

2008 No 003122-01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY
AES KILROOT POWER LIMITED
FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DETERMINATION OF THE
NORTHERN IRELAND AUTHORITY FOR UTILITY
REGULATION DATED 23 OCTOBER 2007

GIRVAN LJ

Introduction

[1] The applicant AES Kilroot Limited ("Kilroot") is the holder of an electricity generation licence and is a party to four separate Generation Unit Agreements ("the GUAs") under which Kilroot is obliged to provide power for consideration to NIE Energy Limited as intermediary and counter party to the GUAs. The licence contains a condition ("the cancellation condition") which provides for the circumstances in which the Northern Ireland Authority for Utility Regulation ("the Authority") may, before the expiration of the contractual term, cancel the GUAs subject to the fulfilment of a number of procedural requirements and subject to the fulfilment of certain conditions. Purporting to act pursuant to the terms of the cancellation conditions the Authority on 23 October 2007 published a determination that the requisite arrangements for the purposes of the cancellation condition had been developed and that they satisfied the requisite requirements specified in the cancellation clause. On 1 November 2007 the Authority gave written reasons for making the determination in a document described as "Rationale for determination that SEM constitutes requisite arrangements" ("the Rationale"). The Authority concluded that the Single Electricity Market (the "SEM")

constitutes requisite arrangements meeting the requirements of paragraph 2 and 3 of the cancellation condition and that the consultation process followed in establishing the SEM met the requirements of paragraph 6 thereof. In these proceedings Kilroot challenges the lawfulness of the determination. It seeks a declaration that the determination is unlawful in failing to comply with the requirements of the licence; a declaration that the determination was procedurally unfair; and a declaration that the determination is irrational. It seeks an order of certiorari to quash the determination.

The context of the application

[2] In order to understand the application and to put it in its proper legal context it is necessary to understand the legal and factual background to the GUAs and the current cancellation clause applicable to them. This involves considering the context in which the GUAs were entered into and what they involved, the background to the cancellation clause, how that clause came to take its present form and why the question of cancellation of the GUAs is a contentious issue as between Kilroot and the Authority. In particular it is necessary to explore the nature and evolution of the SEM and its impact on the GUAs.

[3] Prior to 1992 the generation, transmission, distribution and supply of electricity to all consumers in Northern Ireland was a public function performed by Northern Ireland Electricity (“NIE”), a state owned company. Following the privatisation of the electricity industry in Great Britain the government in Northern Ireland proceeded to privatise the Northern Ireland industry. This involved the disposal of the Northern Ireland power stations with the remainder of the industry involved in electricity supply, transmission and distribution being retained in the control of NIE plc. Long term bilateral contracts known as Power Purchase Agreements (“PPAs”) were to govern the relationship between the new generating companies and NIE plc. These PPAs had two components namely a power station agreement relating to the stations’ operation and a number of individual GUAs relating to each power station. These GUAs contained provisions relating to the purchase and payment of electricity.

[4] The GUAs made provision for two categories of payment, namely energy payments and availability payments. The former represented reimbursement of production and dispatch costs. The latter represented the amount paid to the generating company for having a generating unit available to produce electricity if required. These latter payments were payable irrespective of whether the electricity was actually produced. The payments were guaranteed and inflation linked. The cost of the payments fell ultimately on electricity consumers. The thinking behind providing an attractive guaranteed income flow to potential buyers of the power stations was to enable purchasers to finance long term operations and to provide an

incentive to power stations to be available and in a position to generate electricity. This in turn benefited consumers in ensuring security of supply.

[5] In 1992 prior to privatisation there were in Northern Ireland four power stations at Ballylumford, Kilroot, Coolkeeragh and Belfast West. These were sold under the privatisation arrangements. AES/ Tractebel Consortium acquired Kilroot and Belfast West. Each power station was bought with the benefit of a PPA in place which included the GUA provisions. Since 1993 there have been a number of changes in the operation of the power stations. For example, Belfast West has since closed down.

[6] In recognition that there was limited scope for competition in the generating sector and that parts of NIE plc activities were natural monopolies the Electricity (Northern Ireland) Order 1992 (“the 1992 Order”) provided for the establishment of an independent electricity regulator, the Director General of Electricity Supply for Northern Ireland with power to issue and regulate licences to the various bodies carrying on business in the electricity market. The Energy (Northern Ireland) Order 2003 (“the 2003 Order”) transferred those functions to the Northern Ireland Authority for Energy Regulation. Its functions were transferred to the Authority in 2007.

[7] Kilroot was granted a generating licence pursuant to article 10 of the 1992 Order. It conferred on Kilroot a licence to generate electricity for the purpose, during the period and subject to conditions therein set out. Condition 20 (“the original cancellation condition”) empowered the regulator to serve a notice on Kilroot determining its GUAs before the contractual expiry date. The regulator was entitled to incorporate such a cancellation condition in the licence having regard to article 11(5) of the 1992 Order. The GUAs were to have a 32 year term commencing on 1 April 1992 and expiring on 31 March 2024. When the conditions of the cancellation condition were satisfied the GUAs could be determined before the end of the contractual term but not before 1 November 2010 (“the permitted cancellation date”).

[8] One of the objectives of privatisation was to encourage competition leading to lower prices for customers. The isolation and small size of the Northern Ireland market and the difficulties of attracting investment at the time made that object difficult to achieve. In 1994 the Northern Ireland Audit Office (“NIAO”) identified the availability payment arrangements under the GUAs as a significant factor in keeping Northern Ireland electricity costs to consumers relatively high. The NIAO Report concluded that the financial arrangements enabled the generating companies to earn a level of profits greater than envisaged at the time of privatisation. Over a relatively short period following privatisation improvements in availability levels resulted in significant increases and hence higher availability payments. In other words when the GUA arrangements were first set up there had been a significant under-estimation of the future ongoing cost of the availability payments that

would ultimately fall on the shoulders of electricity consumers. Consultants commissioned by the regulator concluded that the existence of long term contracts between NIE plc and the operating companies meant that there was little incentive for generators to move to a more competitive generating environment. Put more simply the existence of the GUAs contributed to the significant lack of competition in the Northern Ireland electricity market.

[9] After privatisation electricity tariffs in Northern Ireland continued to be significantly higher than those applicable in the rest of the United Kingdom. These increased costs flowed from a number of factors including the size of Northern Ireland, the higher costs of maintaining system security, higher costs of generation since all fuel had to be imported adding to the costs of raw materials and the legacy of the privatisation contracts or PPAs. London Economics, a firm of consultants engaged by the regulator in 1997, were of the opinion that “excess price relative to the market levels would persist in the absence of any action until at least 2010 given the terms of the contracts.”

[10] In the course of the 1990s the relevant Department in collaboration with the regulator, participants in the electricity industry and other key stakeholders sought to achieve the realisation of an energy policy aimed at greater efficiency, lower costs, diversification of supply and security of supply. Following the Strategy 2010 Report and reports produced by the Enterprise Trade and Investment Committee of the Northern Ireland Assembly the Department published a consultation paper in 2002 which explored the options available for addressing the issue of over priced long term contracts, power stations with low efficiencies and lack of competition. A further consultation paper in March 2003 issued by the regulator acknowledged that the benefits of more cross-border trade in electricity and the development of a single energy market had not yet been quantified. Following the outcome of the consultation by the regulator he concluded that the best future for the Northern Ireland electricity market lay in developing a trading mechanism across the island of Ireland more akin to a trading pool.

[11] The 2003 Order made changes to the statutory powers and duties of both the department and the regulator. Article 12 of that Order provided –

“The principal objective of the Department and the Authority in carrying out their respective electricity functions is to protect the interests of consumers of electricity supply by authorised suppliers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the generation, transmission or supply of electricity.”

Article 12(2) required the Department and the Authority to carry out their functions having regard to (inter alia) the need to secure that the reasonable demands for electricity are met and the need to secure that licence holders are able to finance their activities which are the subject of obligations imposed by or under Part II of the 1992 or 2003 Orders.

[12] The thrust of European Union policy has been to move to a more competitive electricity market across the EU. The rationale of this policy is that a liberalised single market will increase efficiencies by introducing competitive forces into the market leading to lower consumer prices and lower production costs. The policy stimulus for the creation of a single electricity market within the island of Ireland derived from those policy objectives and from the Good Friday Agreement. The United Kingdom and Irish government established a non statutory joint steering group asked by the two Governments to formulate proposals as to how harmonisation might be achieved. It produced the All Island Energy Market Development Framework in 2004. It identified as a priority the development of a single electricity market to permit all-island trading in wholesale electricity. A Memorandum of Understanding (“the MOU”) presented to Parliament in December 2006 set out the two Government’s expectations about the promotion of a competitive market. Amongst other things the Memorandum stated:

“The Authorities intend that SEM arrangements will be designed to promote the creation of a single competitive, sustainable and reliable market in wholesale electricity in Northern Ireland and Ireland within the context of the European Union’s policy on the creation of an EU wide internal market for electricity, while aiming to minimise the cost of establishing such a market.

In particular the authorities intend that the SEM arrangements will, among other things:

- (a) be transparent, integrated and promote competition in the sale and purchase of wholesale electricity on an all island basis and thereby enhance prospects for investment in the electricity in Northern Ireland and Ireland.”

[13] For the purpose of establishing and operating the SEM and as part of the SEM proposed legislation proposed was to include (inter alia) provisions and arrangements necessary or expedient to address issues arising from implementation or in consequence of the introduction of the SEM including provisions designed to ensure that the ability of the Authority to direct the

cancellation of existing cancellable GUAs in Northern Ireland would not be prejudiced by the introduction of the SEM recognising that such contacts were likely to subsist following implementation of the new trading arrangements subject to such amendments as may be considered necessary or expedient in connection with or in consequence of the implementation or operation of the SEM.

[14] The regulators in the two jurisdictions were charged with devising and formulating detailed trading arrangements which would be operated on the establishment of the SEM. In 2005 they issued a high level design paper for public consultation containing proposals for the operating arrangements of the SEM. Public consultation on the draft implementing legislation took place from 1 November 2006 to January 2007. A partial regulatory impact assessment into the effects of the draft legislation and the results of that assessment were included in the public consultation. The MOU was made available for consideration.

[15] NERA Economic Consulting were commissioned to prepare an independent cost benefit analysis. Published in November 2006 it estimated a net quantifiable social benefit to consumers of £100m over a 10 year period from efficiency and economies of scale. The impact on the Northern Ireland Electricity consumers' bills was estimated to be approximately 1%. This conclusion depended on a number of assumptions and the conclusions were tentative.

[16] The Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 ("the SEM Order") was introduced in March 2007 and parallel legislation was passed by the Irish Oireachtas in the form of the Electricity Regulation (Amendment) (Single Electricity Market) Act 2007 on 5 March 2007. Article 9(1) of the SEM Order sets out the principal duties and objectives of the Department, the Authority and the SEM Committee in relation to SEM. The principal object was described as being "to protect the interests of consumers of electricity in Northern Ireland and Ireland supplied by authorised persons, wherever appropriate by promoting effective competition between persons engaged in or in commercial activities connected with, the sale or purchase of electricity through the SEM."

[17] The key features of the operation of the SEM include a gross mandatory pool mechanism in which all generators of 10 MWs or over must trade; a single trading and settlement code; capacity payments to cover the availability costs of generators and a market operator to manage day to day trading. Generating companies submit offers to the market operator to trade electricity through the pool. Despatch instructions are then issued. Generally the most efficient plans will be despatched first. The market operator matches offers to demand from the supply companies. It also determines the price of supply based on bids received. Bids and prices are supposed to be transparent and visible to all

parties. The implementing legislation provides a number of regulatory features designed to ensure consistent regulation of the SEM in both jurisdictions. Article 6 provided for the establishment of a SEM Committee. Any decision on the exercise of a relevant function of the Authority in relation to SEM must be taken on behalf of the Authority by the SEM Committee. A market monitoring unit reports to the SEM Committee in respect of any irregular market behaviour and possible abuses of market power. The SEM began operations on 1 November 2007 a date described in the documentation as the “Go-Live” date.

The cancellation condition

[18] As part of the framework for the SEM provision was made in article 3 of the SEM Order for modification of conditions in a particular licence. Article 3 conferred upon the Department after consultation with the Authority or on the Authority with the consent of the Department where it considered it necessary and expedient to do so a power to modify licence conditions for the purpose of implementing or facilitating the operation of the SEM or in consequence of or for giving full effect to the SEM. Following consultation commenced in April 2007 and acting pursuant to article 3 which included the duty to consult under article 3(4) the Authority did modify the terms of the cancellation condition contained in Kilroot’s licence. The modified condition, formally numbered 20 and now renumbered 15 of the licence conditions so far as material provides –

Modification of Supply Competition Code and cancellation of contracts

1. When the Authority shall have determined that the requisite arrangements have been developed and that they satisfy the requirements of paragraph 3, it shall be entitled to exercise the powers specified in paragraph 4, provided that the procedural requirements of paragraph 6 have been followed.
2. The requisite arrangements are arrangements which, if implemented by means of the making of modifications of the Supply Competition Code, the Grid Code and the Northern Ireland Fuel Security Code, or otherwise implemented (in whole or in part) under or by virtue of the powers contained in the Electricity (Single Wholesale Market) (Northern Ireland) Order 2007, would facilitate an increase in competition in the generation of electricity available for supply in Northern Ireland or the supply of electricity in Northern Ireland for the benefit of consumers of electricity in Northern Ireland in respect of the price charged and the other terms of supply, the continuity of supply and the quality of the electricity supply services provided.
3. The requirements of this paragraph are:

- (A) that there is available for immediate establishment an electricity trading system by which (except as provided in paragraph 7) the power procurement manager and all licence holders will be bound and which, in the opinion of the Authority, will:
- (i) constitute proper and adequate arrangements for the trading of electricity and the calculation and settlement of payments due for the provision of available generating capacity and the delivery or supply of electricity;
 - (ii) ensure that adequate arrangements are in place for the provision by relevant generators of all necessary System Support Services and the proper remuneration of those services;
 - (iii) be based upon a system of despatch of generation sets which is technically viable and will not prejudice the security and stability of the total system of any part of it;
 - (iv) ensure that there are adequate incentives for relevant generators to make available such generation capacity as will in aggregate be at least sufficient to ensure that all reasonable demands for electricity in Northern Ireland are satisfied;
 - (v) ensure that all generators and relevant licensed suppliers are contractually bound to comply with the provisions of the Northern Ireland Fuel Security Code or, to the extent superseded by any other code or arrangement, such other code or arrangement;
 - (vi) ensure that either -
 - (a) relevant suppliers shall contract for or acquire, in aggregate, amounts of generation capacity and quantities of electricity from the power procurement manager which are not less than the amounts of generation capacity and quantities of electricity for which the power procurement manager is committed to pay under:
 - A. the power purchase agreements to which the power procurement manager is a party and which are cancellable generating unit agreements which at all relevant times have not been cancelled; and

B. the power purchase agreements to which the power procurement manager is a party and which are not liable to be cancelled;

or:

(b) arrangements are in place pursuant to which the power procurement manager is entitled to recover monies equal to the shortfall (if any) between the sums it pays for amounts of generation capacity and quantities of electricity under:

A. the power purchase agreements to which the power procurement manager is a party and which are cancellable generating unit agreements which at all relevant times have not been cancelled; and

B. any power purchase agreements to which the power procurement manager is a party and which are not liable to be cancelled;

and the amounts it recovers for the provision of such quantities of electricity.

- (vii) not in its operation require any generator to breach any obligation incumbent upon it under the Large Combustion Plants (Control of Emissions) Regulations (Northern Ireland) 1991 in relation to emissions;
- (viii) contain arrangements which will ensure that each generator which shall be a party to a cancellable generating unit agreement, for so long as such agreement shall not have been cancelled, shall be in no worse a financial position in respect of its rights under that cancellable generator unit agreement by reason of the operation of Clause 7.3.2 of each power station agreement;
- (ix) ensure that an appropriate share of the costs of the Land Bank Business shall be borne by each relevant supplier;
- (x) not, in its operation, cause the licensee to be unable to finance the carrying on of the activities which it is authorised by this licence to carry on.

(B)

4. The powers referred to in paragraph 1 are powers to serve upon the power procurement manager and the generator under a cancellable generating unit agreement a notice directing them to terminate the cancellable generating unit agreement pursuant to Clause 9.3 thereof upon such date or the happening of such event as shall be specified in the notice. The licensee shall comply with such a direction address to him.
5. The powers specified in paragraph 4 may not be exercised in relation to any cancellable generating unit agreement in the table appearing in Schedule 2 earlier than the date appearing opposite that cancellable generating unit agreement in that table. The Authority may, in relation to any cancellable generating unit agreement and upon the application of either party to that cancellable generating unit agreement, modify the table appearing in Schedule 2 by substituting a later date for the date appearing opposite that agreement in that table.
6. The procedural requirements which require to have been followed for the purposes of paragraph 1 are:
 - (a) in its preparations for the making of the determination referred to in paragraph 1, the Authority shall have consulted with the Department, all licence holders, the power procurement manager, the General Consumer Council and such other persons as the Authority shall consider likely to be materially affected in relation to the steps that it believes require to be taken and the documentation and other obligations which it believes require to be entered into, imposed or assumed in order to satisfy the requirements of paragraph 3 and to create and implement the requisite arrangements;
 - (b) in the consultations referred to in sub-paragraph (a) above, the Authority shall have made available to each person so consulted such drafts of the documentation in question and of the instruments or other means by which the obligations in question are to be imposed or assumed, as it shall consider are necessary so as properly to inform such persons of the detail of its proposals;
 - (c) the Authority shall have given each person so consulted the opportunity to make representations in relation to the relevant steps and the relevant documentation and shall have taken into consideration all such representations (other than those which are frivolous or trivial) in making the determination;

- (d) the Authority shall have published its conclusions as to the relevant steps and the relevant documentation (including drafts of the relevant documentation) and its reasons for those conclusions;
- (e) the Authority shall, before exercising any power under paragraph 4, have given not less than 180 days' notice to the Department, the power procurement manager, every person who at the time it gives the notice is a licence holder, and the General Consumer Council that it intends to do so; and
- (f) the Authority shall, in publishing any statement of proposals or the reasons for them, have treated as confidential any representation (including any submission of any written material) which (and to the extent that) the person making the representation shall, by notice in writing to the Authority or by endorsement on the representation of words indicating the confidential nature of such representation, have specified as confidential information.

7.

8. Notwithstanding paragraph 6, the Authority shall be entitled, after having carried out the consultations referred to in paragraph 6 and published its conclusions, both before and after it shall have given any notice of the kind referred to in sub-paragraph (e) of paragraph 6, to make any modification of the relevant documentation which either:

- (a) is, in its opinion, necessary or desirable in order to refine the requisite arrangements;
- (b) involves only a change of a technical nature in the requisite arrangements; and
- (c) will not increase the liability or decrease the rights of any person bound or to be bound by the Supply Competition Code beyond what may be regarded as reasonable in relation to that person;

provided it gives due notice of such amendment or variation to such persons as appear to it to be likely to be affected thereby.

or

is made in accordance with the provisions of the relevant documentation being modified.

9. The implementation of the requisite arrangements may be secured (in whole or in part) either –
- (a) ...
 - (b) by the exercise of powers under or by virtue of the Electricity (Single Market) Northern Ireland Order 2007.

12. In this Condition:

“relevant documentation” means the documentation and other obligations referred to in sub-paragraph (a) of paragraph 6;

“relevant steps” means the steps referred to in sub-paragraph (a) of paragraph 6;

and

“requisite arrangements” means the arrangements referred to as such in paragraph 2.

The determination

[20] According to its determination, the Authority determined that the arrangements which took the form of the SEM constituted the development of requisite arrangements in accordance with paragraph 2 of the cancellation condition and that those arrangements satisfied each of the requirements of paragraph 3 of the cancellation condition.

Kilroot’s challenge to the determination

[21] Mr Hanna QC and Mr Kennelly on behalf of Kilroot challenged the lawfulness of the determination on a number of grounds. Kilroot’s first challenge lies in relation to the alleged legal defects in the consultation process leading up to the determination (“the consultation challenge”). Its second challenge relates to alleged failure on the part of the Authority to satisfy the various requirements of paragraph 2 of the cancellation condition. Interlinked to that challenge is an allegation of Wednesbury irrationality on the part of the Authority. The third challenge is based on an alleged failure by the Authority to properly take account of the requirements of paragraphs 3(A)(ii), (iv) and (x).

The consultation challenge

[22] It was argued that the SEM was developed over the course of 3 years prior to the commencement of the new trading system at the go live date. The process began with a memorandum of 23 August 2004 between the Authority in Northern Ireland and its counterpart in the Republic of Ireland the Commission for Energy Regulation. It proceeded through the publication of the development framework consultations on the high level design of the SEM, the MOU, the making of the SEM order, fixing a “go active” date in July 2007 and coming to ultimate fruition at the go live date. A massive amount of work was carried out in relation to the creative design and implementation of the SEM. As time went by any effective opportunity for change progressively reduced. The majority of the elements of the legal framework for SEM were in place by 3 July 2007 at the go active date. Mr Hanna contended that all the main steps in relation to the creation and implementation of the SEM occurred before July 2007 when the Authority produced a consultation paper which was made available to Kilroot to purportedly lay the basis for consultation on the question whether there should be a determination that requisite arrangements had been developed which satisfied the requirements of paragraphs 2 and 3 of the cancellation condition. Key to Kilroot’s case is Mr Hanna’s proposition that Kilroot should have been consulted at the outset of the creative process in relation to the steps that the Authority believed required to be taken to create requisite arrangements for the purposes of the cancellation condition. Kilroot should have been consulted before the steps were taken so that Kilroot would have a fair opportunity to influence the nature of those steps at a stage when they were still at the formative stage. Kilroot should have been made clearly and unambiguously aware that it was in effect being consulted under paragraph 6 of the cancellation condition so that it could understand from the outset that there was a proposal under consideration which could lead to the early cancellation of the GUAs. The obligation under paragraph 6(a) of the consultation condition clearly pointed to a duty to consult on steps, documents and other obligations necessary in order to satisfy the requirements of paragraph 3 and to create and implement the requisite arrangements. The Authority wrongly considered that its duty was to consult only in order to satisfy the requirements of paragraph 3 after and not before the event. The Authority thus only consulted with hindsight.

[23] Mr Hanna relied on authorities including ex parte Coughlan [2001] QB 213; R (Greenpeace) Limited v. Secretary of State for Trade and Industry [2007] EWHC 311 and R v. Barnett London Borough Council (ex parte B) [1994] ELR 357. He argued that the consultation process in this case fell significantly below the level of proper consultation which must take place at a time when proposals were still in a formative stage.

[24] Kilroot argued that the Authority could not treat the pre-July 2007 consultation process relating to the establishment and implementation of the

SEM as consultation on requisite arrangements for the purposes of cancellation condition. Counsel argued that there was a major difference between (1) a proposal to create, implement and develop a SEM which is not intended to constitute requisite arrangements under the cancellation condition and (2) a proposal to create, implement and develop a SEM intended to constitute requisite arrangements. It was argued that on previous occasions when consideration was being given to the possibility of making a determination under the cancellation condition the matter had to be raised clearly and explicitly. Kilroot was entitled to assume that this practice would continue. On 2 April 2007 the Authority assured Kilroot that consultation on the cancellation condition would be conducted separately. Kilroot argues that this was inconsistent with the contention that the Authority had been consulting on the requisite arrangements all along. It was Kilroot's case that its valuable interest in the GUAs should not have been put at risk without this having been made clear.

[25] The course of the consultation pointed away from the Authority's case that it was consulting all along in relation to arrangements that would satisfy the requisite arrangements for the purpose of the cancellation condition. It was unreasonable and lacking in procedural fairness to suggest that Kilroot should have worked this out for itself by reading through the 257 consultation papers listed in the affidavit of Mr McCann.

The Authority's response to the consultation challenge

[26] Mr Larkin QC and Mr Scoffield who appeared on behalf of the Authority sought on their argument to put the determination in what they contended was its proper context. Mr Larkin contended that the 2010 date for the possibility of the possible cancellation of the GUAs was clearly connected to the fact that the guaranteed minimum life to 2010 permitted the shareholders of Kilroot to be sure that they could recover the costs of their initial investment. That investment was bond financed and the bond would be repaid by 2010. It had been the view of the NIAO and at least three independent experts and the former electricity regulator that the GUAs permitted Kilroot to receive sums for electricity and other services significantly in excess of prevailing market values. Mr Larkin pointed out that the GUAs have not been cancelled nor will they necessarily be cancelled by 2010. Although in the present market the GUAs are essentially anti-competitive on their face and maintained at a cost to the consumers in future market climates they might represent value for the consumer. All the determination means is that there is now a trading system in place which is such that come 2010 the possibility of a cancellation can be considered.

[27] The SEM was developed in its own right for the benefit of electricity consumers. The two Governments and the two regulators did not set out to create and implement requisite arrangements so as to render Kilroot's GUAs

cancellable. Rather they set out to create an all island competitive industry trading system. Once they had done so the Authority addressed its mind to whether this new trading system might constitute the requisite arrangements. It must clearly have been obvious to Kilroot that the development of a market such as the SEM had the potential to be an electricity trading system which facilitated competition so as to provide a new context in which the GUAs might be liable to termination. If Kilroot's consultation challenge were correct it results in the SEM having to be undone and subjected to consultation all over again in order for the SEM to constitute requisite arrangements.

[28] Consultation began at the most formative stage of the development of the SEM in March 2005. That took place over a 2 ½ year period and the consultations were lengthy, detailed and full with 257 consultation and decision documents. Kilroot played an active role as a consultee. The consultation process concluded with a consultation paper issued on 6 July concerned specifically with the question whether the authorities should make the determination. Kilroot had a fair and proper opportunity to influence the nature of the relevant steps at a formative stage and before any decision concerning the development of the SEM became set in stone. The Authority consulted in relation to all the steps required to create a trading system which satisfied each of the requirements. The intention at paragraph 6 is to give all interested parties not merely Kilroot the chance to comment on and contribute to the development of the arrangements. The proposals of a new system is subjected to industry scrutiny. Mr McIlldoon, former Chief Executive and Chairman of the statutory predecessor to the Authority in his affidavit in paragraph 7 stated that he personally met with Kilroot on many occasions between 1995 to 2005 to discuss the renegotiation or cancellations of the contracts. He distinctly recalled talking to Kilroot about the qualities of the SEM market from the prospective of the potential cancellation of the Kilroot GUAs. Mr Larkin sought to argue that paragraph 3(A) makes clear that the determination on potential requisite arrangements must take place when there is ready for immediate establishment an electricity trading system by which all licence holders will be bound and which satisfies the requirements of the condition. This points to consultation at a time when the system is ready for implementation i.e. before the go live stage. The 6 July consultation satisfied the requirements. There was still an opportunity for the go-live date to be postponed and, if necessary, for the key aspects of the SEM to be modified. It was not set in stone. Mr Larkin rejected Kilroot's proposition that the earliest point at which Kilroot became aware of the intention to make a determination under paragraph 1 of the cancellation condition was the publication of the consultation document in July 2007. Even on its own case it was aware of such an intention from April 2007 when consultation began as the amendment of the cancellation condition.

The paragraph 2 and paragraph 3 challenges

[29] Kilroot's challenge was also argued on the basis that the Authority had erred in that it had failed to satisfy the test set out in paragraphs 2 and 3 of the cancellation conditions. It could not assess any increase in competition without first determining the counter-factual. The Authority had to have the material available to it that showed that the new arrangements if implemented would facilitate and increase in competition in the generation of electricity available for supply in Northern Ireland. This assessment had to be forward looking. The Authority had to carry out a forward looking examination of the SEM or to the relevant comparator. Paragraph 8 of the Rationale led to the assumed conclusion that the requirements of paragraph 2 of the cancellation condition were fulfilled. It was claimed that Kilroot had consistently sought to argue that the Authority had failed to show that the SEM would facilitate competition because of three outstanding and unresolved problems namely the dominance in the SEM of the Irish ESB, the uncompetitive aspects of the bidding system and the very high level of state intervention in the Republic of Ireland in respect of ESB, Board Gáis Energy and Bord na Móna. Under the new arrangements there is insufficient structural change to the ESB to mitigate its dominance. The uncompetitive bidding system applies without distinction to all operators including Kilroot. It was strongly argued that the Authority's attempt did go far enough to control the ESB but succeeded in distorting competition from other smaller organisations. The introduction of such a dominant undertaking into the Northern Ireland situation would be to distort competition and to discourage investment. Mr Lynch in his affidavit referred to the allegedly anti competitive stance of the ESB and its state-aided investments being carried out in the Republic by ESB. He said new state aid rules were insufficient to control ESB's dominance. They were not being effectively policed.

[30] Mr Hanna also argued that the Authority had failed to show that the alleged increase in competition would be for the benefit of consumers of electricity in Northern Ireland in respect of the particular matters in paragraph 2. The Authority had failed to address the risk of the dominance of ESB and Viridian taking any benefits from the SEM rather than those benefits going to consumers. Increased competition was not the same as increased regulation which needed to deal with the anti competitive situation brought about by giving the ESB such an entrenched position in the market. The cost benefit analysis carried out by the Authority's economics consultant firm NERA predicted a very marginal benefit to consumers in Northern Ireland and that was making favourable assumptions which were by no means certain. New investors would be unlikely to invest in the market until they had seen SEM operating and seen outcomes working for a period. Furthermore the SEM market would reduce security supply for Northern Ireland consumers because of a loss of load expectation. The Northern Ireland loss of load expectation stood at 4.9 hours. The SEM standard was now 8 hours per year for the whole

of the island. There would be no incentive to work to a higher standard than that because of tax incentives and advantages in the Republic of Ireland. New generators would locate in the Republic of Ireland and not in Northern Ireland and Northern Ireland consumers would increasingly become dependent on supplies from the Republic with a reduction of indigenous generation in Northern Ireland. In combination with the limitations in inter-connection capacity the disincentive to build new capacity in Northern Ireland was likely to result in the deterioration in the continuity of supplies in Northern Ireland and not a benefit. It was argued that none of these points was dealt with adequately in the Rationale.

The paragraph 3 challenge

[31] Kilroot raised three additional points against the determination arising out of an alleged failure to show that the requirements of paragraphs 3(A)(ii), (iv) and (x) were satisfied. It is alleged that the payments for ancillary services provided had been fixed at the same price since 1999 and will continue to do so under the SEM. This payment is therefore unlikely to amount to proper remuneration. The Authority has, it is alleged, failed to address how the payment could be in any way said to reflect costs in the market place. In relation to paragraph 3 (iv) the Authority has failed to show that there are adequate incentives for relevant generators to make available such generation capacity as will in aggregate be at least sufficient to ensure that all reasonable demands for electricity in Northern Ireland are satisfied. The dominance of the ESB in the Republic of Ireland, the failure to address the issue of state support in Republic, the SEM's lack of support for new investment in Northern Ireland, the higher corporation tax in Northern Ireland and the fact that transmission loss adjustment factors in the SEM favoured investment in the Republic were all factors which it was alleged supported Mr Lynch's view that there were no controls on Northern Ireland generators exiting the market. These factors showed that paragraph 3(A)(iv) was not satisfied. Relying on 3(A)(x) it was argued that the Authority had not shown that the new SEM arrangements would not cause Kilroot to be unable to finance the carrying on of its activities as authorised by the licence.

The Authority's response to the paragraph 2 and 3 challenges

[32] Counsel argued that the court should be astute to avoid contradicting a conscientious decision maker making a judgment in good faith and with knowledge of all the facts especially when the judgment was made by an economic regulator exercising expert judgment. In such cases the constraining role of the court is modest. The applicant in this case had no basis for a rationality challenge to the determination. The Authority did not have to show that the SEM arrangements would promote competition. It was inappropriate and unnecessary to prove a counter-factual. In reaching its decisions the Authority was obliged by article 9 of the SEM Order to protect the interests of

consumers of electricity by promoting effective competition between persons engaged in or commercial activities connected with the sale or purchase of electricity. The Authority was aware of the questions of market dominance and the SEM arrangements were designed to ensure that there were in place mechanisms to promote effective competition within the SEM. Kilroot's challenge to the effectiveness of those mechanisms is an illegitimate attempt to open up a merits review. Kilroot's complaint that the system security standard had been reduced under SEM was misconceived. A notional standard of 8 hours LOLE applied to the whole island would still give rise to a higher system security in comparison with 4.9 hours applying to Northern Ireland. The 8 hour standard is concerned with the loss of load when it is measured across the entire island. It would yield a lower expected amount of unserved electricity energy in Northern Ireland than at 4.9 standard applying to Northern Ireland. Kilroot's allegation that the requirements of paragraph 3(A)(ii) had not been met was misconceived. The ancillary services which form part and parcel of the SEM were like its other constituent elements consulted on widely. The evidence was quite insufficient to show that the Authority's view that the present remuneration was Wednesbury irrational. Likewise the suggestion at paragraph 3(A)(x) requirement was not satisfied was misconceived.

[33] Both Mr Larkin QC and Mr Maguire QC who appeared with Mr McLaughlin for the Department of Enterprise Trade and Investment argued that the court should in any event in its discretion decline to grant any relief. Kilroot had not demonstrated any arguments that would have made any difference to the outcome of the determination. Kilroot did engage in a consultation process (the July consultation) on the very issue with which the proceedings were concerned. Mr Maguire QC argued that if it was found that there was any form of technical flaw or minor defect it would not be in the public interest to upset arrangements which had been put in place after a very costly exercise of consultation, public participation and negotiations with a large range of interested bodies. The cost of setting up the SEM according to Mr Maguire was in excess of £280 million. The applicant's challenge necessarily involves a much more major potential interference with the structure of the SEM than Kilroot alleges or realises and a large range of other persons and bodies would have to be consulted again. Mr Maguire called in aid the decision of the Court of Appeal in R v. Monopolies and Mergers Commission (ex parte Argyll Group plc) [1986] 2 All ER 257 to show that the court can and in appropriate cases should decline to grant judicial review leave where the needs of good administration call for that course.

Analysis of the cancellation condition

[34] Paragraph 1 of the cancellation condition confers a power on the Authority to serve on Kilroot a notice terminating the GUAs on such a date and the happening of such event as shall be specified in the notice. In the case of the relevant GUAs this power is not exercisable until November 2010. The power to serve such a notice however is subject to fulfilment of preconditions. The first precondition is that the Authority “shall have determined” two things. Firstly, that what are called the “requisite arrangements” have been developed. Secondly, that those arrangements satisfy the requirements of paragraph 3. The requisite arrangements are set out in paragraph 2. Thus in effect the Authority before it can exercise its termination power in paragraph 4 must determine that the requirements of both paragraphs 2 and 3 are satisfied. The second condition is that the Authority must have fulfilled the procedural requirements set out in paragraph 6.

[35] In the present instance the Authority has purported to make a determination that the requirements of paragraphs 2 and 3 have been satisfied in 2007 long before it can exercise the powers of termination under paragraph 4. Questions arise, firstly, whether paragraph 1 envisages a determination so far in advance of the permitted exercise of the power of cancellation and, secondly, whether it envisages a determination divorced from an intention on the part of the Authority to exercise its powers under paragraph 4. Both Kilroot and the Authority argued the case on the basis that a determination can properly be made in advance of any would be exercise of the power to terminate under paragraph 4 and divorced from any present intention to do so. I shall proceed on the basis that this common case is correct.

[36] Bearing in mind that there may be changes in relevant circumstances between the date of the determination and the earliest date at which the power under paragraph 4 may be exercised it seems clear that the dictates of procedural fairness will demand a further consultation process before the Authority can fairly proceed to issue a notice under paragraph 4. Mr Larkin conceded that the duties set out in articles 9 and 12 of Order call for a balancing of priorities, the protection of consumer interests, the promotion of effective competition, the need to ensure that licence holders can finance activities and so forth. When active consideration is being given to the decision whether or not to exercise the paragraph 4 power of cancellation the Authority will have to consider market circumstances prevailing at the time, information relating to the actual operation of SEM, factors affecting the interest of consumers and the circumstances of Kilroot and other market participants at the time. Mr Larkin accepted that at that stage it will be necessary to have regard to all relevant factors including the kind of requirements found in paragraph 3 of the cancellation condition. Full consultation will take place with regard to these matters. In a written submission on the context and timing implications of the

two separate functions of making a determination and serving a cancellation notice the Authority's submission concluded in paragraph 18 by stating -

"The Authority has said that it will consult on these matters at the relevant time, not as an offer to Kilroot, but because as a matter of good practice it would always seek to consult on the exercise of such a discretionary power where there is a potentially complex legal and factual matrix within which it must make its decision. The process of preparing for and undertaking consultation is the means by which the Authority informs itself of the relevant factors to which it will have regard."

[37] The accepted need for full consultation in the light of the relevant prevailing circumstances close to the date of the intended exercise of paragraph 4 powers does raise the question as to what benefit flows from a determination made in 2007. However, inasmuch as it is accepted that if validly made it fulfils the requirements of a condition precedent to the exercise of paragraph 4 power it is necessary to determine whether it has been validly made for if it has not that precondition for exercise of the paragraph 4 power would not yet exist and the Authority would have to take steps to ensure compliance. If validly made then in theory the paragraph 4 power could be exercised subject, however, to the need for the full consultation conceded by the Authority.

[38] The fulfilment of the procedural requirements in paragraph 6 must be established before the paragraph 4 power is exercised. The proviso is not expressly stated to be a condition precedent to a validly made determination that the paragraph 2 and 3 conditions have been satisfied. It might be argued that Kilroot would not need to establish at this juncture a breach of the procedural requirements but might call in aid breaches of the procedural requirements whenever the Authority moves to exercise its paragraph 4 powers. However, both parties' arguments linked the question of the procedural requirements to the question of the validity of the determination. This approach is supported by the wording of paragraph 6(a) which treats the procedural requirements and the determination as linked. I shall assume that the parties were correct to treat the procedural requirements and the determination as linked.

[39] Paragraph 1 read with paragraph 2 and 3 of the cancellation condition points to the Authority reaching a judgment at a point in time immediately before the coming into effect of new arrangements under an electricity trading system binding the power procurement manager and all licence holders. The Authority must form the judgment that, if appropriately implemented by the means adumbrated in paragraph 2, the arrangements

“would facilitate an increase in competition in the generation and supply of electricity in Northern Ireland for the benefit of consumers in relation to price, other terms of supply, continuation of supply and quality of electricity supply services.” The words “facilitating an increase in competition” point to something less than the creation of trading arrangements leading inevitably to an increase in competition of a particularly high kind. To facilitate something is to make it easier to achieve. To increase something is to make it grow or develop. Any modest growth will constitute an increase.

[40] If the Authority properly directing itself as to the relevant issues concludes in good faith that new arrangements have the tendency to make it easier for competition to grow even to a limited extent, then its judgment could not be challenged in public law. Mr Larkin correctly argued that it is well established that the courts should be astute to avoid contradicting a conscientious decision maker acting in good faith and with knowledge of all the facts. In R (Puhlhofer) v. Hillingdon London Borough Council [1986] 1 AC 484 at 518 Lord Brightman pointed out –

“Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debateable to the just conceivable it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision making power save in a case where it is obvious that the public body consciously or unconsciously are (sic) acting perversely.”

In R v. Director General of Telecommunications (ex parte Cellcomm) [1999] ECC 314 speaking in the context of a judicial review of a decision by the regulator of the telephony sector Lightman J said –

“Where the Act has conferred the decision making function on the Director it is for him and him alone to consider the economic components, weigh the compelling considerations and arrive at a judgment. The court must be astute to avoid the danger of substituting its views for the decision makers and of contradicting a conscientious decision maker acting in good faith . . . If (as I have stated) the court should be very slow to impugn decisions of fact made by an expert an experienced decision maker, *it must surely be even slower to impugn his educated prophecies and predictions for the future.*” (Italics added).

In R v. Securities and Futures Authority (ex parte Panton) (1994) Unreported Sir Thomas Bingham MR speaking in the context of a judicial review of a decision made by a self-regulatory organisation under the Financial Services Act 1986 which recognising that such bodies were subject to judicial review went on to say –

“Recognition of that jurisdiction must in my judgment be combined with a recognition that the clear intention of the Act is that the bodies established under the Act should be the regulatory bodies and that it is not the function of the court in anything other than a clear case to second guess their decisions or, as it were, look over their shoulder. Thus, the position that I think we end up with is that these bodies are amenable to judicial review but are, in anything other than very clear circumstances, to be left to get on with it.”

See also his comments in R v. International Stock Exchange of the United Kingdom and Ireland (ex parte Else) [1993] QB 534 at 552 when he pointed out that –

“The courts will not second guess the informed judgments of responsible regulators steeped in the knowledge of their particular market.”

[41] A challenge to the Wednesbury rationality of a decision is notoriously difficult to establish particularly as in the present case where one is dealing with educated prophecies and predictions for the future on the part of an expert regulator. An applicant cannot succeed in such a challenge simply by seeking to persuade the court that it should reach a different view on the merits. To succeed the applicant must show that the conclusion reached was quite untenable in the light of the evidence or defied logic. Kilroot’s challenge to the determination on this ground cannot succeed.

[43] Having regard to the evidence a regulator acting rationally and logically was entitled to reach the view that the GUAs imposed significant cost on consumers, that the existing Northern Ireland electricity market was marked by a lack of competition and that Northern Ireland as a small and isolated market faced difficulties of its own creating competitive structures. The conclusion that the SEM and the new arrangements thereof facilitated an increase in competition notwithstanding the problems created by ESB’s dominance and the other factors in the Republic of Ireland criticised by Kilroot, represented a judgment which could in no way be described as illogical or irrational and was well within the range of legitimate conclusions a regulator could reach.

[43] The Authority's conclusion that the requirements of paragraph 2 were satisfied required the authority to take into account the relevant factors which it was directed to consider in determining whether the arrangement facilitated an increase in competition. Regard had to be had to prices charges, terms of supply, continuity of supply and the quality of electricity supply services. There is nothing to suggest that these factors were left out of account or misunderstood by the Authority. The question of continuity of supply was raised in particular by Kilroot which argued that there could be a decrease in continuity of supply having regard to inter connector problems. However Mr McCann in his affidavit in paragraphs 214 to 227 sets out tenable answers to Kilroot's contentions. The NERA report pointed to the real possibility of some albeit limited savings for Northern Ireland consumers that would be reflected in some decrease in price. The Authority had sufficient material before it which could satisfy a reasonable regulator steeped in the knowledge of the electricity industry to conclude that the requirements of paragraph 2 were satisfied.

[44] In reaching its decision the Authority had to have regard to the requirements which paragraph 3 demanded of arrangements that to satisfy in paragraph 2. Paragraph 3 requirements are conditions which in the opinion of the Authority will do certain things. Clearly a judgment must be made by the Authority as to whether the individual requirements are fulfilled. Such a judgment will be a subjective one but Mr Larkin accepted that it had to be rational hence it is not a complete answer to Kilroot's challenge to the Authority's decision to rely on the genuinely held subjective viewpoint if that viewpoint is itself Wednesbury unreasonable or was reached without regard to the proper considerations.

[45] As to Kilroot's allegation that the requirement of paragraph 3(A)(ii) of the cancellation condition had not been met the questions are -

- (a) whether it has been shown by Kilroot that the Authority left that consideration out of account; and
- (b) if did not, whether its conclusion that it was satisfied was so against the evidence that no reasonable decision maker could have concluded the condition was fulfilled.

There is no basis for suggesting that the Authority failed to consider the question whether the condition was fulfilled. The only real basis for Kilroot's challenge is that the rate had not been increased for some time. That is insufficient evidence to persuade the court that the Authority' view that the present remuneration is adequate pending some future increase is Wednesbury unreasonable.

[46] Kilroot also argued that paragraph 3(A)(iv) was left out of account or not properly considered and that the conclusion that the condition was satisfied was irrational. However the evidence points to the conclusion that the judgment reached by the Authority on this condition was one that could tenably be reached in the light of the materials before it. (See the affidavit of Mr McCann paragraphs 235 to 239, 219 to 227 and 181 to 201).

[47] As to paragraph 3(A)(x) the answer to Kilroot's complaint that this condition was not satisfied is that as of the time of the determination under the same arrangements about to be established Kilroot was to be bound to the new single market but without any financial penalties because it was going to continue to effectively receive the availability payments under the GUAs until they were terminated if ever. Clearly at the stage of making a decision whether to cancel the GUAs the Authority would have to consider whether the cancellation of the GUAs would cause the licence holder to be unable to finance the carrying on of its activities. As at the date of the determinations there is no substance in the applicant's challenge.

The consultation issue

[48] Paragraph 6 sets out the procedural requirements required to be followed for the purposes of paragraph 1. The provisions of this paragraph which Mr Larkin frankly accepted was ill drafted and confusing are difficult to follow. However, what paragraph 6(a) appears to require is that in the run up to making a paragraph 1 determination that the requirements of paragraphs 2 and 3 are satisfied the Authority must have carried out a consultation process. The process must have involved a range of parties including but not limited to licence holders. The persons to be consulted are persons that the Authority considers are likely to be materially affected, by the steps, documents and obligations required (a) to satisfy the requirements of paragraph 3 and (b) to create arrangements which would facilitate an increase in competition taking account of the matters spelt out in paragraph 2. Paragraph 6(b) and (c) indicate the nature of the consultation, documentation and information required for proper consultation, the nature of the opportunity to consultees to participate meaningfully and the duty of the Authority to take representations into account.

[49] Paragraph 6 makes clear that the licence holders (inter alios) have a right to have an input into any new arrangements envisaged and in the course of being worked out for the establishment of an electricity trading system intended to facilitate an increase in competition in relation to matters listed in paragraph 2.

[50] It is clear that a very extensive consultation process was carried out leading from the initial idea of a single market up to the creation of a complex arrangement now applicable in the SEM. It is also clear that Kilroot was kept

informed of developments and had a full opportunity to contribute its viewpoint at each stage of the process leading up to the creation of the relevant SEM mechanisms. Kilroot's case is that it was never informed or made aware of the fact that the Authority was developing arrangements intended to lead to a cancellation of the GUAs.

[51] Mr Larkin correctly argued that the intention of paragraph 6 was to give all interested parties and not merely those with a direct interest in the GUAs or their cancellation the chance to comment on and contribute to the development of arrangements leading to a new electricity trading system. It was not fundamentally a procedural protection for Kilroot in relation to cancellation but rather about ensuring that the Authority made a determination under paragraph 1 only on an informed basis after exposing the competitiveness and other features of the new trading system to industry scrutiny. The type of consultation which will be required before any new competitive trading system which might constitute the requisite arrangements is one on which the major stakeholders in the electricity industry would be consulted. Effectively paragraph 6 required that Kilroot had a meaningful say on the question whether and how the new system should be developed. If a new system emerged it might or might not constitute a system that satisfied the requirements of paragraphs 2 and 3. Clearly once the new system was about to be implemented the dictates of procedural fairness quite apart from paragraph 6 required that Kilroot should be entitled to specifically be consulted on the question whether the arrangements did satisfy paragraph 2 and 3 if the Authority was minded to make a determination under paragraph 1. Kilroot was duly consulted on that issue. The dictates of procedural fairness apart from the provisions of paragraph 6 would not however require that Kilroot should be consulted about the formation of the scheme specifically in the context that the scheme might give rise to arrangements that could satisfy paragraphs 2 and 3. In constructing a new system affecting a wide range of parties the duty of consultation required that they should be able to express their views so as to influence the final outcome. Their views would doubtless be fashioned and influenced by their own particular economic interests. Consultees could not expect that their particular economic interests should dictate the form of the consultation process which was intended to be general and not particularised to the individual circumstances of the individual consultees though regard would have to be had to the view points of the key players in the industry. Each consultee in making his own views available would and should be alive to the implications of the proposals in respect of his own economic circumstances. Kilroot was at all times fully aware of the cancellable nature of the GUAs and of the conditions of the cancellation clause and should reasonably have been aware that any new trading system formulated by the Authority with its statutory obligations to advance competitiveness in the industry could very well give rise to a system satisfying or having implications for the provisions of paragraphs 2 and 3.

[52] In the unlikely event that Kilroot genuinely did not consider that possibility in the initial stages of the consultation, that possibility must have been plainly clear to it when the consultation began on the altering of the terms of the cancellation condition in April 2007. Against the background of the evolution of the consultation process and the development of the SEM mechanisms with all that they entailed for the relevant parties Kilroot should at that stage have raised its legal challenge as to the adequacy of the consultation process and/or taken steps to bring to the attention of the Authority all the points which Kilroot considered to justify its argument that the new arrangements could never satisfy the requirements of paragraphs 2 or 3. Kilroot did not raise any legal challenge to the adequacy of the consultation procedure which had been carried out up to that point. The SEM mechanisms were firmed up and a new system emerged at very considerable expense. If Kilroot had a sound legal argument for a challenge to the adequacy of the consultation process its delay in pursuing its points would render it inappropriate to grant relief. The emergence at very considerable expense of a complex new trading arrangement which is now in place together with the fact that there will be further detailed consultation before the paragraph 4 power is exercised point strongly in favour of a refusal of relief on discretionary grounds if, contrary to my conclusion, Kilroot were entitled to relief. As it is, I am satisfied that the consultation process carried out by the Authority satisfied the requirements of paragraph 6 and the common law requirements of fair procedure.

[53] For these reasons the application is dismissed.