Neutral Citation No: [2019] NICA 47 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:*	**DEE10914** **STE11058** **MOR11059**
	Delivered:	**20/09/2019**

IN HER MAJESTY'S COURT OF APPEAL NORTHERN IRELAND

ON APPEAL FROM THE QUEEN'S BENCH DIVISION

IN THE MATTER OF AN APPLICATION BY GREEN BELT (NI) LTD FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT FOR THE ECONOMY TAKEN ON 15 MAY 2017

Before: Morgan LCJ, Stephens LJ and Sir Donnell Deeny

SIR DONNELL DEENY (delivering the first judgment at the invitation of the Lord Chief Justice)

Introduction

[1] Green Belt (NI) Ltd ("the appellant") appeals against the decision of McCloskey J to dismiss the appellant's application for judicial review of a decision of the Department for Economy dated 15 May 2017 "to refuse an appeal in respect of and thereby refuse accreditation of a facility under the Renewable Heat Incentive Scheme Regulations (NI) 2012".

[2] It is the appellant's contention that a panel set up by the Department to hear the appellant's appeal from a refusal of accreditation excluded from its consideration relevant information which it ought to have taken into account.

The Renewable Heat Incentive Scheme

[3] Section 113(a) of the Energy Act 2011 empowered the respondent's predecessor to make regulations –

"(a) Establishing a scheme to facilitate and encourage renewable generation of heat in Northern Ireland …".

This was done in the form of the Renewable Heat Incentive Scheme Regulations (NI) 2012, subsequently amended.

[4] Key provisions of the Regulations include the following:

"Renewable heat incentive scheme

3.—(1) These Regulations establish an incentive scheme to facilitate and encourage the renewable generation of heat and make provision regarding its administration.

(2) Subject to Part 7 and regulation 24, the Department must pay participants who are owners of accredited RHI installations payments, referred to in these Regulations as "periodic support payments", for generating heat that is used in a building for any of the following purposes—

(a) heating a space;

(b) heating liquid; or

(c) for carrying out a process.

(3) Subject to Part 7, the Department must pay participants who are producers of biomethane for injection periodic support payments.

4.—(1) A plant meets the criteria for being an eligible installation (the "eligibility criteria") if—

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

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

(c) regulation 15 does not apply; and

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

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

…

Other eligibility requirements for technologies

12.—(1) The requirements referred to in regulation 4(b) are—

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

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

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

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

(2) The requirements of paragraph (1)(a) and (b) are deemed to be satisfied where the plant was previously generating electricity only, using solid biomass or biogas, and was first commissioned as a CHP system on or after 1st September 2010;

(3) But the requirements of paragraph (1)(a) and (b) are not satisfied where the plant was previously generating heat only and was first commissioned as a CHP system on or after 1st September 2010."

[5] Regulation 22 provides for the owner of an eligible institution to apply for that installation to be "accredited". This is what the appellant sought to do. Further guidance on this is provided by regulations 23 and 26.

[6] Of particular importance is regulation 33:

> "Participants must comply with the following ongoing obligations, as applicable –
> …
>
> (p) they must not generate heat for the predominant purpose of increasing their periodic support payments."

This was the effective ground of refusal of accreditation in this case.

[7] Regulation 2 provides certain definitions. Regulation 36 is of importance to the appellant as it provides that periodic support payments shall accrue from the

tariff start date and shall be payable for 20 years. Regulation 50 is of particular relevance here as permitting a review of a decision by a party such as the appellant:

> **"Right of review**
>
> 50.—(1) Any prospective, current or former participant affected by a decision made by the Department in exercise of its functions under these Regulations (other than a decision made in accordance with this regulation) may have that decision reviewed by the Department.
>
> (2) An application for review must be made by notice in such format as the Department may require and must—
>
> (a) be received by the Department within 28 days of the date of receipt of notification of the decision being reviewed;
>
> (b) specify the decision which that person wishes to be reviewed;
>
> (c) specify the grounds upon which the application is made; and
>
> (d) be signed by or on behalf of the person making the application.
>
> (3) A person who has made an application in accordance with paragraph (2) must provide the Department with such information and such declarations as the Department may reasonably request in order to discharge its functions under this regulation, provided any information requested is in that person's possession.
>
> (4) On review the Department may—
>
> (a) revoke or vary its decision;
>
> (b) confirm its decision;
>
> (c) vary any sanction or condition it has imposed; or
>
> (d) replace any sanction or condition it has imposed with one or more alternative sanctions or conditions.

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

[8] Regulation 51(1) provides that the Department "must publish procedural guidance to participants and prospective participants in connection with the administration of the scheme". This was subsequently done as set out below.

[9] Schedule 1 paragraph 1(1) regulates the provision of information by prospective participants to the Department and provides:

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

[10] McCloskey J properly drew attention to two particular components to be found in Schedule 1(2) in the context of the present challenge:

> "(2) The information is, as applicable to the prospective participant –
> …
>
> (k) evidence which demonstrates to the Department's satisfaction the installation capacity of the eligible installation;
>
> …
>
> (w) such other information as the Department may require to enable it to consider the prospective participant's application for accreditation or registration."

[11] The arrangements empowered and enabled the Department, pursuant to Section 114(1) of the 2011 Act, to enter into arrangements with Ofgem, formally known as GEMA, denoting the gas and electricity markets authority, to enable that body to perform a wide range of functions on behalf of the Department while the Department reserved to itself some retained functions. One of the retained functions was the review procedures set out at regulation 50 above.

[12] Statutory Guidance ("the Guidance") was published with regard to the Scheme in two substantial volumes. A subsidy *per* kilowatt-hours-thermal (kWhth) of eligible renewable heat was payable for accredited installations.

[13] The Guidance emphasised that for accreditation an applicant "will have to demonstrate to Ofgem that an installation meets the NI RHI eligibility criteria" (paragraph 2.3).

[14] Paragraph 2.13 of the Guidance states:

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

Paragraph 2.14, reads:

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

[15] Chapter 12 of Volume II of the Guidance dealt with dispute resolution. The judge reproduced this bulky chapter as an Appendix to his judgment and summarised it as follows at paragraph [10] of his judgment:

> "[10] Within Volume 2 of the Statutory Guidance, there is a discrete section, chapter 12, dealing with "Dispute Resolution". Given its bulk and importance, this is reproduced in the Appendix to this judgment. In very brief compass:
>
> (i) Ofgem can be required to review any decision made by it in the exercise of the functions conferred upon that agency by the instrument noted in [8] above.
>
> (ii) It is explicitly provided that this is <u>additional</u> to the <u>statutory review</u> function exercisable by the Department under Regulation 50 (one of the reserved functions). The former is accorded the distinguishing taxonomy of "*formal review*".
>
> (iii) It is expressly contemplated that the formal review will be the first remedy pursued by the dissatisfied party, in the hope that it will obviate the need to resort to the statutory review.
>
> (iv) The Ofgem formal review will entail the reconsideration of all information previously

provided, the consideration of "*further information*" supplied and the examination of all representations made by the interested party.

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

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

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

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

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

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

[16] These matters are of crucial importance to the ultimate determination of this appeal. The respondent chose to introduce a further level of review between the original decision and the statutory review pursuant to regulation 50. The Guidance provided that that review would involve the consideration of "further information". The statutory review *i.e.* pursuant to regulation 50 was required by this Guidance to be "*based on all the evidence, information and representations submitted by the affected person to the original decision maker or Ofgem's (Formal Review Officer).*"

The Application

[17] The applicant relied on a document to be found at Tab 6/74 of the Appeal Book, being a woodchip supply contract entered into between Green Belt (NI) Ltd and Irish Wood Chipping Services Ltd, dated 3 November 2015. The applicant commissioned the boilers which it hoped would attract subsidy on 14 November 2015 (Tab 2/3). Applications were made, in duplicate, because there were multiple boilers, on 15 November 2015. This appears from the affidavit of Jonathan Latimer

on behalf of the appellant. It should be noted that the appellant had chosen to install some ten 99 kilowatt boilers rather than one or more larger boilers. As is now notorious, boilers under 100 kilowatt capacity enjoyed a much more generous measure of subsidy than those over 100 kilowatt capacity.

[18] At exhibit Tab 2 to the affidavit of Jonathan Latimer is the letter of authorisation and application form put forward by the appellant. There was an important passage contained at Tab 2 page 6 of this document:

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

[19] A consultant employed by the appellant, one Christopher Boyle, wrote to Mr Latimer by email on 24 February 2016. His request to them with regard to responding to queries from Ofgem included the following:

> "Confirm to me it is for commercial use and I can do the rest. Please provide evidence that the drying was for commercial purpose (sic). This may be in the form of invoice (showing the dried product was the subject of a commercial transaction) website, photos. Provide invoices for sale of woodchip."

[20] This followed an inquiry of 22 February 2016 from the RHI accreditations team. That team was properly concerned to ascertain that the drying was for a commercial purpose. Subsequent emails made it clear that this matter was of importance. Various other aspects of the application were considered. Photographs were provided and taken into account by the RHI team.

[21] On 15 August 2016 Edmond Ward wrote on behalf of Ofgem (who, it will be remembered, were performing functions for the respondent Department) rejecting the application. This, the first of the Ofgem decisions, contained the following passages:

> "Your application for accreditation was rejected for the following reasons: pursuant to Regulation 23(4) …….. Ofgem may refuse to accredit an eligible installation if its owner has

> indicated that one of the applicable ongoing obligations will not be complied with. It is our opinion that your installation is not compliant with Regulation 33(p) ……. The submitted schematic and site images demonstrate that wood chip drying is the only heat use at this site ….
>
> As the wood chip is only being dried for the purpose of combustion within this installation and other installations at this site, and those other installations are in turn being used to dry wood chips for use in this installation and others, it is our opinion that the installation is used solely for the purpose of generating heat for the predominant purpose of increasing periodic support payments. Based on your description of the installation, its uses and supporting documentation, it is our opinion that you will be unable to comply with Regulation 33(p)."

[22] Although disappointed at the time, the appellant now accepts that that decision by Ofgem was a proper one with which they cannot quarrel.

Formal Review

[23] The appellant determined to apply for a "formal review" of this refusal of its application. The provisions relating to that are summarised at paragraph [15] above. This formal review is to be distinguished from the statutory review pursuant to regulation 50. As set out above, the chapter on dispute resolution to be found at Chapter 12 of Volume 2 of this Statutory Guidance for the Scheme provided that the formal review would entail reconsideration of all information previously provided, the consideration of "further information" supplied and the examination of all representations made by a party such as the appellant.

[24] On 29 August 2016 the appellant wrote a letter to Ofgem Complaints at Ofgem in London. It was signed by its director and subsequent deponent Jonathan Latimer. It sought a formal review in accordance with the dispute resolution procedures.

[25] That letter set out in some detail what might be regarded as an attempt by Green Belt to mend its hand. Green Belt acknowledged that their statement at HH120 was correct namely that "woodchip will be produced for sale for commercial purposes, but as of yet no sales of woodchip have been made from this site". However, their point was that the plant had only been commissioned at that stage and that the intention was to operate the boilers to make woodchip for commercial

purposes. The letter asserted that up to the end of June 2016 542.93 tonnes of woodchip had been produced for sale. Evidence of such sales since January 2016 was attached. The assertion is made therefore that they were not in breach of Reg. 33(p) as the fuel being burned would be for legitimate commercial purposes. The contract adverted to above in this judgment was dated 3 November 2015 and between Mr Latimer and a Mark Hanley of Irish Wood Chipping Services Limited. In the papers sent to Ofgem for the formal review there were invoices. The first of these claimed payment of £5,749 for the supply of 71.86 tonnes.

[26] In a subsequent e-mail Mr Latimer explained that those invoices were not issued until 4 April 2016 to allow for the "implementation and bedding in of a new project". They wanted to ensure that the quality of the product was to the standard required by the purchasing party.

[27] There was a subsequent exchange of e-mails and communications between the parties leading up to the decision of Ofgem of 6 February 2017. This was signed by Teri Clifton, Head of Operations for Non-Domestic RHI. She wrote in her letter of decision to Mr Latimer that she had carefully considered the facts of the case while apologising for the delay. In essence she took two points in deciding to reject the review application and to uphold the earlier decision to refuse accreditation.

[28] Ms Clifton set out her conclusions on her review of the original decision very fully in her letter of 6 February 2017 of some 5 pages. She set out the passage quoted above at [18] in answer to question HH120 on the application form. She continued: "As the woodchip is only being dried for the purposes of combustion within this installation and other installations at this site, and those other installations are in turn being used to dry woodchips for use in this installation and others, it is our opinion that the installation is used solely for the purpose of generating heat for the predominant purpose of increasing periodic support payments." At that point she was quoting the original decision.

[29] In her "Outcome of My Review" section she points out that, of the evidence submitted since the original decision, the earliest invoice of commercial use is 6 April 2016 (in fact 4 April) whereas the application was dated 15 November 2015:

> "For Ofgem to determine eligibility of the commercial nature of the site, the invoices would need to have been produced at point of application and had to relate to commercial use prior to the application. On that basis I am satisfied that the original decision is correct and appropriate based on its individual facts; and therefore the rejections stand."

[30] She goes on to support her decision by analysing the further information which had been provided. *Inter alia* she states that the application was not "properly made" in accordance with regulation 22(2) for the reason set out above.

[31] She pointed out that it was only on 15 September 2016 when Ofgem was asked to review its 6 May 2016 decision that any evidence of eligible heat use was supplied. Such evidence was the contractual arrangement dated 3 November 2015; see [25] herein. She acknowledges that if this had been submitted at the time of the application a rejection may not have followed but she went on to point out some characteristics of this contractual arrangement dated 3 November 2015 and the subsequent invoices. She pointed out no details of this activity were supplied in support of the application. She also pointed out in particular that, significantly, this new "evidence" referring to November 2015 and activity by January 2016 was inconsistent with statements made by Jonathon Latimer himself on 21 March 2016. On that date, in response to questions raised by Ofgem between 22 and 24 February 2016, he stated that "as of yet" no commercial wood drying was in fact being undertaken but that such an activity was envisaged.

[32] I pause to point out that at paragraph 5 of his affidavit of 11 August 2017 Mr Latimer acknowledges that the other party to this arrangement of 3 November 2015, Irish Wood Chipping Services Ltd was a joint venture company of theirs which they had been supplying with woodchip for some 8 years. It was not truly an arm's length transaction therefore.

[33] I note further that the trial Judge expressly adverted to this at paragraph [14] of his judgment and quoted from the March 2016 response of Mr Latimer:

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

[34] The conclusion of Ms Clifton was as follows:

> "Therefore the evidence that has been supplied in relation to eligible heat use is inconsistent. The evidence was not available when the decisions to reject the applications were made so did not form part of those decisions. But had it been available, these inconsistencies should have detracted from the weight that Ofgem may legitimately have placed on it."

She then upheld the earlier decision rejecting the application.

[35] We observe that although invoices were furnished there appears to be no receipt or acknowledgement from other bodies of receipt of the wood product.

[36] It is convenient at this time to point out that counsel for the respondent accepted that it was not essential under the Regulations to achieve commercial use at the date of application. It was sufficient pursuant to the Regulations to achieve that by the date of "accreditation".

[37] Looking again at my notes of the appeal hearing I do not really see any adequate answer from counsel for the appellant to the point that these subsequent documents were largely self-serving and apparently inconsistent with earlier assertions of Mr Latimer.

Statutory Review

[38] Following the rejection by Ms Clifton of the appellant's application for formal review, the appellant then sought to appeal the decision under challenge by way of the statutory path provided for by regulation 50.

[39] By letter dated 10 April 2017 the respondent stated, *inter alia*:

> "The statutory review will be based on all the evidence, information and representation submitted … to Ofgem …"

[40] The outcome of the statutory review is to be found in a letter from the Department for the Economy of 15 May 2017. It was signed by Jonathan McAdams of the RHI Taskforce. On the first page of that letter he sets out the following:

> "The purpose of this statutory review was to consider a decision made by Ofgem in relation to the above number applications, in the light of the regulations, and <u>all other available evidence</u>, and conclude whether the original decision-maker erred in coming to the conclusion not to allow the applications."

[41] That statement was not viewed as controversial by counsel but one notes the words now underlined.

[42] The letter went on, *inter alia*, to note that it was the duty of the applicant to ensure that any information provided is accurate.

[43] The learned trial Judge dealt with these matters between paragraphs [30] and [40] of his judgment. But in particular at [37] he found the following:

> "Given the court's analysis that all of the information provided by the applicant was considered by the

> Department in making the impugned decision both grounds of challenge must fail."

It is wise therefore to set out the rest of the decision letter of 15 May 2017 written pursuant to regulation 50 to properly consider the appellant's submission to the contrary:

> "In this instance, the original decision was made by Ofgem, on the basis of the information supplied at the time of application, as required by the legislation. The panel noted that this is a discrete process, concluded at the point the application is considered and either accepted or refused.
>
> The ongoing management or participation on the scheme, and the possible use of the enforcement mechanisms laid out in Part 7 of the Regulations, is entirely separate from this process.
>
> The panel concluded that it would not have been in order for Ofgem to consider the statutory powers open to them in relation to enforcement, as these powers related to the treatment of active participants, not applicants yet to be admitted, notwithstanding that the ability of an applicant, or as the case may be participant, to meet the `continuing obligations' plays a key part in both processes.
>
> Ofgem were under a duty to perform their role on the basis of the information supplied at the time of application. Ofgem, as a matter of good practice may seek further information where there was ambiguity or lack of clarity in the original application.
>
> The panel concluded that, in this case no such ambiguity existed. The intended purpose was clearly stated, and while the information provided may in hindsight, have been incorrect it was not unclear. Ofgem were therefore under no duty to seek further clarity and could not have been expected to do so.
>
> The panel noted that it is the duty of the applicant to ensure that any information provided in relation to the applications is accurate, and meets the conditions required for acceptance onto the scheme.

The panel concluded that the applicant provided clear detail within their applications of intended use – a use that on the clear terms provided was not an eligible use. Whilst that the information (sic) may have, in retrospect, been discovered to have been inaccurate does not mean that the information was unclear. As such the decision of Ofgem not to seek further clarification was both reasonable and correct.

The panel agreed with both Ofgem and the Formal Review Officer that the intended use stated in these applications would prevent the applicant from complying with their ongoing obligations as *per* Regulation 33(p) of the Regulations.

The panel concluded that Ofgem therefore acted reasonably in rejecting the applications based on the information available to Ofgem at the point in time when their decision was made.

The later provision of information which may have suggested a use that did not fall foul of Regulation 33(p) does not of itself invalidate the earlier decision.

The panel were cognisant of the fact that had the applicant provided further evidence to support commercial activity within their original applications that it may have been appropriate for Ofgem to reach a different decision. The panel additionally notes this further evidence may not have been conclusive of such eligible use. But in the event as stated, this further evidence does not, and cannot invalidate the original decision of Ofgem.

In light of the facts of the case the panel agreed unanimously that Ofgem's decision was therefore both reasonable and correct on the evidence provided at the time of application, and therefore agreed unanimously to confirm Ofgem's original decision.

As outlined in scheme guidelines, the Statutory Review marks the final stage of the internal review process. Should you be dissatisfied with the FRO's decision you have the option to take your complaint to the Northern Ireland Ombudsman etc."

Appellant's Submissions

[44] Mr Richard Harwood QC appeared for the appellant. He drew attention to the requirement under regulation 51(1) to "publish procedural guidance to participants and prospective participants in connection with the administration of the scheme". This was done by way of a document entitled 'Non-Domestic Northern Ireland Renewable Heat Incentive – Guidance'. No doubt conscious of the wording of regulation 50(1) and (2)(b) that the decision was to be reviewed by the Department under the statutory procedure rather than by way of rehearing he drew attention to the fact that the Guidance provided that, where an affected person is not happy with the decision and "wishes to provide further evidence, information or representations in support of the request for a review, the Formal Review Officer ("FRO") will reconsider his decision based on such additional information."

[45] He relied further on paragraph 12.19 of the Guidance as follows:

> "Where Ofgem consider that an affected person is submitting fresh information or representations with a request for statutory review, they may treat the request for statutory review as a request for a formal review. Therefore an affected person should instigate a statutory review only where they consider that they have already made available to either the original decision-maker or the FRO all potentially relevant evidence, information and representations for their consideration."

[46] Therefore he submits it is clearly contemplated that fresh information can be introduced at the statutory review stage and further reference to that is to be found at 12.20 and 12.22 of the Guidance. The latter opens with this sentence. "The statutory review will be based on all the evidence, information and representations submitted by the affected person to the original decision-maker or Ofgem's FRO." I have cited to some degree above these provisions which were acknowledged in correspondence by the Department.

[47] The appellant submits that the learned trial Judge erred at [37] in finding that the information provided by the applicant "was considered by the Department in making the impugned decision."

[48] The appellant does so on the basis of the express statements of both the FRO and the statutory review. In the form of a letter of 6 February 2017 it is expressly stated that such evidence "would need to have been produced at point of application." Again: "because there was no information or evidence of eligible heat use supplied with the application …"

[49] Further she stated:

> "Had this information and evidence been supplied with the applications: or had it been supplied whilst the applications were receiving consideration by Ofgem, the concerns in relation to eligible heat use and hence the basis on which the applications were eventually rejected may not have arisen. But, in fact the information and evidence was not supplied to Ofgem until sometime after the decisions were made."

This approach to the issue *i.e.* disregarding the Guidance and its permission to add further information is reinforced at several points in the decision letter of the statutory review including a passage cited above and in particular this sentence:

> "But in the event, as stated, this further evidence does not, and cannot, invalidate the original decision of Ofgem."

[50] Counsel submits the matter was put beyond peradventure by the response by the Department to the pre-action protocol letter, sent on 31 August 2017 to this effect:

> "In determining their respective reviews, both Ofgem and the Department concluded that … the reviewing bodies were not themselves obliged to take account of the fresh information supplied by your client."

[51] The appellant submitted that it was clear that the decision to be reviewed by the statutory review was the decision of the Formal Review Officer and cited in support of that regulation 50(2)(a) and (b) and the Guidance. He therefore submitted that it was in Wednesbury terms a breach of the duty to take into account a relevant consideration to ignore that further evidence or, in the alternative, that the appellant had a legitimate expectation of a procedural kind that the further information would be taken into account.

[52] He went on to deal with the situation which would exist if this court accepted those submissions and very properly posed the question: "If the further information was not lawfully considered, would Ofgem/the Department have undoubtedly refused the application if they had considered it?" I will deal with that topic within that part of this judgment entitled consideration.

Respondent's Submissions

[53] The court had the assistance of valuable written and oral submissions from Mr Paul McLaughlin for the Department. As mentioned above he argued that eligibility must be demonstrated at the date of accreditation. Refusal on accreditation would not, in the past, have precluded a further application but given the changes made by the legislature this was not an option open to this appellant.

Mr McLaughlin rightly acknowledged that all three decisions, the original one, the Formal Review and the statutory review by the Department were all relevant.

[54] With regard to the appellant's first argument he submitted that a reading of the letter by the Formal Review Officer showed that she had taken into account and assessed the new information provided by the appellant. She pointed out that it was "inconsistent" with earlier information provided on behalf of the appellant, as indeed outlined above. In the course of his argument the court asked Mr McLaughlin for his argument to counter the tenor of the panel's letter of 15 May 2017 with regard to later information and in particular the sentence reading: "but in the event, as stated this further evidence does not, and cannot, invalidate the original decision of Ofgem." He argued that the very fact that the panel stated that they were "cognisant" of the fact the applicant had provided further information which may have suggested a use that did not fall foul of regulation 33(p) showed that they had in fact taken the information into account.

[55] Mr McLaughlin further submitted that as the review, in his submission, did take the fresh information into account but chose to reject it that was a matter of weight for the panel and not a matter of law for the court. He cited Lord Hoffman in *Tesco Stores v Secretary of State for Environment [1995] 2 All ER 636.* He candidly acknowledged that the issue of their duty to consider the fresh material was a thorny issue. He sought to support the view of the trial Judge on the basis, expressed by him at [31] that the intention of regulation 50 was not to allow a revocation of an initial Ofgem decision "on the basis of highly significant new information not available to Ofgem." He sought to argue that the guidelines with their reference to fresh information were not in truth inconsistent with the somewhat broader Regulations.

[56] The Judge's finding at [39], attacked by the appellant, was, in Mr McLaughlin's submission merely a response to a contention by the appellant. The Judge was entitled to conclude that the new information, which significantly altered the application at the outset and which was inconsistent with previous information, would not have "inevitably resulted in a grant for accreditation" to the appellant.

Consideration

[57] I have set out the materials to be found in the Guidance above. This Guidance was issued on foot of regulation 51 of the Regulations. While it is correct that in a direct conflict with the plain wording of the Regulations on any particular point the Regulations should prevail, nevertheless one must acknowledge that the Guidance is, at the least, an aide to interpretation of the Regulations.

[58] If one took regulation 50 in isolation its language, of reviewing the decision, might preclude Ofgem or the Department from taking into account information that was provided after the initial decision by the Department to refuse accreditation.

The review might have been confined only to the information that was provided to the Department at that time *i.e.* up to the original decision not to accredit.

[59] Such a view could, of course, work injustice. If an applicant, through misfortune or clerical error omitted a significant part of an application and an employee of Ofgem rejected the application, although in truth it was a wholly appropriate scheme on which the applicant had spent considerable sums of money it might be thought a disproportionate outcome. There is nothing surprising therefore in the contention of the appellant that the Regulations should be read in the light of the Guidance allowing further information.

[60] As I have set out above, dealing with Chapter 12 as summarised by the Judge, it is clearly envisaged that an applicant who is seeking either a formal review of an initial decision or a statutory review is entitled to put in information. Such an entitlement would be a delusion and a mockery, to borrow the words of Lord Denman in *OConnell v The Queen*, 4 Sept. 1844, if it did not carry with it the implication that the Formal Review Officer and, if necessary, the Statutory Review Panel would take the information into account. I consider therefore that there was a duty on Ofgem initially and the Department ultimately, on a statutory review, to take into account the further information provided by the appellant.

[61] Again in the light of the Guidance I take the view that the decision under the regulation covers the entirety of the decision made by or on behalf of the Department at the different stages, including the Formal Review stage

[62] One then has to ascertain and find whether the Statutory Review Panel in particular did take such information into account in arriving at their decision. If they did not it would, *prima facie*, be a breach of their Wednesbury duty to take into account relevant considerations. It might also be, although I do not rule on this expressly, an unlawful non-compliance with the legitimate expectation of the appellant to have their new information, which they had been allowed to provide, considered.

[63] The Formal Review Officer, Ms Teri Clifton, in her letter quite clearly took into account the information that had been provided. Indeed counsel for the appellants did not press us on this aspect of the case. I have taken into account the quotations, for and against, from her decision letter of 6 February 2017.

[64] We confess to having more difficulty with the ultimate decision being challenged before the court below and here of the Statutory Review Panel. I have set this out *in extenso* above.

[65] I incline to the view that there is a measure of ambiguity in the letter of 15 May 2017 signed by Mr Jonathan McAdams on behalf of the Department for the Economy and written to the appellant. On the one hand I accept Mr McLaughlin's submissions that there is reference to further information being provided by the

applicant. That occurs at several places. The new information is crucial because it is now accepted that on the initial information provided by the appellant the Department was quite right to reject their application for accreditation as contrary to Regulation 33(p). A crucial paragraph has been quoted already but bears repetition.

> "The panel were cognisant of the fact that had the applicant provided further evidence to support commercial activity within original applications that it may have been appropriate for Ofgem to reach a different decision. The panel additionally notes this further evidence may not have been conclusive of such eligible use. But in the event, as stated, this further evidence does not, and cannot, invalidate the original decision of Ofgem."

[66] It is the two words "and cannot" in this paragraph which give a difficulty for the respondent here. Those words would seem to suggest that they believe that they could not invalidate the original decision because of the additional information although they make clear that they are alert to the earlier criticisms of that further information. It might therefore have appeared that in doing so they had failed to take into account a relevant consideration. But among the documents exhibited to the affidavits of the party there is one at Tab 13 of the Appeal Book. It consists of the minutes of this panel meeting on 25 April 2017 and names the three members serving on the panel. They were attended by a legal advisor and by a member of the panel secretariat. The legal advisor present, Mr Martin McEvoy, is noted as advising the panel at some length. This includes, at paragraph 5, the following. "M McE reiterated that the role of the panel was to review Ofgem's decision on the basis of information available to Ofgem at the time of making their decision." Pausing there that was not in my view a correct direction to them; the subsequent information that they had been allowed to submit ought to have been taken into account.

[67] It is recorded at paragraph 4 that all panel members were aware of the specific details of the case, including the rationale for Ofgem's original decision and the subsequent formal review by Ofgem.

[68] The panel's decision is recorded at paragraphs 13-15. The Chair, Heather Cousins, properly reminded her colleagues of their powers under regulation 50. The panel then agreed unanimously to confirm the Ofgem decision. That decision is recorded at paragraph 15 and concludes with these two sentences:

> "The panel were cognisant of the fact that had the applicant provided evidence to support commercial activity within their application that it may have been appropriate for Ofgem to reach a different decision. <u>However in light of the facts of the case the panel agreed unanimously to confirm Ofgem's decision."</u>

[69] This concluding sentence is clearly in favour of the respondent. Provided they considered the facts of the case they were entitled not to upset the earlier decision because the new information, following the initial decision, provided by the appellants was "inconsistent" with and indeed at odds with the initial statements made by the appellants as the judge found; see [17] to [37] above. In particular as the judge set out at [14] of his judgment Mr Latimer of Green Belt wrote this in a letter of 21 March 2016 in reply to enquiries from Ofgem:

> "It is envisaged that woodchip will be produced for sale for commercial purposes, but as of yet no sales of woodchip have been made from this site."

This completely contradicts the later claim, based on invoices, but not, significantly, receipts, that sales for commercial purposes were taking place from January 2016, two months before this letter. Thus, while I differ from the judge on his approach to the Formal Review, for my part, his finding, at paragraphs [37-39] that the new information was not ignored is one with which it is difficult to quarrel.

[70] In this situation one reminds oneself of the recent judgments of the Supreme Court relating to the role of an appellate court in its review of findings made by a judge at first instance. I refer in particular to the judgment of Lord Kerr in *DB v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7. His Lordship dealt with the issue at paragraphs [78] – [80]. In particular he quoted the judgment of Lord Reed in the case of *McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477*. Having considered the authorities Lord Kerr said the following at paragraph 80.

> **"**[80] The statements in all of these cases and, of course, in *McGraddie* itself were made in relation to trials where oral evidence had been given. On one view, the situation is different where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and consideration of contemporaneous documents. But the vivid expression in *Anderson* that the first instance trial should be seen as the "main event" rather than a "try out on the road" has resonance even for a case which does not involve oral testimony. A first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as

> strong in a case where no oral evidence has been given, remains cogent. In the present appeal, I consider that the Court of Appeal should have evinced a greater reluctance in reversing the judge's findings than they appear to have done."

[71] This is not a case where the trial Judge heard oral evidence but it is not wholly dissimilar to the decision in *DB* where the judicial review judge had formed the view with which the Court of Appeal disagreed. It seems to me of assistance to bear in mind this principle at this time. Given the clearly expressed views of the Judge I am not persuaded that he is wrong or that we should interfere with them. I consider it a more evenly balanced matter than the trial Judge did but I am unwilling to reject his conclusion that the panel did take into account the facts of the case, as they say in the minute of their decision. Once one forms that view that they did take the facts into account it was a clearly rational and proportionate decision to reject the challenge to the decision because of the unsatisfactory nature of the belated evidence offered by the appellant. Indeed if one had concluded otherwise *i.e.* that there had been an error of law, one might have hesitated to grant a remedy to the appellant, overruling the judge, because any quashing of the decision and direction to reconsider it would in all likelihood have been futile. The evidence of change of front and inconsistent claims as set out at paragraphs [31] – [37] was sufficiently graphic for the Department to be fully entitled, even if required to retake the decision, to arrive at the same outcome. To approach it another way the judge would have been entitled to refuse relief to the applicant even if he had found a failure to take into account relevant information.

[72] In the alternative I consider that the appellant has not discharged the onus on it to show that the Department's decision was unlawful.

[73] I would therefore dismiss the appeal.

STEPHENS LJ (delivering the second judgment at the invitation of the Lord Chief Justice)

Introduction

[74] The central issue is whether a panel set up by the Department to consider a statutory review of a decision taken by the Office of Gas and Electricity Markets ("Ofgem") to decline accreditation for the appellant's ten biomass wood chip boilers ("the installations") under the Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012 ("the Regulations") excluded from its consideration relevant information which it ought to have taken into account so that the Department's decision dated 15 May 2017 should be quashed.

[75] As Sir Donnell Deeny has set out there can be three stages to the accreditation process. First, there is an application by a potential participant to and a determination by an officer of Ofgem who is referred to as "the original decision-maker." Second the applicant can require Ofgem to carry out a review ("the formal review") by an officer of Ofgem referred to as the "formal review officer." The formal review involves not only reconsideration of all information previously provided but also according to the statutory guidance published under Article 51 of the Regulations ("the statutory guidance") the consideration of "*further information*" supplied and the examination of all representations made by the interested party. Third, the applicant can require the Department to carry out a review ("the statutory review") which review according to the statutory guidance is "based on all the evidence, information and representations submitted by the affected person to the original decision-maker *or Ofgem's ("Formal Review Officer")*" (emphasis added).

[76] The appellant, whose ten applications for accreditation were unsuccessful at all three stages, asserts in these judicial review proceedings that "evidence, information and representation submitted by it to the Formal Review Officer" was not taken into account in the statutory review so that the decision of the Department dated 15 May 2017 was Wednesbury unreasonable having left out of account relevant information or was in breach of a procedural legitimate expectation see *United Policyholders Group v A-G of Trinidad and Tobago* [2016] UKPC 17 at paragraphs [37] and [38]. On either of these grounds the appellant asserts that the impugned decision should be quashed. McCloskey J ("the judge") dismissed the application for judicial review. The appellant now appeals to this court.

[77] Sir Donnell Deeny has helpfully and comprehensively set out the relevant provisions of the Energy Act 2011, the Regulations and the statutory guidance. I incorporate into this judgment those provisions as set out by Sir Donnell Deeny.

[78] The essential problem with the appellant's ten applications was that Regulation 23(4) provides that "(the) Department may refuse to accredit an eligible installation if its owner has indicated that one of the applicable ongoing obligations will not be complied with." Regulation 33 specifies the ongoing obligations with

which participants must comply one of which is that participants "must not generate heat for the predominant purpose of increasing their periodic support payments" (see Regulation 33(p)). The appellant's ten installations were designed to burn woodchips in ten biomass boilers in order to provide heat to dry woodchips. If in turn the dried woodchips were then burnt to dry yet further woodchips the predominant purpose would have been to increase the appellant's periodic support payments which would not be in compliance with the continuing obligation in Regulation 33(p). However, if the predominant purpose was to dry woodchips in order to sell those woodchips for instance so that others could burn them to heat premises or to resell them, that would not be a breach of the ongoing obligation contained in Regulation 33(p). As will become apparent the original decision maker refused to accredit the ten installations on the basis that the appellant had indicated that it was the former rather than the latter so that there would not be compliance with the ongoing obligation in Regulation 33(p).

Factual background

[79] Green Belt Limited, which is a company registered in the Republic of Ireland, has been involved in planting lands and timber harvesting in both the Republic of Ireland and Northern Ireland for over 30 years. It manages some 300,000 acres of forestry for private clients, investors and pension funds. It has also operated a longstanding commercial woodchip drying and supply operation in Ireland. It is the parent company of Green Belt NI Limited, the appellant.

[80] In 2015 the appellant constructed a woodchip drying installation in Middletown, County Armagh which consisted of ten woodchip biomass boilers located in a plant room generating heat used in drying sheds containing exposed pipework serving the drying floor for the purposes of drying woodchips.

[81] On 3 November 2015 the appellant asserts that it entered into a written woodchip supply contract with a joint venture company of its to whom it had been supplying woodchip for some 8 years, namely Irish Woodchipping Services Limited. The contract was for a period of three years commencing on 1 January 2016. It provided that the minimum monthly quantity of woodchip to be supplied by the appellant to Irish Woodchipping Services Limited was to be 1,500 tonnes at £80 *per* tonne of woodchip at 25% moisture content. The contract was signed by Jonathan Latimer a director of the appellant and Mark Hanly a director of Irish Woodchipping Services Limited.

[82] On 14 November 2015 the appellant commissioned its ten 99 kilowatt woodchip biomass boilers.

[83] The appellant engaged agents to submit its applications for accreditation to Ofgem. As there were ten boilers there were ten applications but all of them were in identical terms. All of them resulted in an identical application process with identical outcomes.

[84] The ten applications for accreditation of the installation were submitted on 15 November 2015. The applications described how heat generated by the installation was used. It contained the following "clarification":-

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

There was no mention of the 3 November 2015 contract in the application forms and as can be seen the clarification referred to a circular use of the woodchip so that it was burnt to dry woodchip which were then burnt to dry more woodchip.

[85] By e-mail dated 24 February 2016 Ofgem enquired of the appellant as to whether the "wood is being dried for self-use or sold to customers."

[86] After 29 February 2016 it has not been possible to make a new application for accreditation under the Regulations. This means that after this date the appellant could not bring a fresh application with information which established that it was not proposing to generate heat for the predominant purpose of increasing their periodic support payments contrary to Regulation 33(p).

[87] On 1 March 2016 Mr Latimer provided information to the appellant's agent so that the agent could reply to the email of 24 February 2016. Mr Latimer informed the appellant's agent that "the wood being dried *is to be sold* to customers however we have not yet generated any sales invoices" (emphasis added). There was no reference in this e-mail to 3 November 2015 contract. The assertion that dried wood "is to be sold" was inconsistent with the 3 November 2015 contract which commenced on 1 January 2016 and provided for minimum monthly sales of 1,500 tonnes. It was also inconsistent with the later assertion that woodchip had been delivered to Irish Woodchipping Services Limited in January and February 2016 and was to be delivered in March 2016.

[88] On 21 March 2016 the appellant's agent passed on the information to Ofgem that "the wood being dried *is to be sold* to customers however we have not yet generated any sales invoices."

[89] On 15 August 2016 the original decision-maker rejected the appellant's application for accreditation. In doing so he stated that "as the woodchip is only being dried for the purpose of combustion within this installation and other installations at this site, and those other installations are in turn being used to dry woodchips for use in this installation and others, it is our opinion that the

installation is used solely for the purpose of generating heat for the predominant purpose of increasing periodic support payments." The original decision-maker continued "based on your description of the installation, its uses and supporting documentation, it is our opinion that you will be unable to comply with Regulation 33(p).

[90] On 15 September 2016 the appellants applied to Ofgem for a formal review of the decision to reject the appellant's application for accreditation. That application was preceded by a letter dated 29 August 2016 from Mr Latimer of the appellants to Ofgem also requesting a formal review. In that letter Mr Latimer stated that the assertion in the application form dated 15 November 2015 that no sales of woodchip had been made from the site "as of yet" was correct as the plant had only been commissioned. In the letter Mr Latimer continued by asserting that since the original application the site had produced 542.93 tonnes for sale up to the end of June 2016. He referred to the 3 November 2015 contract which he enclosed together with "evidence of sales since January 2016 to date." The evidence of sales included six invoices to Irish Woodchipping Services Limited for each of the months January 2016-June 2016. The total amount invoiced was £43,434.00. The invoices for January, February and March had an invoice date of 4 April 2016. There were no receipt of delivery documents nor was there any proof of payment. This was part of the further information which it is asserted was not taken into account by the Department on the subsequent statutory review.

[91] On 24 October 2016 there was a telephone discussion between Ofgem and the appellant during which Ofgem queried why the invoices for January to March 2016 had an invoice date of 4 April 2016. The appellant's response contained in an e-mail of the same date was that:

> "a delay like this is a typical occurrence in the implementation and bedding in of a new project. We wanted to ensure that the following criteria were being satisfied
>
> - that the quality of the product was to the standard required by the purchasing party
>
> - that the volumes and method of delivery were satisfactory to the purchasing party.
>
> It was agreed between the parties that invoices would be issued once these teething issues were resolved and we got the all clear to commence invoicing at the start of April."

This was another part of the further information which it is asserted was not taken into account by the Department on the subsequent statutory review.

[92] On 6 February 2017 the formal review officer, Ms Teri Clifton issued Ofgem's decision in relation to the formal review. I have added emphasis to various points made by the formal review officer. She stated that "at *point of application*" the appellant had "no evidence to show that the site was *commercially viable*." She continued that "for Ofgem to determine eligibility of *the commercial nature* of the site, the invoices would need to have been produced *at point of application* and had to relate *to commercial use prior to application*." She continued by stating: "(on) that basis I am satisfied that the original decision was correct and appropriate based on its individual facts; and therefore the rejections stand." That was conclusive of the formal review but she then also considered the further information. She stated that had "the information and evidence been supplied with the applications or had been supplied whilst the applications were receiving consideration by Ofgem the concerns in relation to eligible heat use and hence the basis on which the applications were eventually rejected may not have arisen." However in fact the information and evidence was not supplied to Ofgem until sometime after the decisions were made by Ofgem to reject the applications, as communicated by its letter dated 6 May 2016. She stated that "the regulations require that Ofgem should assess an application that is submitted to it on the strength of the evidence and information supplied" and that was "what [Ofgem's] decision was based on." It is clear that she rejected the formal review on those grounds which in essence were that (a) the invoices would need to have been produced at *point of application* and had to relate to *commercial use prior to the application* and (b) in the alternative that the decision could not be based on the further information. However the formal review officer then went on to consider the further information which had been provided even though it was not material to the decisions to reject the applications. She stated that

> "the evidence that was supplied in September 2016 and which addressed an activity that had been put into train on 3 November 2015 and commenced by January 2016 is inconsistent with the statements made by yourself on 21 March 2016. On that latter date, in response to questions raised by Ofgem on the applications between 22 and 24 February 2016, you stated that "as of yet" no commercial wood drying was in fact undertaken but that such an activity was envisaged. However the evidence supplied by yourself in September 2016 indicated that by the time that the 21 March 2016 statement was made to Ofgem, commercial wood drying had been taking place for 2-3 months pursuant to contractual arrangements that had been in place for nearly 6 months."

It is not clear whether the formal review officer also rejected the applications on the alternative ground of an evaluation of the further information as she also stated: "…

had it been available, these inconsistencies should have detracted from the weight that Ofgem *may* legitimately have placed on it" (emphasis added). That does not amount to a determination that the further information carried no weight so that once evaluated it should be left out of account.

[93] By letter dated 2 March 2017 the appellant requested a statutory review. In that letter Mr Latimer explained that production for November/December 2015 was low for three reasons. First, a harvesting site had been shut down. Second, as they were in the early stage of commercial production they were required to test their product *i.e.* chip size and moisture content to make sure it satisfied their end user requirements. He stated that in that respect three trial loads were sent free of charge to customers in November/December 2015 namely Monaghan VEC, Roscommon County Council and Ballyconnell Pig Farm and that if requested delivery documents can be supplied to verify this data. Third, when drying was not taking place production was shut down. Mr Latimer explained that this was reflected in the initial low readings on the boilers. Mr Latimer continued by asserting that the lack of invoicing at a point in time does not mean that there was no commercial production taking place. Invoicing for the period January to March 2016 was done on 4 April 2016. He also attached a schedule of production since commissioning of equipment up to 31 December 2016. He stated that sales only took place from January onwards. Mr Latimer also addressed the issue of inconsistency between the application and the correspondence in March 2016 on the one hand and the further information. He acknowledged that a more accurate statement in March 2016 would have been "Woodchip has been produced for sale for commercial purposes, and invoicing procedures are currently being finalised."

[94] By letter dated 10 April 2017 Heather Cousins, Deputy Secretary at the Department, informed the appellant that she had been appointed as the Department's Statutory Review Officer and that the Statutory Review "will be based *on all the evidence, information and representations submitted by you/your legal representative to Ofgem (including Ofgem's FRO)*" (emphasis added). This letter together with the statutory guidance was relied on by the appellant in support of its assertion that there was a procedural legitimate expectation that the statutory review would take into account all the evidence, information and representations made to Ofgem including to Ofgem's formal review officer.

[95] A Departmental Statutory Panel was then appointed to undertake the statutory review. Heather Cousins was Chair and Beverley Harrison and June Ingram were Panel members. Martin McEvoy was legal advisor to the Panel. All those persons were present when the Panel met on 25 April 2017 together with Victoria Reid who prepared minutes of that meeting.

[96] It is apparent from the minutes of the meeting that the panel members were given legal advice by Martin McEvoy that "the role of the panel was to review Ofgem's decision on the basis of information available to Ofgem at the time of making their decision." The minutes then record that the panel discussed the

circumstances of the case noting that Ofgem made their decision based on the information available to them at that time and it was the appellant's responsibility to ensure the information included within the application was accurate and reflective of the facts. The panel noted reference in Ofgem's formal review response letter of 6 February 2017 to the statement that "had this information and evidence been supplied with the applications; or had it been supplied whilst the applications were receiving consideration by Ofgem, the concerns in relation to eligible heat use and hence the basis on which the applications were eventually rejected may not have arisen." It was noted that the appellant did not provide the required evidence within the appropriate time window, *i.e.* whilst Ofgem were considering the application prior to its rejection. The panel decision was then recorded as being that the applicant provided clear detail within their application of intended use. The panel agreed that the intended use stated in the application would, as purported by Ofgem, prevent the applicant from complying with their ongoing obligations as *per* paragraph 33(p) of the Regulations and hence Ofgem were correct to reject the application based on the information available to Ofgem at the point in time when their decision was made. The panel were cognisant of the fact that had the applicant provided evidence to support commercial activity within their application then it may have been appropriate for Ofgem to reach a different decision. However, in the light of the facts of the case the panel agreed unanimously to confirm Ofgem's decision.

[97] By letter dated 15 May 2017 the appellant was informed of the outcome of the statutory review. The purpose of the statutory review was stated in that letter to be:

> "To consider a decision made by Ofgem in relation to the above numbered applications, in the light of the Regulations, and all other available evidence, and conclude whether *the original decision-maker* erred in coming to the conclusion not to allow the applications" (emphasis added).

It can be seen that the purpose relates to the decision made by the original decision-maker rather than by the formal review officer though this was qualified by reference to "all the other available evidence." The letter continued that the original decision was made by Ofgem "on the basis of information supplied at the time of the application." I consider that the reference to "the original decision" is a reference to the decision by the original decision maker dated 15 August 2016. The letter then continued by stating that the panel considered that Ofgem might seek further information where there was ambiguity or lack of clarity in the original application. However, the panel was of the view that the intended purpose was clearly stated, and while the information provided may, in hindsight, have been incorrect, it was not unclear. On that basis the panel considered that there was no duty on Ofgem to seek further clarity. The letter then continues as follows:

> "The panel concluded that Ofgem therefore acted reasonably in rejecting the applications based on the information available to Ofgem *at the point in time when their decision was made*.
>
> The later provision of information which may have suggested a use that did not fall foul of Regulation 33(p) does not of itself invalidate the earlier decision.
>
> The panel were cognisant of the fact that had the applicant provided further evidence to support commercial activity within their original applications that it may have been appropriate for Ofgem to reach a different decision. The panel additionally notes this further evidence may not have been conclusive of such eligible use. But in the event, as stated, this further evidence does not, and cannot, invalidate the original decision of Ofgem.
>
> In light of the facts of the case the panel agreed unanimously that Ofgem's decision was therefore both reasonable and correct on the evidence available at the time of the application, and therefore agreed unanimously to confirm Ofgem's original decision."

[98] On 7 July 2017 the appellant's solicitors sent a pre-action letter to the Department. The reply from the Department dated 31 August 2017 stated that "(in) determining their respective reviews, both Ofgem and the Department concluded that … the reviewing bodies were not themselves obliged to take account of the fresh information supplied by your client." One of the questions in this appeal is whether the Department when undertaking the statutory review was under a duty to take account of the further information supplied by the appellant to the formal review officer.

[99] On 11 August 2017 the appellant commenced these proceedings.

[100] On 20 November 2017 leave to apply for judicial review was granted.

[101] On 8 March 2018 the judge dismissed the application for judicial review.

The decision at first instance

[102] The judge having set out the relevant Regulations and the statutory guidance together with a summary of the factual background identified the appellant's challenge as having two central elements; one factual, the other legal. The judge stated that the factual component was whether on the statutory review the

respondent had failed to take into account certain of the information provided by the appellant to Ofgem in relation to the formal review process. The judge identified the legal component as being whether this failure (if established) vitiates the respondent's decision in two respects, namely whether it gives rise to a breach of the Regulations and/or whether it frustrates the appellant's legitimate expectation generated by the statutory guidance and correspondence that all material submitted will be considered.

[103] The judge held that the formal review and the statutory review under Regulation 50 were not full blown merit appeals or re-hearings. Rather the function was one of a review with the formal review not being divorced from the statutory review process. In his view the real question was what is the Department (a) obliged, as a matter of legal duty and (b) empowered, as a matter of legal discretion to consider in exercising a statutory review function. He considered that Regulation 50 which provides for the statutory review "was clearly designed to be exhaustive of the right of review" and that "multiple layers of review cannot have been the underlying legislative intention …." Then at paragraph [31] the judge stated:

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

At paragraph [32] the judge stated:

> "While this analysis does not preclude the consideration of new information at the Regulation 50 review stage, I consider that where the new material trespasses beyond mere clarification or modest elaboration or infilling it cannot operate to vitiate the initial decision. This approach is in my judgement

clearly implicit in Regulation, being fully harmonious with the concept and essence of review."

[104] The judge then turned to the factual component as to whether the respondent in making the impugned decision took into account all of the new information provided by the appellant to Ofgem. He considered that the duty imposed on the respondent in exercising its review function under Regulation 50 was to take into account both the initial Ofgem decision and, where one exists, any ensuing Ofgem "formal review" decision. The judge continued by stating that in his judgment the impugned decision of the respondent had a particular focus on the initial decision of its agent Ofgem, while simultaneously taking into account the formal review decision and the evidence generated in the formal review process. The judge concluded that "all of the information provided by the applicant was considered by the Department in making the impugned decision …." He stated "in short, there is neither sufficient evidence, nor evidence warranting the inference, that the information in question was ignored." Furthermore, the judge emphasised the important distinction between considering the new information and giving effect to it. He stated that the applicant's real complaint properly exposed is of the latter species. Furthermore he considered that the challenge was unsustainable as the new information went well beyond the limitations identified in paragraph [32] of his judgment. He stated that what he termed the later rescue attempt undertaken by the appellant was not permitted by the statutory model as it strayed beyond the narrow confines of review.

[105] The judge dismissed the application for judicial review.

Analysis

[106] Mr McLaughlin, who appeared on behalf of the Department, correctly accepted that it was not essential under the Regulations to achieve eligibility at the date of the application. It is sufficient pursuant to the Regulations to achieve that by the date of accreditation. On this basis that part of the decision of the formal review officer dated 6 February 2017 which refers to "at the point of application" or to "use prior to application" is incorrect.

[107] The Regulations do not refer to or require sophisticated, successful or indeed any commercial use. However commercial use is relevant to the decision as to whether there will be compliance with the ongoing obligation in Regulation 33(p) not to generate heat for the predominant purpose of increasing periodic support payments. Any reference to commercial use in for instance Ofgem's letter of 6 February 2017 has to be construed in that sense.

[108] The judge distinguished the classic form of a review from the classic form of an appeal process and I consider that he was correct to do so. However the nature of the formal review and of the statutory review under consideration in this case is obtained from the Regulations and from the statutory guidance. For the reasons

articulated by Sir Donnell Deeny at [57]-[61] I agree that at formal review and at statutory review there is a duty to take the further information provided by the appellant into account.

[109] The duty to take information into account does not mean that the information has to be either accepted or rejected. The graphic phrase used by Mr McLaughlin was that there was that no obligation to swallow the evidence. I agree, see *Tesco Stores Limited v Secretary of State for the Environment & others* [1995] 2 All ER 636 at 657 f–h. The further information is to be evaluated and the weight, if any, to be attached to it is for the decision-maker. In considering information it is perfectly legitimate to consider whether the documents provided are "largely self-serving" whether the information is inconsistent with other information or whether the quality of the information is sufficient so that for instance invoices are backed up by contemporaneous delivery dockets and appropriate proofs of payment by the purchaser to the vendor. It is also appropriate to consider the relationship between the vendor and purchaser particularly if the transactions are not at arm's length. Furthermore it may be relevant as to why the information was not provided at an earlier and more appropriate stage. All these factors and the weight to be attached to any particular factor in the evaluation of the further information are for the decision maker and not for this court.

[110] The judge restricted the nature of the further information by stating that "where the new material trespasses beyond mere clarification or what is elaboration or infilling it cannot operate to vitiate the initial decision." On that basis the judge considered that further information not of that nature was not permitted by the statutory model as "it strayed beyond the narrow confines of review". I do not consider that there is any constraint to the nature of the further information that can be made available. I arrive at that view not only on the basis of the Regulations and the statutory guidance but also because the decision by Ofgem has two parts. The first is what is termed the original decision. The second the formal review. In reality they both form Ofgem's decision making process during which the potential participants are encouraged to provide further information to assist in that decision making process. Furthermore the purpose of the scheme contained in the Regulations and of the statutory guidance is to facilitate rather than to set out procedural hurdles which would require applicants to go back to make a fresh application if anything was insufficient.

[111] The question as to whether the statutory review took into account the further information provided by the appellant is essentially a question of fact. The judge concluded at [37] that "all the information provided by the (appellant) <u>was</u> considered by the Department in making the impugned decision …." The role of this court in relation to factual determinations made by the judge is limited. The relevant principles have been set out by Lord Kerr at paragraphs [78] – [80] when giving the judgment of the Supreme Court in *DB v Chief Constable of the Police Service of Northern Ireland* [2017] UKSC 7 so that that it is only in the rarest occasions when the appeal court is convinced by the plainest of circumstances that it should interfere

with the factual findings of the first instance judge. Lord Wilson stated in *In re B (A Child)* [2013] 1 WLR 1911, paragraph [53] that "… where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it." This court does not conduct a re-hearing and it is only in very limited circumstances that the factual findings made by the Tribunal will not be accepted by this court, see also *Mihail v Lloyds Banking Group* [2014] NICA 24 at [27]; *McConnell v Police Authority for Northern Ireland* [1997] NI 253; *Carlson v Connor* [2007] NICA 55; *Chief Constable of the Royal Ulster Constabulary and Assistant Chief Constable A H v Sergeant A* [2000] NI 261 at 273. In this case the judge's major concentration was on the classic distinction between review and appeal. I consider that the concentration should be on the particular facts.

[112] I consider that plainly the statutory review did not take into account the further information provided by the appellant. The members of the statutory review panel were provided with legal advice that they should not do so. Their legal advisor Mr McEvoy was recorded in the minutes as reiterating that the role of the panel was to review Ofgem's decision on the basis of the information available to Ofgem at the time of making their decision by which he meant the original decision. There was no analysis of the further information either recorded in the minutes of the meeting or referred to in the letter of 15 May 2017. That letter clearly establishes that they did not do so. It refers to the further information which had been provided to the formal review officer but then emphatically states that "this further evidence does not, and cannot, invalidate the original decision of Ofgem." This clearly states that the members of the panel believed that they could not invalidate the original decision of 15 August 2016 because of the further information. The next paragraph of the letter then provides the reason why it cannot invalidate the original decision as being

> "In light of the facts of the case the panel agreed unanimously that Ofgem's decision was therefore both reasonable and correct on the evidence provided at the time of application, and therefore agreed unanimously to confirm Ofgem's original decision" (emphasis added).

The position is also made absolutely clear in the Department's response to the pre-action protocol letter stated that "(in) determining their respective reviews, both Ofgem and the Department concluded that … the reviewing bodies were not themselves obliged to take account of the fresh information supplied by your client."

[113] It is suggested that the minutes of the meeting of the panel establish that the members of the panel did perform their duty to take into account the further

information. In this respect reliance is placed on that part of the minute which records as follows:

> "The panel were cognizant of the fact that had the applicant provided evidence to support commercial activity within their application that it may have been appropriate for Ofgem to reach a different decision. However in light of the facts of the case the panel agreed unanimously to confirm Ofgem's decision."

There is no express elucidation as to what were the facts of the case and given the rest of the minutes and also the terms of the letter the facts of the case could only be the facts as at the date of the original application rather than any of the further information.

[114] I consider that the statutory review was *Wednesbury* unreasonable in that it failed to take into account and to consider the further information provided by the appellant to the formal review officer.

[115] I agree with Sir Donnell Deeny that it is not necessary to arrive at a conclusion in relation to the alternative basis of challenge that there was a breach of a procedural legitimate expectation.

[116] The finding that the statutory review was *Wednesbury* unreasonable on its own does not determine this appeal. There is a presumption that the appellant who has succeeded in establishing the unlawfulness of the impugned decision is entitled to be granted a remedial order. The court does, however, have discretion in the sense of assessing "what it is fair and just to do in the particular case" either to withhold a remedy altogether or to grant a declaration (rather than quashing the decision). That is subject to the requirements of the rule of law which means that "the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow" see *Berkeley v Secretary of State for the Environment and Another* [2001] 2 A.C. 603. In England and Wales that presumption has now been substantially modified by section 84 of the Criminal Justice and Courts Act 2015 which provides that the High Court must refuse to grant relief on an application for judicial review, and may not make any award under the Senior Courts Act 1981 s.31(4), if "it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred." In this jurisdiction the position remains as at common law.

[117] There are two potential points in relation to the exercise of discretion.

[118] First the judge stated that "*it is far from clear* that the (appellant) has addressed this issue, namely the abrupt and unheralded appearance of this highly significant new evidence, fully and candidly in its affidavit evidence" (emphasis added). The

judge did not say that if judicial review grounds had been established then in the exercise of discretion a remedy would have been denied to the appellant on the basis of lack of candour. It is not necessary to consider whether relief can be refused on this basis because even if it could one of the factors in the exercise of discretion must be an actual finding that there was a lack of candour on behalf of the appellant. As is apparent the judge observed that it was "far from clear" rather than that it was clear on the balance of probabilities that there was a lack of candour.

[119] Second Sir Donnell Deeny states at [71] that the "judge would have been entitled to refuse relief to the applicant" on the basis that the Department was "fully entitled, even if required to retake the decision, to arrive at the same outcome." I agree that the Department is fully entitled on retaking the decision to arrive at the same outcome but this would be on the basis that it had taken into account and evaluated the further information and rejected it. However the test in the exercise of discretion is not whether the Department is "entitled" or "fully entitled" to arrive at the same outcome but rather whether the court is satisfied that the outcome would have been the same. The formal review officer stated that had "the information and evidence been supplied with the applications or had been supplied whilst the applications were receiving consideration by Ofgem the concerns in relation to eligible heat use and hence the basis on which the applications were eventually rejected may not have arisen." The statutory review stated that the further evidence "may not have been conclusive of such eligible use" and also stated that "it may have been appropriate for Ofgem to reach a different decision." It can be seen that both the formal review officer and the statutory review accepted that on the basis of the further information accreditation might have been granted. Against that factual background it cannot be said that the outcome would have been the same.

[120] The judge also made reference to this aspect of the exercise of discretion stating that the claim was "in any event defeated by the unmistakable realities relating to the timing and content of the new information." The implication might have been that the judge had formed the view that the further information could not have changed the decision. However I consider it more likely that the judge was addressing a contention which was withdrawn on appeal that the further information was so compelling that it was inevitable accreditation should be granted so that the appellant was entitled to an order of mandamus compelling the Department to grant accreditation. That was the claim that was "in any event defeated" and rightly so. However the judge was not addressing the separate question as to whether if the impugned decision was unlawful relief should be refused in the exercise of discretion.

[121] I do not consider that the relief of quashing the impugned decision should be refused in the exercise of discretion.

Conclusion

[122] I consider that the appeal should be allowed and the impugned decision should be quashed.

MORGAN LCJ

[123] I have had the opportunity of reading both judgments in draft and agree with the judgment delivered by Stephens LJ.