

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10/10/2013

**Before:**  
**MR JUSTICE BLAIR**

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**Between:**

<b>THE QUEEN ON THE APPLICATION OF ENERGIE EST LDA</b>	<b><u>Claimants</u></b>
<b>- and -</b>	
<b>(D1) THE SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE</b>	<b><u>Defendants</u></b>
<b>(D2) MICROGENERATION CERTIFICATION SCHEME STANDARDS MANAGEMENT GROUP</b>	
<b>-and-</b>	
<b>(IP1) GREENEABLE ENERGY LIMITED</b>	<b><u>Interested</u></b>
<b>(IP2) GREENHEAT (a firm)</b>	<b><u>Parties</u></b>
<b>(IP3) MICROGENERATION CERTIFICATION SCHEME STEERING GROUP</b>	

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**Mr Simon Murray** (instructed by **Prospect Law**) for the **Claimants**  
**Mr Daniel Kolinsky** (instructed by **Treasury Solicitor**) for the **First Defendant**  
**Mr Tim Eicke QC** (instructed by **Addleshaw Goddard LLP**) for the **Second Defendant**

Hearing dates: 2 and 3 October 2013  
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## **Judgment**

**Mr Justice Blair :**

1. This case concerns a certification scheme called the Microgeneration Certification Scheme, or MCS, which has to do with the generation of energy from renewable sources. The claimant is a company incorporated in Portugal. It designs and produces solar collectors. A solar collector is a device which converts sunlight into electricity or heat, and solar panels are now a familiar sight on rooftops and other sites in this country and elsewhere. However, the claimant's model uses a relatively novel technology, and that is the underlying cause of this dispute.
2. The claimant seeks judicial review of a decision of the Standards Management Group (SMG) of MCS made on 16 November 2012 which had the effect that the claimant's product no longer fell within the scheme. Whilst the decision did not prevent the claimant from marketing and installing its product, the result of the decision was that

incentives provided by the Government to consumers to encourage the installation of green energy products were no longer available. The claimant asserts that this has seriously damaged its business.

3. The claim is brought by permission of Sales J, who ordered the hearing to be expedited. The heads of challenge are (1) illegality under EU law (regarding the reciprocity of product certification), (2) illegality under domestic law (in respect of the Green Energy Act 2009), (3) breach of legitimate expectation (as to the continuing registration of the claimant's product), (4) procedural unfairness in various respects, and (5) violation of claimant's rights to property under Article 1 of the First Protocol of the European Convention on Human Rights.
4. On these grounds, the claimant seeks declaratory relief that the impugned decision was unlawful, together with an order quashing that decision and an order that the matter be again considered and lawfully determined. Human Rights Act damages are also claimed, though, following an agreement between parties, if the claimant succeeds on liability, damages issues are to be transferred to the Queen's Bench Division for later resolution pursuant to CPR 54.20.
5. Though not itself the decision maker, the first defendant, the Secretary of State for Energy and Climate Change (DECC), accepts responsibility for the decision of the MCS SMG because the MCS is not yet incorporated, as is eventually envisaged. The defendants each deny the claim, asserting that the decision was lawfully taken.

#### The Microgeneration Certification Scheme (MCS)

6. There is a substantial body of evidence filed in respect of the claim in the form of four witness statements from Mr Tiago Costa for the claimant, a witness statement from the first defendant, and four witness statements from Mr Gruffydd Thomas for the second defendant. Together with exhibits, some of this evidence is technical. The claimant served its fourth witness statement late in the day before the hearing, which was not satisfactory. However, though objecting to its admission, the second defendant was able to serve its response on the second day of the hearing.
7. Nevertheless, the basic facts are clear, and the parties agreed some of the background facts. In summary, the Microgeneration Certification Scheme (MCS) was developed by a company called BRE Certification Ltd under contractual arrangements with DECC, following a procurement exercise in 2006. This led to DECC creating the MCS mark, a registered trademark, which is still owned by it. The mark was licensed to a company called Gemserv Ltd through its contract for licensee services with DECC. The licence allows Gemserv Ltd to use the mark, and to sub-licence its use. Gemserv provides administrative services to the MCS.
8. The MCS was set up as an industry-led scheme to bring about improvement in industry standards and increase consumer protection in the field of microgeneration products. It aims to increase public confidence in and take up of such products. The creation and maintenance of consumer confidence in the products is a core purpose of the scheme. To that end, the MCS sets standards for the certification of microgeneration products used to produce electricity and heat from renewable sources. It also sets standards for the certification of installation companies to ensure that the microgeneration products are installed and commissioned to the highest

standard for the consumer. Certification is based on a set of installer standards and product accreditation requirements. A number of these MCS standards have been referred to in the course of the hearing.

9. The MCS is not a statutory scheme. It describes itself as an internationally recognised quality assurance scheme, whose standards allow accredited third party certification bodies to certify microgeneration products. It was notified by the Government to the European Commission on 9 August 2007 under Directive EC 98/34/EC (the Technical Standards and Regulations Directive).
10. It has been described as having a hierarchical structure, and various MCS entities within it feature in this claim. The overarching MCS body is the MCS Steering Group which meets four times a year and is the third interested party in this claim. It has appointed the MCS Standards Management Group (SMG) to oversee the development of MCS standards. As explained to me in the course of the hearing, for present purposes the decision-maker was the MCS SMG.
11. Beneath the SMG are a number of MCS Technical Working Groups. Two are of particular relevance in these proceedings, the “Solar Thermal” working group and the “Heat Pump” working group. These terms describe distinct technologies for microgeneration, one based on a solar collector, and the other based on a heat pump which transfers heat from the ground or the air to a domestic hot water tank. Beneath the Technical Working Groups are further sub-groups formed as and when necessary to meet specific technology demands.
12. It has been recognised in various Government policy documents that the encouragement of this technology depends at least in part on providing incentives to consumers to acquire it. There are a number of these—the Feed-InTariff (FiTs), Renewable Heat Incentive (RHI), and the Renewable Heat Premium Payment (RHPP). They have this in common—in order to access them, both the installed product and the installation company must be MCS certified. The claimant says, and I do not think that this is seriously in dispute, that the availability of these incentives is an integral part of developing a successful business in such products. Certification is commercially important therefore.

#### The claimant’s product

13. As it is put by the claimant, it designs and produces innovative solar collectors that seek to limit the constraints that reduced levels of sunlight place on the operation of traditional solar collectors, which makes them particularly suited to the UK climate. The product is manufactured near Porto in Portugal. In essence it is a water heating system, which the claimant calls a “thermodynamic solar system”. It consists of a panel through which refrigerant flows (which is the collector component) and other components. (One of the issues between the parties relates to the distinction between the collector and the system as a whole.) The refrigerant is a fluid which changes from a liquid to a gas when passed through the collector as it absorbs heat from the environment in which the collector is situated.
14. The collector is connected to a compressor which raises the temperature of the gas coming out of one end of the collector, transferring the gas to a coil inside a water cylinder. Heat taken from the gas heats the water. As it cools, the gas goes to liquid

form. The liquid then re-enters the other end of the collector to start the process again. As explained in the evidence, the system works on a similar principle to a domestic fridge.

15. It was agreed by the parties in their submissions that the product may be described as something of a hybrid. Whilst it uses a collector, the liquid entering the panel is not water, but refrigerant. So while it is like solar technology in using a collector, it is like heat pump technology in using the property of refrigerant to convert from liquid to gas and back to liquid according to the ambient temperature.
16. The claimant wishes to market its product in the UK, and has done so to date by supply to distributors in the UK, of which two are interested parties in these proceedings (they did not make separate submissions at the hearing). The claimant is not directly concerned with the installation process.

### The certification process

17. Under the MCS, third party certification bodies undertake the task of assessing whether a product complies with the MCS standards for products, and whether an installer company complies with the MCS standards for installers. The claimant's case is that its product has been certified according to European standards, and the certification is entitled to recognition under the Technical Standards and Regulations Directive. Through the directive or otherwise, it is not in dispute that there is a duty of mutual recognition of certificates under EU law.
18. Nor is it in dispute that the claimant has the benefit of a certification. The dispute is as to the extent of the certification. As regards the process of certification, the parties agreed (with some omissions) a flow chart prepared by Mr Gruffydd Thomas who is Chair of MCS SMG. I annex the agreed document to this judgment.
19. In summary, the claimant had their collector tested at the Institut für Thermodynamik und Wärmetechnik (ITW) which is part of Stuttgart University in Germany in 2009. It was tested to European Standard EN12975, '*Thermal solar systems and components - Solar collectors*'. This standard was approved by the European Committee for Standardisation ("CEN"), which is the European standards body, on 6 February 2006. It comes in two parts, Part 1 dealing with General Requirements, and Part 2 dealing with Test Methods. A European standard carries with it an obligation of implementation as an identical national standard.
20. However, it is agreed that the test was done using water, not refrigerant, as is in fact used in the claimant's product. As has been identified by the parties since the outset of the dispute (for example in the first witness statement of Mr Tiago Costa for the claimant) a central dispute between the parties is as to the scope of the certificate. The claimant says that it covers use of the collector with refrigerant, whereas the defendants say it does not.
21. The ITW test report dated 19 August 2009 was sent by the claimant to DIN CERTCO in Berlin for a certificate to be issued. DIN, which stands for Deutsches Institut für Normung e.V., is a National Standardisation Body (NSB) identified in Annex II of the Technical Standards and Regulations Directive. It is equivalent to the British Standards Institute in the UK. DIN CERTCO is the certification organisation of DIN.

22. DIN CERTCO evaluated the test report with the EN12975 standard and the claimant's factory processes against the standards set by "Solar Keymark". The "Solar Keymark" is a certification mark for solar thermal products developed by the European Solar Thermal Industry Federation ("ESTIF") and CEN. (It looks something like a key with a circle representing the sun, and can be seen on the flow chart.) DIN is a certification body registered with the "Solar Keymark" scheme.
23. On 9 September 2009, DIN CERTCO issued the claimant with the certificate. This certifies that "Solar collectors of the type thermodynamic solar panel" conforms to EN 12975 and the "Specific CEN KEYMARK Scheme Rules for Solar Thermal Products". It grants the claimant a license to use the Solar Keymark and DIN marks until 31 August 2014. In other words, it has been valid throughout the relevant period. The parties are agreed that the DIN CERTCO certificate relies on a test to standard EN 12975.
24. As the flowchart shows, the certificate allowed the claimant's collector to be registered on the Solar Keymark database with ESTIF in Brussels. Gemserv administers the MCS product database with a link to the Solar Keymark database. Thus the claimant's collector was registered on the MCS product database through the automatic link. I do not think that it is in dispute that it was the claimant's collector that was registered, not the whole system—this is because it was the collector that was the subject of the certification by DIN CERTCO.
25. It may be noted that MCS has three databases in all. As described by Mr Thomas, as well as the product database, which is publicly accessible, there is an installer database, and an installation database.

#### The challenged decision

26. The claimant began distributing its product in the UK in July 2010. The take up was initially modest. Up to 27 September 2012, 97 installations had been registered with MCS. By 19 November 2012, that is, about the time of the decision letter, 355 installations had been registered, which was a sharp rise. It was this increase in installations that brought the claimant onto (as it was put) the radar of the MCS SMG.
27. Mr Thomas says that the first notice of any queries came on 17 August 2012 when he was asked whether the claimant's systems could be installed and registered under the MCS. He referred the query to Gemserv. The Renewable Heat Incentive Team within DECC took the issue up at about the same time. The industry responses received were negative. According to Mr Thomas, there was also an issue as to the use of refrigerant classified as "fluorinated greenhouse gases", and whether installers qualified to install solar systems (as opposed to heat pump systems) had the necessary qualifications to handle it. The responses that Mr Thomas got also suggested that as a hybrid product, a new standard might be needed.
28. The issue of "thermodynamic products" was raised at a meeting of the MCS SMG on 4 October 2012. There was no consensus, but it was agreed that the issue would be raised with certification bodies and MCS installers, as well as manufacturers.
29. Accordingly, Mr Chapman of Gemserv emailed Mr Costa, the claimant's International Operations Manager, on 8 October 2012 seeking further information,

and there was subsequent email and phone contact. Mr Costa and Mr Thomas had a phone conversation on 15 October 2015, when the concerns that the MCS SMG had were explained. Mr Costa sought to meet these concerns, as he has throughout.

30. There was an interchange about test data as required by Appendix H (solar water heating) of the Government's Standard Assessment Procedure for Energy Rating of Dwellings (SAP 2009). Mr Thomas took the view that the methodology did not cover the use of refrigerant. The basic dispute between the parties emerged right at the beginning therefore, and while the contact was constructive on both sides, Mr Costa did not succeed in alleviating Mr Thomas' concerns.
31. The position of the MCS SMG is shown by letters that Gemserv wrote on behalf of the SMG to thermal installers and installer certification bodies on 17 October 2012. The letter to installer certification bodies said that, "The product type requires refrigeration competence and we are working with the manufacturer we are aware of with Solar Keymark approval to understand how this product works so as to hopefully allow MCS to develop formal installer requirements for its installation. We are currently unsure as to whether the product type is within the solar thermal installer standards or the heat pumps installer standards, although cases are being made from within the heat pump working group that this is heat pump technology".
32. The letter added, "The other potential position which the Scheme may take is to temporarily suspend the registration of the product on the MCS database for the reasons that it does not currently conform to the MIS solar thermal requirements or the MIS 3005 requirements and therefore cannot be classed as an MCS installation." This letter was not copied to the claimant, but the letter to the installers which makes similar points was copied the same day.
33. Emails continued to be exchanged between Mr Thomas and Mr Costa, who sent him among other material the ITW report from 2009. Mr Costa told him that the test had been done with water, or water with glycol (which is an antifreeze), he was not sure which. However, he drew attention to a passage on page 5 of the report which says in the English wording, "allowed heat transfer fluid – water/water glycol mixture or refrigerant". This remains an important part of the claimant's case, and is discussed below. MCS did not accept the validity of this point.
34. On 5 November 2012, Gemserv wrote on behalf of the MCS SMG to MCS solar thermal installers. In submissions, the claimant referred to the letter as containing reasons for the decision on 16 November 2012 which it challenges. The letter records a decision to temporarily suspend the registration of solar thermodynamic products such as the claimant's. Although not addressed to the claimant, Mr Thomas emailed Mr Costa seeking to explain the position. In reply, Mr Costa expressed his surprise, warning of the effect it would have on his company's sales.
35. The letter of 5 November 2012 states that:

"Further to our letter sent out on 17<sup>th</sup> October 2012 to all MCS registered Solar Thermal Installers, MCS has now completed an initial review of the thermodynamic product type (including solar thermodynamic panels), and as a result, MCS has now taken the decision to temporarily suspend the registration of solar thermodynamic products within the MCS installation database until

requirements for the installation of this product type can be developed by the Scheme.

To be completely clear, this decision does not mean that the products cannot be installed in the UK, simply that they cannot be registered within the MCS installation database.

This is not a decision that has been taken lightly and the reasons for temporarily suspending the use of these products are:

1. The performance of the products being installed in the UK cannot be fully determined; this is mainly due to the fact that these systems are being installed using refrigerant but the 12975 testing and certification through Solar Keymark did not use refrigerant as the heat transfer medium.

2. Systems with a compression heat exchange unit are unable to meet the requirements for completing the SAP and performance estimation calculations required under MCS, i.e. hybrid type systems are not covered fully within the SAP methodology which is required to be completed under MCS.

3. It is not clear how compliance with Part G of the building regulations is fully met, due to the system's packaged control strategy. Installers are required to meet all parts of the building regulations under MCS, and it is uncertain if installers are able to do this within the system's packaged control strategy.

4. It needs to be determined if the classification of these systems within MCS are actually Solar Thermal systems or if they should be classified as Heat Pump systems.

Installation companies with contracts with customers in place prior to the date of this letter (5<sup>th</sup> November 2012) for the installation of such systems will have until 18<sup>th</sup> November 2012 to register completed installations within the MCS installation database. From 19<sup>th</sup> November 2012, no further installations will be allowed to be registered within the MCS Installation database, and the product will be unavailable for selection.

MCS is already working with a number of manufacturers to develop the requirements either by extension to the existing MIS 3001 or MIS 3005 or a brand new Scheme document if appropriate.”

36. On 9 November 2012, MCS held a meeting with various thermodynamic manufacturers including Mr Costa representing the claimant and representatives of three of the claimant's distributors to discuss the situation and the way forward. The minutes of the meeting record consensus as to the need for clarity as to how the products fit within MCS save for Mr Costa whom, the minutes record, “insisted that their EN 12975 certificate and therefore Solar Keymark Certificate covered the system even when it used a refrigerant as the heat transfer medium”. It was however agreed that the standards would require updating.
37. Mr Costa also said that the claimant's system had been tested under a different standard, namely European Standard EN12976 *‘Thermal solar systems and*

*components – Factory made systems*’. This was potentially significant, because whereas EN12975 applies to collectors, EN12976 applies to the system. He agreed to send it, though it did not arrive until after the impugned decision was taken on 16 November, a few days later, and there was no certificate in this regard.

38. By now, the MCS SMG considered that it was clear that the Solar Keymark certification was based on collectors tested with only water as the heat transfer medium, and that systems such as the claimant’s with a refrigerant were not covered by either EN 12975 tests or the Solar Keymark certification. Mr Thomas says in his first witness statement that he spoke to DIN CERTCO which “confirmed to us our decision”. However email exchanges with DIN CERTCO (which the defendants properly disclosed) do not support a proposition in those terms. An email of 10 December 2012 seems to support the claimant’s position, and though Mr Thomas continued to pursue the point for some time, the end result is inconclusive.
39. The decision letter of 16 November 2012 was sent to those present at the 9 November 2012 meeting (including the claimant). The previously advised suspension of the collector from the MCS installation database was lifted. As of Monday 19 November 2012, however, the claimant’s collector would only be registered if used with water and/or water-glycol mix. Since it was designed for use with refrigerant, this effectively had the same result. MCS said that it was going to work with the thermodynamic product manufacturers to look at developing scheme requirements for systems installed using refrigerant. It was going to set up a sub-committee with this aim.
40. The text of the letter (signed by Mr Thomas) was as follows:

We would like to thank you for attending the recent meeting with the Microgeneration Certification Scheme (MCS) to discuss thermodynamic products.

As discussed we look forward to working with you all on developing suitable MCS requirements for thermodynamic products. After much deliberation and evaluation of the various routes that may be possible to create and/or amend a standard within the scheme we believe that the technology would best sit within the MCS heat pumps standard.

We will therefore be looking to set up a sub-committee of the MCS heat pumps working group to develop suitable requirements as soon as possible. The support of all product manufacturers will be essential in driving this work forward and as such we encourage you to view this as an opportunity to help frame the industry requirements for this technology.

Following the meeting last Friday we have also taken the decision that any systems installed using a heat transfer medium that is covered by the relevant certification (i.e. the EN12975 tests of the Solar Keymark certification) and subsequently the MCS should be allowed to be notified through the MCS database.

As a result we have decided to allow installers to continue registering these collectors using water or water – glycol mix ONLY as the heat transfer



medium, if they wish to do so. This follows clarification from Solar Keymark that the Solar Keymark certificate provided is based on a heat transfer medium of water or water – glycol mix only.

With immediate effect the previously advised suspension of the collector from the MCS installation database will no longer be in force and a clarification will be made to the product name to make it clear that this collector can only be registered if used with water and/or water-glycol mix heat transfer medium and when installed in full compliance with MIS 3001.

Insofar as we can ascertain at this stage, the registration under MCS of thermodynamic installations using refrigerant cannot be deemed compliant with MCS requirements and as such from Monday, 19th November cannot be registered on the MCS database for the reasons issued and made clear in earlier communications. For thermodynamic systems using refrigerant which have already been registered in the MCS Installation database, the MCS certificates will be classed as suspended and the installers will be responsible for ensuring these systems have met all the relevant UK building regulations.

Following a full review, if a new standard is created or an existing standard modified to extend the scope of the scheme to allow certification of these systems, then any existing systems will need to meet the new requirements to enable a valid MCS certificate to be created.

MCS is clear that the decision does not mean refrigerant based systems cannot be installed in the UK, simply that they cannot be registered on the MCS Installation database. However anyone installing these systems will be responsible for ensuring that they meet the relevant UK building regulations.

We are extremely grateful for your contribution last week and we are very keen that we can move this forwards as soon as possible, in the meantime should you have any questions please do not hesitate to contact me.”

41. The claimant maintains that the effect of de-registration has been seriously to damage its business in this country. It is concerned about claims from those who have already had installations made, though I was told by counsel for MCS that Government incentives already paid had not been affected. As I have said, damages are outside the scope of this hearing.

#### Developing a standard that will satisfy the MCS

42. It is not in dispute that the claimant’s product is novel technology, though clearly it has now been around for some time. A cautious appraisal is given by a body called the Energy Saving Trust, whose guidance as of October 2012 on thermodynamic solar panels indicates a current lack of data. However, the claimant asserts that its product has significant advantages, in effect combining the benefits of solar and heat pump systems.
43. As indicated in its November letters, MCS has set up a sub-committee to consider new standards for thermodynamic products. The claimant is a member of the sub-group, but is concerned at slow progress. There is currently a delay, it says, whilst the

heat pump group considers the output of the sub-group, and a meeting due on 9 October 2013 has been postponed.

44. For MCS, Mr Thomas says in his fourth witness statement of 2 October 2013 that the development of new standards is complex, and that the time being taken is not out of line with expectations. He mentions the further time that it would take to develop international standards such as EN12975, but my understanding of his evidence is that finalising the work which will accommodate the claimant's product type is not in any way dependent on that. He says that, "The product standard is nearing completion and is following the defined MCS "change process". We fully expect that this standard, along with the accompanying installation standard, should reach publication before the introduction of any Government incentives next year".

### The grounds of challenge

#### ***Ground 1: Illegality under EU Law***

45. The claimant's first ground is based on the proposition that in accordance with Directive EC, 98/34/EC each European member state must accept mutual recognition of certification, which is not disputed. It follows, the claimant submits, that the MCS SMG could not lawfully refuse to recognise a solar collector from the claimant which was using water as a heat transfer fluid. Again, that is not disputed.
46. In its skeleton argument, the claimant contends that the majority of solar collectors are tested with water. However, several other types of fluids are permitted. In addition to testing with water, tests are permitted using antifreeze, 50% glycol and water, among others, and it is common practice within laboratories and the industry to test with a range of fluids. The support for this factual submission is in a passage in Mr Costa's third witness statement.
47. The claimant's main point is that EN 12975 does not require the manufacturer to use the same fluid that was used during the tests. EN 12975, it is said, leaves it up to the manufacturer to state what types of fluids are permitted for use in the collector. It says that the performance of a collector running water will be different from the performance of a collector running other fluids. Notwithstanding this, it says that Appendix H of SAP 2009 does not take into account the type of fluid that is used to assess the performance of the collector or the whole system. It uses the EN 12975 performance figures obtained when the collectors were tested with water.
48. The claimant says that the reason it chooses to test its collector with water is that water is the most common fluid in use to test collectors. It says that the laboratory where it tests collectors did not have the equipment to test the collector with refrigerant, as it was the first manufacturer whose product they were asked to test using refrigerant. It uses refrigerant because it gives higher overall performance of solar systems. The claimant further contends that, as a matter of physics, the collector will be more efficient when used with refrigerant rather than water. It submits that none of the four points made in the letter of 5 November 2012 set out above are valid.
49. There were some differences in emphasis in the defendants' response to these contentions. The second defendant said that the fact that the claimant's collector remained registered on its database meant that there was no breach of EU law. On the

other hand, this cannot in my view be a sufficient answer, since the effect of the decision is to exclude the benefit of registration because the MCS SMG has stipulated that the collector may only be used with water or water/glycol mix.

50. More broadly, the defendants' contention is that the effect of the decision of the MCS SMG was to clarify correctly the extent to which the claimant's product benefits from certification. The claimant's solar collector component is certified under standard EN 12975 based on a test conducted with water as the heat transfer medium in accordance with the methodology of that standard. No tests under that standard were undertaken using refrigerant and the methodology of that standard cannot be used for testing with refrigerant. The claimant's system does not have the benefit of any further certificate.
51. The defendants say that there were clear and rational reasons to clarify the extent to which the claimant's solar collectors have the benefit of certification and for ensuring that a system which uses refrigerant rather than water as a heat transfer medium fits within an appropriate standard in the absence of an existing standard. There was plainly, the defendants say, no breach of EU law in giving effect to the correct extent of the certification.
52. My conclusions on this ground are as follows. I refer first to the description of the certification process set out above. The defendants contend that the DIN CERTCO certification of 9 September 2009 only covered the collector when operating using water. The claimant contends that the fact the collector was not tested with refrigerant does not mean that the DIN certification does not cover the equipment when used with refrigerant. This, as it was put, is the nub of the case.
53. The first point to note is that it is not in dispute that the DIN CERTCO certification only covers the solar collector. It does not cover the rest of the system, of which the solar collector is part. The certificate itself is a single page. There is a one page annex, but I do not think that the claimant's oral submission that the reference there to "appropriate frost protection measures" included the use of refrigerant is correct.
54. There is a further one page annex consisting of a "Summary of EN 12975 Test Results". It summarises the ITW test results referred to above. The certificate is described as a "Solar Keymark Certificate". This annex states expressly that the fluid used in the test was "water". These three pages constitute the certificate, and are publicly available.
55. As mentioned above, there is a further European Standard EN12976 relevant to the product, and unlike EN12975 which applies to collectors, it applies to systems. One of the claimant's models was tested by ITW, and a Test Report was issued on 8 January 2010. Although it only applied to the model tested, I accept the claimant's submission that the report contains a description of its product generally. In this test, refrigerant R134a was used. The claimant says, entirely reasonably, that it obtained this test so as to have the benefit of an independent test on its product.
56. However, it is important in my view to appreciate the limitations. The description of the test method states that the testing was based on a draft international standard adjusted for the purpose. Unlike the test report into the collector which is described as "according to" EN 12975, this report is said to be "based on" EN 12976. Perhaps for this reason, no certificate was issued. But in any case, the claimant made it clear

that it does not rely on this report in making its claim. Its case is that the Keymark certificate in relation to the collector is enough.

57. This is of some significance, because of the terms of MCS Standard 004 '*Product Certification Scheme Requirements: Solar Collectors*' of 25 February 2009. This states that certification and approval is based on evidence of compliance with EN 12975, or EN 12976. The second defendant accepts that if system had been certified under EN 12976, it would qualify for their database. But the claimant relies solely on EN 12975, and does not contend that the system is certified. In that regard, the standard of installation is governed by MCS Standard MIS 3001 (MIS stands for "Microgeneration Installation Standard"). MIS 3001 sets out the requirements for contractors undertaking the supply, design, installation, set to work commissioning and handover of solar heating microgeneration systems. The second defendant says, and I accept, that it is predicated on the use of water as the heat transfer fluid.
58. In his fourth witness statement, Mr Costa challenges the assertion made by Mr Thomas earlier in the year that water based liquids such as water or water with antifreeze do not have the same characteristics as refrigerants. Mr Thomas says that, unlike refrigerants, water based fluids are not "phase change" fluids. In contradiction, Mr Costa says that most fluids, including water, change their phase from liquid to vapour as the temperature increases.
59. Whilst this is obviously correct in itself, I do not accept the conclusion that the claimant seeks to draw from it, which is answered in the fourth witness statement of Mr Thomas. As he says, and as is common ground, the claimant's system works on the basis that the refrigerant leaves the collector in a gaseous state.
60. Discussing heat transfer fluid, paragraph 6.1.3.2 of EN 12975-2 says that the heat transfer fluid used for collector testing may be water or a fluid recommended by the collector manufacturer. However it goes on to say that, "The mass or volume flowrate of the heat transfer fluid shall be the same throughout the test sequence used to determine the thermal efficiency curve, time constant and incident angle modifiers for a given collector". This in my view makes good Mr Thomas' proposition that the test methodology of EN 12975 does not allow for a phase change. As he says, if steam is escaping from water based solar collectors (an example given by Mr Costa) it can only be taken as a sign of a defect in the system.
61. In the same witness statement, Mr Costa suggests that instead of having regard to Appendix H of SAP 2009, the utilisation of Appendix Q ("Special features and specific data") instead could be one potential solution to keeping the claimant's product on the database. However, as Mr Thomas says in response, the claimant did not follow up on this suggestion at the time of the decision. Further, it is Appendix H that is identified in the installation standard, MIS 3001. The Appendix Q point was taken very late, and does not in my view affect the outcome.
62. The matter comes back therefore to the defendants' basic point, which is that the claimant's collector was only tested with water, and the data is correspondingly limited. The claimant relies on a passage in the ITW test report of 19 August 2009. As I said above, on page 5 of the report under the heading "Limitations", the English wording states, "allowed heat transfer fluid – water/water glycol mixture or

refrigerant”. The claimant’s case is that this determines the issue in its favour, because the possibility of using refrigerant was there from the start.

63. In fact, this passage comes in a part of the report that is setting out “General Specifications (acc. to manufacturer)”. In other words, this part of the report sets out information that the claimant gives to ITW. The claimant’s answer is that there is nothing in the defendants’ point that refrigerant was (as the claimant put it) “self-reported”.
64. As a matter of comment, it was perhaps a little odd that the claimant should have identified the heat transfer fluid in this way, since there is no dispute that the collector was not intended to be used with water/glycol mixture *or* refrigerant, but with refrigerant only. It is perhaps accounted for by the evidence of Mr Costa that there were no facilities available to test the collector with refrigerant. (I reject the faint suggestion from the second defendant that the claimant in some way misled ITW.)
65. Notwithstanding, the fact remains that the testing of the collector was, as the certificate states, conducted with water, whereas the claimant’s system uses refrigerant as the heat transfer fluid. In my judgment, these certificates are intended to be self-standing, so that they can be used throughout the European Union. I doubt that it is appropriate to look for qualifying explanations in surrounding material. But even if it is, I am satisfied that nothing in the evidence detracts from the defendants’ contention.
66. The claimant relies on a certificate that attests to the use of water as the heat transfer fluid in its collector, whereas in fact it uses refrigerant. It does not have any certification of a complete system under EN 12976. I disagree with the claimant that the decision that the collector can only be registered on the MCS database if used with water or water/glycol mix and installed in compliance with MIS 3001 amounts to the imposition of an additional requirement. In my view, it gives effect to the existing certification. I accept the defendants’ submission that there has been no breach of Union law because the claimant’s collector is and remains registered with MCS on its product database for use in accordance with the DIN CERTCO certificate.
67. It has to be kept in mind that the onus is on the claimant to show that its collector and/or system have been wrongly excluded from the scheme. This is not only an evidential point applying to it as the claimant in legal proceedings. The claimant remains free to sell and install its product. What it seeks is the benefit of the MCS mark and the consequent access of its products to Government incentives. Whilst Mr Costa’s witness statements were helpful, in my view they fell some way short of demonstrating that entitlement. Further, there were omissions. The claimant’s evidence did not (for example) provide any independent support for the proposition (which may be correct) that refrigerant provides significantly superior efficiency when used with a solar collector, or provide supporting evidence for the assertion that large numbers of the product have been installed elsewhere in Europe, or explain whether the problem that it has encountered here is unique to the UK. In effect, it relies simply on the certificate, which for reasons I have given is not sufficient.
68. I do not accept the suggestion that concerns about the extent of testing under the DIN CERTCO certificate “smacks of ex post facto rationalisation”. The evidence makes

clear that the extent to which the product had been tested was a key line of enquiry whilst the decision was at the formative stage.

***Ground 2: Illegality under UK Law***

69. The claimant contends that actions of the defendants with respect to the impugned act were unlawful in that they contravened the purpose of the Green Energy (Definition and Promotion) Act 2009. It contends that by removing the claimant's product's registration under the MCS Solar Collectors scheme before registering it under another scheme, MCS is effectively frustrating the principal purpose of the UK empowering legislation (*Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997). The role of the MCS is to encourage innovation and to ensure that consumers are able to have access to the most efficient and modern technology, rather than to deny this by allowing access only to less efficient products.
70. In fact, the MCS predates the 2009 Act, and the first defendant may be right to say that this is an answer to this point. The claimant responds that the impugned decision post-dated the Act. However, its submission on illegality under English law was not developed in argument. I do not think that the point has any substance on its merits. Section 1(1) of the 2009 Act provides that, "The principal purpose of this Act is to promote green energy". In that regard, I agree with the claimant that an important role of the MCS is to encourage innovation, but a core purpose is also the creation and maintenance of consumer confidence in registered products. The latter point is an agreed fact. The encouragement of innovation is furthered in the present case by the ongoing work on a new standard to accommodate thermodynamic solar systems. I agree with the defendants that it would compromise the consumer confidence purpose of the MCS to allow products to carry the endorsement of the scheme where they have not been subjected to appropriate testing. This in my view answers the claimant's second point.

***Ground 3: Breach of Legitimate Expectation***

71. The claimant's case is that it based its move into the UK market on the certification requirement and the subsequent registration of its product on the MCS database. The requirement and the registration were based on compliance with the specified European Standard. Nowhere in the MCS requirements is it stated that testing must have been carried out using refrigerant. The claimant therefore had a 'substantive' legitimate expectation that its product qualified for registration. On that basis, it invested a considerable amount of time and money developing its business in the UK, entirely in reliance of its legitimate expectation that its product was registrable (and indeed registered) on the MCS database.
72. The claimant accepts, I think, that the outcome of this issue depends on the scope of the DIN CERTCO certificate already discussed. For reasons I have given, I have upheld the defendants' contention that the extent of the certification from which the claimant benefits is that its solar collector has been certified in accordance with EN 12975 based on a testing with water. There is no certificate which is based on testing with refrigerant, no performance data for refrigerant, and no certification for the system as opposed to the collector. The claimant can have no legitimate expectation for mutual recognition beyond the correct scope of the certification. There can be no expectation based on the fact that the system was being registered until November

2012, because this was not based on any representation by the claimant, but depended on claimant's own understanding of the position.

73. I do not accept the claimant's contention that "the only fair solution would be to retain the Claimant's product on the MCS database until the necessary amendments to the registration requirements had been made". This is unrealistic, particularly since creating a new standard will inevitably take some time. It fails to recognise the scheme's purpose of protecting consumers and creating and maintaining consumer confidence, which I am satisfied would be prejudiced if a product was inappropriately registered.
74. There is a further reason why a claim based on breach of legitimate expectation cannot (in my view) succeed. The claimant accepts that its product has characteristics of both solar collector and the heat pump technology. It accepts, indeed it asserts, that it falls between two stools. I agree with the second defendant that this undermines any legitimate expectation argument. In any case, I do not consider that the claimant has made good this ground.

#### ***Ground 4: Procedural unfairness***

75. In this respect, I refer to the factual account set out above of the events that led to the challenged decision which I shall not repeat. Various matters are raised by the claimant under this ground.

##### *(a) Inadequate reasoning*

76. The claimant submits that the decision letter of 16 November 2012 setting out the reasoning behind the decision was inadequate, because it was based on a lack of information regarding the efficiency of the equipment when used with a refrigerant contrary to the requirement in the MCS SMG Terms of Reference that decision making shall be on a "scientific and rational basis". I reject this because the decision letter makes the reason clear, and the issue has remained the same since. Further, the claimant has not (as observed above) provided independent support for its assertion as to superior efficiency.

##### *(b) No meaningful consultation*

77. The claimant submits that the temporary suspension occurred on 5 November 2012, that it attended a meeting on 9 November 2012, and that on 16 November 2012 the MCS SMG wrote confirming its decision. It contends that this consultation on the change of policy was not meaningful because (a) it was taken in too short a timeframe and (b) its content was inadequate, and in particular, the views of interested parties were not adequately taken into account and (c) there was no justifiable or adequate reason given for the urgency.
78. I do not accept this view of the time frame. As explained above, contact between the parties began well prior to 5 November 2012, when Gemserv emailed Mr Costa on 8 October 2012 seeking further information about its product. The concern of MCS was identified at that time, and the claimant was given an opportunity to answer it.

79. I have been concerned with one aspect of the procedure which the claimant drew attention to in oral reply submissions. As was pointed out, the last paragraph of the minutes of the meeting on 9 November 2012 seems to envisage “an update following the meeting”. In fact, the decision letter followed the meeting. On balance, I do not think that this renders the decision procedurally unfair. This is because, as I have said earlier, the issue between the parties was clear, even at that stage. Indeed, it has remained the same in these judicial review proceedings.

*(c) No decision should have been taken on deregistration until a relevant technical category had been created*

80. I do not agree with the claimant that there was no urgency such that required a speedy decision, or that no decision should have been taken on deregistration until a relevant technical category had been created. As explained earlier, although the claimant first sold its product in the UK in July 2010, the rate of registration sharply increased in the period immediately before the decision letter. The figures are important in this regard. Up to 27 September 2012, only 97 installations had been registered with MCS. By 19 November 2012, 355 installations had been registered, which was clearly a sharp rise. In those circumstances, the MCS SMG was entitled, in my view, to decide to take early action. Otherwise, the volume of continuing registrations risked making the situation unmanageable.

*(d) Lack of an effective route of appeal*

81. The claimant submits that the procedure was unfair, because it was not provided with an effective route of appeal against the decision of 16 November 2013. The submission is based on *R v Life Assurance Unit Trust Regulatory Organisation Limited Ex Parte Ross* [1993] QB 17. In that case, the issue was whether an intervention notice by a regulatory authority in respect of an investment business was unfair because the company had no opportunity to make representations beforehand. In such circumstances, the court said that: “... if a decision-making body is to exercise powers such as those of serving an intervention notice without giving anybody the opportunity to make representations beforehand, its procedures should provide that those who might otherwise expect to have been allowed to make representations should at least be allowed to make immediate application to set the decision aside and to appeal against it. In this respect the situation is very similar to that which obtains when the court grants an ex parte injunction” (at p.52).
82. This case was decided in the particular circumstances of financial regulation, where the intervention of the regulator could have the effect of closing an investment business down. It does not follow, as the claimant suggested, that a Microgeneration Certification Scheme of the kind run by the second defendant has to provide a route of appeal against a decision whether or not to permit registration, or to permit it on terms. No authority was cited to suggest that there is any such obligation, and I do not think that there is. That would be a very onerous obligation for a small organisation such as MCS.
83. On the other hand, a registration decision may have serious consequences for a business in the microgeneration field, and the claimant says that it did in this case. In such circumstances, fairness may require a party affected to have the chance to make representations beforehand. I think that it did in this case. In that regard, I refer to the



factual description set out above of what happened. The decision taken by the MCS SMG was not equivalent to an ex parte injunction as was the intervention notice in the *LAUTRO* case. The crucial difference is that the claimant was involved in the process from an early stage, and was given the opportunity to put forward its position. In my view, there was no procedural unfairness.

*(e) Other matters*

84. I did not understand the claimant to pursue an argument set out in its skeleton argument based on the fact that Mr Thomas should have declared an interest in that he is the owner and director of a training company in the field and his company is an ancillary member of the Solar Trade Association. As I understand it from the second defendant's submissions, an allegation of bias was not made until the claimant's skeleton argument was updated on 17 September 2013. As the second defendant says, the matter was raised by way of "putting the second defendant to proof in this respect". That is not an adequate way to raise an allegation of bias, which has to be properly spelled out in time to give the party against whom it is made a proper opportunity to answer it. On the facts, the MCS was set up as an industry led body, and connections of the kind identified by the claimant are inevitable. As Mr Thomas says, MCS members have interests in the renewable technology sectors, and it is for that reason that they are of value to the MCS.

*(f) Procedural unfairness: conclusion*

85. Elsewhere in this judgment I have described the sub-group that was set up following the decision of 16 November 2012 to develop a standard which would accommodate thermodynamic solar systems of the type manufactured by the claimant. As regards the claimant's assertion that this work has been insufficiently progressed, the defendants took somewhat different positions. The second defendant maintained that the subject of the judicial review was limited to the impugned decision. The first defendant however acknowledged that if the court was of the view that the MCS SMG was taking no action, or insufficient action, then the court would have grounds for concern about the situation. I agree with the first defendant. The decision about the registration of the claimant's product was essentially one of classification. It says nothing about the advantages, or otherwise, of the product in terms of microgeneration, which is the point of substance.
86. In that regard, there was some emphasis placed in the second defendant's submissions as to safety considerations. Beyond the necessary care to be observed in the installation of systems using greenhouse gases, and accepting Mr Thomas' concern that building regulations have to be properly complied with, there is no evidence of any justified concern on the part of the MCS SMG as to the safety of the claimant's product. On the contrary, it made clear in the decision that nothing in it in any way prevented the claimant from continuing to sell and install its product. The issue was, essentially, whether the product was to be treated as a solar collector, or a heat pump, and if neither, how to take the matter forward so that suitable standards could be developed for its registration and installation. I accept that this was an important part of the consumer confidence role which is a core purpose of the scheme, but safety concerns did not feature in the decision in my view.

87. I have set out above the facts relating to the work of the sub-group. It is taking longer than was anticipated to bring its work to a conclusion. However, I accept that the MCS has to strike a balance on the one hand between the application of its standards and methodology in support of consumer confidence, and on the other avoiding the risk of discouraging innovation and competition. This is not a straightforward task, and I do not think that the evidence supports a valid criticism at the present time. If it did, the position may well in my view be different. In the result, the claimant has not made good its fourth ground.

***Ground 5: Violation of Claimant's property as guaranteed by A1 P1 ECHR***

88. The claimant advanced a contention that the decision to remove the product from MCS registration and to refuse to register it for the future interfered with its enjoyment of its possessions in violation of the right to enjoy the same under Article 1 of the First Protocol of the European Convention on Human Rights. In reply submissions, the claimant acknowledged that this ground depended on the same factual dispute as to the scope of certification as is discussed above. This was a correct concession, since its case as to “possessions” within A1 P1 ECHR (as to which see *R (Nicholds) v Security Industry Authority* [2007] 1 WLR 2067 at [74] and [81], and *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265 at [73], approved in *R (Countryside Alliance) v Attorney General* [2007] UKHL 52 at [21]) depends on its case as to registration (*R (Infinis Plc) v The Gas and Electricity Markets Authority* [2013] EWCA Civ 70 at [23]). Given my findings above, I need not say any more about this ground.

Conclusion

89. In the event, the claim is dismissed. I am grateful to the parties for their assistance, and will hear them as to any further matters arising.

### Annex



