the primary objective of the notified measure is environmental protection*". It identifies the legal basis of the regulations namely the Energy Act 2011. It discusses the duration and budget for the scheme.

[387] In terms of the form of support and levels provided it notes that the tariffs under the scheme "*are designed to cover the difference in costs between the renewable heat alternative chosen for the installation and the traditional fossil fuel heating system. As such they incorporate the differences of capital costs, operating costs, as well as `hassle' (ie non-financial) costs.*"

[388] It acknowledges that the tariffs have been set based on economic advice from external consultants and that only "*useful heat*" is eligible for payment under the scheme, that is, heat which would otherwise have to be met by fossil fuels.

[389] The report sets out the methodology by which the tariffs and bands were established.

[390] The decision notes that the cost of capital used in the calculation is 12% for all technologies, except for solar thermal. It notes that in order not to provide perverse incentives to waste heat, each reference installation is calibrated to have a specific load factor and the tariff is calculated with references to that load factor. It then sets out the proposed tariffs and the ranges of installations to which the tariffs apply. It specifically addresses the issue of "*no overcompensation*" and comes to the conclusion that there is an absence of overcompensation in the scheme on the basis of the detailed economic model designed by the external consultants.

[391] It goes on to specifically consider the 2008 guidelines and in particular point 109 above. It is satisfied that the compatibility conditions laid down in point 109 are met because the notified measure concerns operating costs for heat produced from renewable energy sources, based on the difference between renewable and

conventional heat production costs. In terms of the absence of overcompensation it records that:

> *"As regards the discounted rate of 12% applied on the calculation of levelised production costs for biomass, biogas and ground source heat production, the Commission notes that this is the same rate used in the mainland UK scheme. Under the assessment of that scheme, the UK authority submitted a detailed report from an independent consultant which concluded that the necessary rate of return to incentivise renewable heat production rate is between 8% to 20%. The chosen rate of 12% is at the lower end of that range and it can be considered reasonable. The so-called barrier costs represent a minimal part of the overall cost and their inclusion or exclusion from the discount calculation does not alter the final tariff – or, conversely, considering the non financial costs as part of the profit, the rate of return becomes only slightly higher than 12%."*

It then goes on to say:

> *"In light of the above the Commission considers that the discount rates applied in the calculation are reasonable."*

It concludes:

> *"In light of the abovementioned considerations, including the commitment of the UK authorities to adapt the notified measure in time in order to avoid overcompensation, the Commission finds that the notified measure is in line with the condition of absence of overcompensation."*

[392] In interpreting the Commission approval it is also appropriate to examine the notification upon which it was based – C-138/09 *Todaro Nunziatina*.

[393] Equally the approval is to be interpreted on the basis of the information, materials and economic data which was presented to it at the time of the decision – C-590/14 *Dimosia Epicherisi v Olouminion Tis Ellados.*

[394] Mr McGleenan argues that the same case establishes the principle that an aid measure should be regarded as "*new aid*" by reference to <u>the effect</u> that the measure has, not by whether it was brought about by a new instrument. I am not persuaded of this. In that case the court was considering aid contained in a legal instrument which extended an earlier measure. Because this resulted in the alteration of the duration of the aid at issue, it had to be regarded as new aid.

[395] Certainly it is this reasoning which requires State Aid approval for the 2015, 2016 and 2017 Regulations but it would not mean that the 2012 Regulations *per se* would constitute new aid because of an alleged change of circumstances.

[396] A central issue in this debate is whether or not the actual outworking of the 2012 Regulations is in compliance with the conditions on which approval was given.

[397] What are the conditions in the approval which are not complied with in the 2012 Regulations? The undoubted focus on the 12% return and the requirement to avoid overcompensation were not so much conditions of the approval but rather a confirmation, in the Commission's view, that the proposed regulations complied with these objectives. In essence the Commission has made the same error as the Department. As Mr Simpson points out this was not a "*conditional*" decision under Article 9(4) of the procedural regulations.

[398] In those circumstances it is certainly a moot point whether the continuation of the 2012 Regulations unamended is incompatible with EU law. The Commission itself is also bound by general principles of EU law and could not exercise its powers to recover unlawful aid in contravention of those principles.

[399] In the CGEU's decision - T-89/09 *Pollmeierma Massivholz v Commission* the court said:

> *"66 The EU courts have also confirmed that when the Commission has before it a specific grant of an aid alleged to be made in pursuance of a previously authorised scheme, it cannot at the outset examine it directly in relation to the treaty. Prior to the initiation of any procedure, it must first examine whether the aid is covered by the general scheme and satisfied the conditions laid down in the decision approving it. If it did not do so, the Commission could, whenever it examined an individual aid, go back on its decision approving the aid scheme which already involved an examination in the light of Article 87 of the Treaty. This would jeopardise the principles of the protection of legitimate expectations and legal certainty from the point of view of both the Member States and the traders since individual aid in strict conformity with the decision approving the aid scheme could at any time be called into question by the Commission.*
>
> …
>
> *67 If following the examination thus circumscribed, the Commission finds that the individual aid is in conformity with its decision approving the scheme it must be regarded as authorised aid, and thus as existing aid. Conversely, where the Commission finds that the individual aid is not covered by its*

> *decision approving the scheme, the aid must be regarded as new aid".* (My underlining)

[400] Clearly the court recognises the principles of the protection of legitimate expectations in determining whether aid is not covered by a decision approving a scheme. On this view the Commission is in the same position as the Department was prior to making the 2017 Regulations. It would therefore have to justify a finding that individual aid was not covered by its decision having regard to the relevant principles upon which legitimate expectations can be frustrated.

[401] As I have indicated there is no doubt that in approving the scheme the Commission intended to permit only tariff payments for production of "*useful heat*" and such as were to deliver a discounted cost of heat over the relevant period of 12% on the capital. The 12% return and the requirement to avoid overcompensation were clearly central to the approval.

[402] The passing of the 2017 Regulations, with the approval of the Commission, means that any potential enforcement proceedings by the Commission have been averted. The difficult issue for the court is whether or not if the 2012 Regulations were to continue without the amended 2017 Regulations would the State be in breach of the State Aid regulations and susceptible to an investigations and enforcement procedure by the Commission?

[403] In this regard the role of a national court is problematic. It is the Commission which has exclusive competence to determine whether any aid measure is compatible with the internal market. However a national court is empowered to determine whether a measure amounts to "*aid*" and can grant remedies to enforce the obligation of Member States under 108(3) not to put aid into effect without prior notification to the Commission and a positive decision. – See the *Dimosia Epicheirisi* – referred to above.

[404] Thus national courts do not have jurisdiction to rule on a State Aid's compatibility with the internal market, that supervision falls within the exclusive competence of the Commission.

[405] The national courts are competent to adopt interim measures in order to prevent the distortion of competition stemming from the grant of an aid in contravention of the standstill obligation provided for in Article 108(c) TFEU.

[406] Thus, in accordance with paragraph 58 of the Commission's notice on the enforcement of State Aid law by national courts (OJ 2009 C 85 p1) where *"there is a risk that the payment of unlawful aid will be made during the course of national court proceedings, the court may find it necessary to issue an interim order preventing the illegal disbursement until the substance of the matter is resolved."*

[407] Neither the court or the Department can determine what the Commission's view would be on whether or not the aid provided under the 2012 Regulations is in accordance with the initial approval decision and is compatible with the internal market. I do accept however that there is an evidential basis for the Department's belief that the continuation of the 2012 Regulations had the potential to expose the State and individuals to an inquiry or enforcement proceedings by the Commission.

[408] Therefore it was in my view entitled to take this into account in deciding to make the 2017 Regulations. The fact that the Commission, on further notification, approved the 2017 Regulations suggests that this view may well be shared by the Commission. By way of example at paragraph 50 of the Commission's approval for the 2017 Regulations it says:

> *"The Commission concludes therefore that the measures now notified as changes to the existing aid scheme are in line with the aims laid down in the scheme at the time of the confirmation and do not impact the Commission's 2012 conclusion on the compatibility of that scheme with the internal market given that observance of the conditions laid down at the time of the scheme's approval are the motivation behind these amendments."*

CONCLUSION

[409] For all the factual and legal complexity surrounding this application the case resolves into an assessment of the requirements of fairness.

[410] At issue is the clash between the private interests of the applicants and the public interest asserted by the respondent.

[411] The *vires* argument turns on whether the 2017 Regulations are so unfair that Parliament could not have intended that the respondent had the power to make them. The A1 P1 and legitimate expectation arguments turn on the strength of the general interest asserted by the respondent and the proportionality of the steps taken to assert that interest by interfering with the rights of the beneficiaries under the 2012 Scheme.

[412] As I have made clear the starting point is that there is a presumption in both the public interest and in relation to the private interest of the beneficiaries that the rights granted under the 2012 Scheme should be upheld.

[413] I have also made it clear that DA's rights under A1 P1 are engaged and that he had a legitimate expectation that his rights under the 2012 Regulations be protected in law.

[414] The respondent can only justify what I have found to be the interference with these rights in exceptional circumstances and where special justification can be shown.

[415] Has the respondent satisfied this high threshold?

[416] In answering this question the judgment of Lord Carnwath in the case of *Cusack v London Borough of Harrow* [2003] UKSC 40 is helpful. In his judgment he considered the issue of interference in cases involving A1 P1 since *Sporrong* and he referred to his own judgment in the Court of Appeal in *Thomas*:

> *"31. Later cases (see eg Bugajny v Poland (Application No 22531/05) (unreported) given 6 November 2007, para 56 and following) have given further guidance on the practical application of article 1 to individual cases. First, the three rules are not 'distinct in the sense of being unconnected'; the second and third rules are to be 'construed in the light of the general principle enunciated in the first rule'. Secondly, although not spelt out in the wording of the article, claims under any of the three rules need to be examined under four heads:*
>
> *(i) whether there was an interference with the peaceful enjoyment of 'possessions';*
>
> *(ii) whether the interference was 'in the general interest';*
>
> *(iii) whether the interference was 'provided for by law'; and*
>
> *(iv) proportionality of the interference."*

[417] Is the interference in this case *"in the general interest"*?

[418] In considering the public or general interest I take into account that there is in itself a public interest in ensuring that members of the public are entitled to rely on government regulations and are entitled to organise their affairs on that basis. It is for this reason that I consider there is a high burden on the respondent to justify the change which I have described as the need for a "*special justification*".

[419] I recognise too that in assessing the public interest the Department enjoys a margin of appreciation. These Regulations were ultimately approved by the Assembly and therefore, as Mr McGleenan says, carry "*substantial democratic legitimacy*". The Regulations reflect the Assembly's assessment of the public interest in a matter of both financial and political importance in Northern Ireland. Although it could be said that these considerations are very much in the macro-political field, because the 2017 Regulations have a retrospective effect on existing regulations I have nonetheless subjected the public interest arguments to a high level of scrutiny.

[420] I have come to the conclusion that the interference was *"in the general interest"*, in that it sought to pursue legitimate aims. I identify these aims as;

(a) Ensuring that the RHI Scheme was in accordance with the UK's obligations under the Renewable Heat Directive;

(b) Ensuring that the scheme operated in a manner consistent with the objectives of the scheme;

(c) Ensuring that the scheme operated in a manner consistent with State Aid approval;

(d) Protection of the Northern Ireland budget.

[421] In my review of the respondent's justification for the regulations I have set out my conclusions that the operation of the scheme is delivering a systematically higher rate of return than the original objective of 12%. I fully agree with the opinion of the Comptroller and Auditor General set out in his June 2016 report that there was an unacceptably high rate of return for businesses taking advantage of the non-domestic scheme in Northern Ireland. The 2017 Regulations seek to address the critical mistakes which led to that rate of return. This objective was central to the design of the scheme and was announced prior to its inception at the time of the public consultation. It also formed the basis upon which the European Commission approved the scheme. The tariff changes are being introduced at a time when, on average, participants have already received support payments in excess of their initial capital investment.

[422] I am also satisfied that the continuation of the 2012 Scheme, absent the 2017 Regulations, will have severe consequences for the Northern Ireland budget which I have found to be close to the anticipated £0.7bn put forward by the respondent, albeit with some caveats and adjustments. I accept that there is an obvious and significant public interest in ensuring that expenditure on the scheme remains within HMT budgets.

[423] I also consider the interference was "*provided for by law*". I have already set out my conclusion that the respondent was entitled to make the regulations under Section 113 of the Energy Act, subject to public law considerations and the issue of fairness.

[424] In essence the issue of justification turns on the question of proportionality. In the *Cusack* case Lord Carnwath said with regard to proportionality of the interference:

> *"49. The cases show that the issue of proportionality can be expanded into the following question:*
>
> > *'whether the interference with the applicants' right to peaceful enjoyment of their possessions struck the requisite fair balance between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights, or whether it imposed a disproportionate and excessive burden on them.' (Bugajny v Poland 6 November 2007, para 67)."*

[425] In terms of striking the requisite fair balance the following matters are relevant or *"pointers"* in the language of the *Finucane* judgment.

[426] The regulations are prospective and do not purport to recoup payments already made.

[427] The regulations will still provide an average return in excess of the anticipated 12% rate of return, notwithstanding the fact that most operators will already have received more than their original outlay.

[428] The 2012 Regulations are an interim measure only. Any future revisions will be based upon a review which will involve further public consultation, legislative scrutiny and Commission approval.

[429] It is also important to consider the circumstances of DA who is the applicant who can assert A1 P1 rights and legitimate expectations.

[430] DA has relied on the 2012 Regulations which expressly provided a guaranteed fixed payment for a period of 20 years in respect of heat used by an accredited installation, subject to certain conditions which are not at play in this application. A fundamental feature of the regulations was the "*grandfathering*" of the payments. This principle was a feature of all the material considered by the Department in making the regulations and was reinforced by the relevant Minister, for example, in encouraging lending institutions to take account of the certainty of the payments in considering applications for funding for relevant installations.

[431] Acting on the Regulations, DA incurred significant capital expenditure in purchasing and installing renewable heat installations in order to obtain accreditation. He obtained significant bank loans and expended savings in support of his capital investment. In addition he incurred significant costs associated with fuel, servicing, loan interest, insurance and other outgoings. He has invested in significant operational infrastructure in his business which was predicated on his anticipation that he would receive the payments for a 20 year period. The effect of

the 2017 Regulations will be to significantly reduce the payments to which he was entitled under the scheme for at least a one year period.

[432] To date DA has already received payments amounting to £226,589 against capital costs of £111,000 in his application form. On the basis of the methodology underpinning the scheme this has already resulted in a 204.1% payment as a percentage of capital spend. If he continues to receive payments on the original basis it is estimated that he will receive a total of £2,549,276. Under the old tariff he would continue to receive an annual payment of £117,443 as opposed to a revised annual payment of £49,617, which on the respondent's figures is well in excess of the annual payment for a 12% rate of return, being £32,259. These figures demonstrate that the second applicant in this case, absent the 2017 Regulations, will receive payments way beyond what was anticipated for this scheme. They clearly constitute "*overcompensation*". The reduced figures payable are much closer to the original intention of the scheme.

[433] In relation to DA's rights Mr Simpson points out that a deprivation of property, absent compensation, is normally unlawful. In *Lithgow v United Kingdom* [1986] ECHR 8 the court said that:

> *"… The taking of property in the public interest without compensation is treated as justifiable only in exceptional circumstances …"*

[434] I have already determined that the interference under the 2017 Regulations constitutes a control of DA's possessions rather than a deprivation. In those circumstances the issue of compensation is not decisive. In so far as it is relevant the test remains whether the interference is proportionate. Having regard to the particular circumstances of DA, I do not consider that a failure to provide him compensation as a consequence of the 2017 Regulations renders the interference unlawful. This is underlined by the overall purpose of the regulations and the fact that they are an interim measure. Should the issue of compensation be raised in the future consultation exercise to be conducted when reviewing the 2017 Regulations it can be given full consideration by the Department.

[435] In terms of the legitimate expectation to consultation I consider that the departure was justified in this case. The circumstances of extreme political urgency and practical impossibility created a unique imperative on the respondent to act before the dissolution of the Assembly.

[436] I am also influenced by the fact that full consultation will take place in the course of the Department's review of the scheme.

[437] In conducting the ultimate balancing test between the demands of the general interests of the public and the requirements of the protection of the individual's

fundamental rights I am particularly influenced by my conclusion that the tariffs are being used to subsidise and support businesses rather than bridging the gap between the cost of converting heating systems which is their real purpose.

[438] I do not consider that the regulations impose a disproportionate or excessive burden on the persons affected given the actual impact on the individuals of the 2017 Regulations. I take a similar view in relation to the particular circumstances of the second applicant who has already benefited beyond what was anticipated in the original scheme and who will continue to receive payments under the 2017 Regulations in accordance with those objectives.

[439] I do not consider that they represent an abuse of power. I have come to the conclusion that there is a compelling public interest justifying the interference with the rights of the affected persons under the 2012 Regulations. I consider that the 2017 Regulations strike the requisite fair balance between the public interest and the individual rights of the affected persons.

[440] I recognise that the introduction and operation of the RHI Scheme has had a damaging effect on public confidence in good administration in this jurisdiction. There is a compelling public interest in permitting the Department to correct the obvious errors and flaws in the scheme it introduced. I also accept that in doing so there is a risk that this may reduce the public's confidence in relying on future guidelines and policies promulgated by Government Departments, but the circumstances of this case are exceptional.

[441] Turning to the specific issues raised in the case I conclude that the 2017 Regulations are not so unfair that Parliament could not have intended that the Department did not have the power to make the 2017 Regulations.

[442] I therefore conclude that the regulations are not *ultra vires*. I conclude that the interference by the respondent with the second applicant's A1 P1 rights and substantive and procedural legitimate expectations are justified.

[443] I have concluded that the 2017 Regulations are not in breach of the Northern Ireland Assembly Standing Order 43 and even if they were I would not grant any relief on that point.

[444] It follows therefore that the regulations are neither *"Wednesbury unreasonable"* or irrational.

[445] Accordingly, I dismiss the application for judicial review.