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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)

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

AND IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY THOMAS FORGRAVE

Mr Gerald Simpson KC with Mr Richard Shiels (instructed by A&L Goodbody Solicitors) for both Appellants
Mr Tony McGleenan KC with Mr Paul McLaughlin (instructed by the Departmental Solicitor's Office) for the Respondent

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Before: Keegan LCJ, Horner LJ, Huddleston J

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] These appeals have been listed together as they raise common issues of fact and law in relation to the operation of the Renewable Heat Incentive Scheme in Northern Ireland ("the RHI scheme"). The first named proceedings were taken in 2017 against the Department of the Economy ("the Department") by a group of boiler owners under the umbrella of the Renewable Heat Association for Northern Ireland and one individual, Mr Alastair Dale, a boiler owner. Those proceedings challenged the legality of changes made by regulations which reduced payments provided under the original scheme. This challenge raised claims based on domestic law and Article 1 Protocol 1 ("A1P1") of the European Convention on Human Rights ("ECHR") which is the right to peaceful enjoyment of property.

[2] The second set of proceedings were brought in 2019 by an individual boiler owner, Mr Thomas Forgrave. He also challenged changes to the payment structure under the RHI Scheme. In addition, this appellant raised a human rights challenge based on A1P1 of the ECHR.

[3] Colton J dismissed the first challenge in a judgment delivered on 21 December 2017 ([2017] NIQB 122). Humphreys J granted leave but dismissed the second judicial review challenge in a judgment delivered on 14 October 2021 ([2021] NIQB 92).

[4] The history of this case is comprehensively examined in the decision of each judge at first instance and so we need not repeat it here. This subject matter has also been scrutinised at the public inquiry which was conducted by Sir Patrick Coghlin. We have considered all the material provided to us. In the interests of economy, we will only reference the points of most relevance to our consideration.

[5] We are concerned with those who entered the RHI Scheme at the initial stages and were accredited between 22 November 2012 and 17 November 2015.

[6] At the outset we recognise that our adjudication arises at a particular stage in the history of the now infamous RHI scheme. At first instance, the cases were brought with a degree of urgency given impending legislative change. There were also claims for interim relief. The landscape is now altered in that the proposed laws have been passed which govern tariffs. In addition, a further round of legislation is contemplated to either close the scheme or revise tariffs. It is within that context that we adjudicate upon the appeals.

Core Background Facts

[7] The starting point in this consideration is the Renewable Energy Directive 2009/28/EC ("the Directive"). This European Directive imposed obligations upon Member States within the European Union to reach renewable energy targets. These were legally binding obligations to ensure that by 2020 Member States delivered minimum targets for the percentage of energy consumption derived from renewable sources. In the case of the United Kingdom, ("UK") the minimum target was set at 15%. The Directive also permitted Member States to introduce support schemes to achieve these targets. These support schemes could include initiatives which promoted the use of energy from renewable sources by means of financial incentive.

[8] As the UK is made up of devolved administrations, energy initiatives were progressed on a bespoke basis in each jurisdiction. To achieve the UK target, each of the devolved administrations agreed a separate target, taking account of the renewable energy consumption levels within each area and the potential for change. This was mandated by the Northern Ireland Executive and encompassed within its Programme for Government. The Executive included a target of producing 4% of heat from renewable sources by 2015 and a further target of producing 10% of its heat from

renewable sources by 2020 – targets that were included within the strategic energy framework approved by the Executive.

[9] The provision of renewable energy required a particular structure to be put in place with the necessary checks and balances. In the event, different schemes were set up for domestic heating and non-domestic heating.

[10] In these appeals we are concerned with non-domestic use of renewable energy sources in small and medium enterprises. The fundamentals underpinning this scheme found expression in formal documentation described as the Renewable Heat Premium Payment (May 2012) Scheme followed by the Non-Domestic Renewable Heat Incentive Scheme (November 2012) and the Domestic Renewable Heat Incentive Scheme (December 2014). This scheme was described as one bespoke to Northern Ireland.

[11] A budget of £860m was available to incentivise renewable energy schemes across the entire UK. Northern Ireland was allocated £25m of this money by Her Majesty's Treasury ("HMT") to support the introduction of incentive schemes within this jurisdiction. This allocation was made to Northern Ireland in addition to its block grant.

[12] Thereafter, expert reports were commissioned to inform the shape of the RHI scheme. These reports specifically advised on suitable tariffs for various sizes of biomass boilers that would allow renewable heat to be created. Consultation then followed. It is not necessary to set out all aspects of the pre-scheme information which was generated in detail. We have considered the comprehensive affidavits which deal with these matters and the bundle of core materials which contain the relevant reports and simply refer to some salient elements of the pre scheme information as follows.

[13] The expert report which frames the original scheme is the Cambridge Economic Policy Associates Ltd ("CEPA") Report. This is the most significant report to read when examining the genesis of the scheme as it informed the regulations which brought the scheme into operation. In brief, the CEPA Report made recommendations for adapting the methodology applied in Great Britain ("GB") for renewable energy to Northern Ireland. That said, there were differences between the jurisdictions. It is abundantly clear from the affidavits that one substantial difference between the jurisdictions was the existing pattern of fuel usage. In simple terms, it appears that most businesses in GB used gas burning heat technology whereas in Northern Ireland most businesses used oil burning systems. This differential affected baseline cost conditions for both fuel and maintenance and an expectation that the rate of subsidy required in Northern Ireland would be lower than in GB.

[14] The different operating conditions we have referred to also resulted in a recommendation that in Northern Ireland, tiered tariffs would not be required. This was on the basis that the estimated difference in cost between oil and renewable fuel was higher than the proposed subsidy for all technologies except solar thermal.

However, this premise was found to be entirely incorrect. Hence, the adoption of this flawed premise started the rot in that it corrupted and skewed subsequent outcomes in relation to small and medium sized biomass boilers. That is because the subsequent tariffs were based on the flawed premise, were greater than the cost of fuel and therefore delivered substantially more compensation for users than had been thought.

[15] Of course, the RHI scheme was public facing. It was also scrutinised in several ways. First, there was public consultation between July and October 2011. Second, State Aid approval was sought from the European Union.

[16] State Aid approval was granted in June 2012. Of note is the original State Aid approval notification as it set some parameters for the scheme going forward. The resulting documentation encompasses the following terms:

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

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

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

(iv) Compatibility of the scheme with State Aid Rules was assessed by reference to the European Commission's Guidelines on State Aid for Environmental Protection, which prohibited overcompensation. Cost calculations were based upon estimates which may result in an over or under estimation in specific cases but would avoid "systemic overcompensation" and represented a fair approach.

(v) Consultants had recommended that the tariff should provide a range of return in the region of 8-22% in order to incentivise conversion. The Northern Ireland authorities had chosen the rate of 12%, which was at the lower end of the range and considered to be reasonable.

(vi) Production costs would be monitored throughout the lifetime of installations (20 years) and subject to scheduled reviews, including early review in the case of significant changes in production costs.

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

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

[17] Once State Aid approval was in place and following consultation the scheme required statutory imprimatur. The parent legislation which enabled the scheme is the Energy Act 2011 ("the 2011 Act").

[18] By virtue of section 113 of the 2011 Act, the Department of Enterprise Trade and Investment ("the Department") was permitted to enact regulations to take the RHI scheme forward. The terms of section 113 provide the necessary legal authority for the subsequent regulations which are now under legal challenge. We therefore set out section 113 as follows:

> "**Section 113 Renewable heat incentives in Northern Ireland**
>
> (1) The Department of Enterprise, Trade and Investment may make regulations—
>
> (a) establishing a scheme to facilitate and encourage renewable generation of heat in Northern Ireland, and
>
> (b) about the administration and financing of the scheme.
>
> (2) Regulations under this section may, in particular—
>
> (a) make provision for the Department or NIAUR to make payments, or to require designated fossil fuel suppliers to make payments, in specified circumstances, to—
>
> (i) the owner of plant used or intended to be used for the renewable generation of heat, whether or not the owner is also operating or intending to operate the plant;
>
> (ii) a producer of biogas or biomethane;
>
> (iii) a producer of biofuel for generating heat;

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

(c) make provision about the circumstances in which such payments may be recovered;

(d) require designated fossil fuel suppliers to provide specified information to the Department or NIAUR;

(e) make provision for payments to fossil fuel suppliers in specified circumstances;

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

(g) confer functions on the Department or NIAUR, or both.

(3) In this section—

"biofuel" means liquid or gaseous fuel which is produced wholly from biomass;

"biogas" means gas produced by the anaerobic or thermal conversion of biomass;

"biomass" means material, other than fossil fuel or peat, which is, or is derived directly or indirectly from, plant matter, animal matter, fungi or algae;

"biomethane" means biogas which is suitable for conveyance through pipes to premises in accordance with a licence under Article 8(1)(a) of the Gas (Northern Ireland) Order 1996 (S.I. 1996/275 (N.I. 2)) (licences to convey gas);

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

"designated fossil fuel suppliers" means—

(a) if the regulations so provide, a specified class of fossil fuel suppliers, and

(b) in any other case, all fossil fuel suppliers;

"fossil fuel" means—

(a) coal;

(b) lignite;

(c) natural gas (within the meaning of the Energy Act 1976);

(d) crude liquid petroleum;

(e) petroleum products (within the meaning of that Act);

(f) any substance produced directly or indirectly from a substance mentioned in paragraphs (a) to (e);

"fossil fuel supplier" means a person who supplies fossil fuel to consumers for the purpose of generating heat;

"functions" includes powers and duties;

"modify" includes amend, add to or repeal;

"NIAUR" means the Northern Ireland Authority for Utility Regulation;

"owner", in relation to any plant which is the subject of a hire purchase agreement, a conditional sale agreement or any agreement of a similar nature, means the person in possession of the plant under that agreement;

"plant" includes any equipment, apparatus or appliance;

"renewable generation of heat" means the generation of heat by means of a source of energy or technology mentioned in subsection (4).

(4) The sources of energy and technologies are—

(a) biomass;

(b) biofuels;

(c) fuel cells;

(d) water (including waves and tides);

(e) solar power;

(f) geothermal sources;

(g) heat from air, water or the ground;

(h) combined heat and power systems (but only if the system's source of energy is a renewable source within the meaning given by Article 55F of the Energy (Northern Ireland) Order 2003 (S.I. 2003/419 (N.I. 6));

(i) biogas.

(5) The Department may by regulations—

(a) modify the list of sources of energy and technologies in subsection (4);

(b) modify the definition of "biofuel", "biogas" or "biomass" in subsection (3).

(6) The Department may by regulations make provision, for the purposes of subsection (2)(a)(iii) and the definition of "fossil fuel supplier", specifying that particular activities do or do not constitute generating heat.

(7) Any power to make regulations under this section is to be exercisable by statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979 (S.I. 1979/1573 (N.I. 12)).

(8) Regulations under this section may not be made unless a draft of the regulations has been laid before, and approved by a resolution of, the Northern Ireland Assembly.

(9) Regulations under this section may—

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

(b) include incidental, supplementary and consequential provision;

(c) make transitory or transitional provisions or savings;

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

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

[19] The ensuing regulations, the Renewable Heat Incentive Scheme (Regulations) (NI) 2012 ("the 2012 Regulations"), contain the applicable tariffs for the use of boilers of different specification including small and medium biomass boilers. This is clearly a complicated regulatory structure. Suffice to say for present purposes that payments were guaranteed for 20 years for heat generated by boilers which were accredited on or after 18 November 2015 (Regulation 36(1)).

[20] Regulation 36 as amended governs payment of periodic support payments to participants and sets the terms of engagement for the boiler owners as follows:

"Payment of periodic support payments to participants

36.—(1) Periodic support payments shall accrue from the tariff start date and shall be payable for 20 years.

(2) Periodic support payments shall be calculated and paid by the Department.

(3) Subject to regulation 42(5) and paragraphs (7) to (7C) the tariff for an accredited RHI installation shall be fixed when that installation is accredited.

(4) Subject to paragraph (7), the tariff for a participant who is a producer of biomethane is the biomethane and biogas combustion tariff set out in Schedule 3.

(5) Subject to paragraphs (6) to (7C), the tariff for an accredited RHI installation is the tariff set out in Schedule 3, 3A, 4 or 5 as the case may be in relation to its source of energy or technology and installation capacity.

(6) For the purposes of paragraphs (5) and (7) to (7C), where the accredited RHI installation is one of a number of plants forming part of the same heating system its installation capacity is to be taken to be the sum of the installation capacities of that accredited RHI installation and all plants for which an application for accreditation has been made (whether or not they have been accredited) which—

(a) use the same source of energy and technology as that accredited RHI installation; and

(b) form part of the same heating system as that accredited RHI installation.

(7) The tariffs for installations accredited before 18th November 2015, other than installations to which paragraph (7B) or (7C) applies—

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

(b) for each subsequent year commencing with 1st April and ending with 31st March, are the tariffs applicable on the immediately preceding 31st March adjusted by the percentage increase or decrease in the retail prices index for the previous calendar year (the resulting figure being rounded to the nearest tenth of a penny, with any twentieth of a penny being rounded upwards).

(7A) The tariffs for installations accredited on or after 18th November 2015, other than installations to which paragraph (7C) applies —

(a) for the period beginning with 18th November 2015 and ending with 31st March 2016, are the tariffs set out in Schedule 4; and

(b) for each subsequent year commencing with 1st April and ending with the next 31st March, are the tariffs applicable on the immediately preceding 31st March adjusted by the percentage increase or decrease in the retail prices index for the previous calendar year (the resulting figure being rounded to the nearest

tenth of a penny, with any twentieth of a penny being rounded upwards).

(7B) The tariffs for installations accredited before 18th November 2015 and falling within the small or medium biomass tariffs set out in Schedule 3A, for the period beginning with the coming into operation of section 2 of the Northern Ireland (Regional Rates and Energy) Act 2018 and ending with 31st March 2019, are the tariffs set out in Schedule 3A adjusted by the percentage increase or decrease in the retail prices index for the calendar year 2017 (the resulting figure being rounded to the tenth of a penny, with any twentieth of a penny being rounded upwards).

(7C) The tariffs for installations (whether accredited before or after the coming into operation of section 3 of the Northern Ireland (Regional Rates and Energy) Act 2019) falling within the small or medium biomass tariffs set out in Schedule 5—

(a) for the period beginning with 1st April 2019 and ending with 31st March 2020, are the tariffs set out in Schedule 5;

(b) for each subsequent year commencing with 1st April and ending with the next 31st March, are the tariffs applicable on the immediately preceding 31st March adjusted by the percentage increase or decrease in the consumer prices index for the previous calendar year (the resulting figure being rounded to the tenth of a penny, with any twentieth of a penny being rounded upwards).

(7D) For the purposes of paragraph (7C) "the consumer prices index" means—

(a) the consumer prices index calculated and published by the Office for National Statistics; or

(b) where the index is not published for a year, any substituted index or figures published by that Office.

(8) The Department must calculate the tariff rates each year in accordance with paragraphs (7) to (7C) and publish on or before 1st April of each year a table of tariffs for the

period commencing with 1st April of that year and ending with 31st March of the following year.

(9) Where an accredited RHI installation falls within the small or medium biomass tariffs as set out in Schedule 4—

(a) the tariff for the initial heat generated by the installation in any 12 month period commencing with, or with the anniversary of, the date of accreditation is the relevant tier 1 tariff specified in Schedule 4;

(b) the tariff for further heat generated in that same 12 month period up to a maximum of 400,000 kWhth is the relevant tier 2 tariff; and

(c) any further heat generated over 400,000 kWhth in the same 12 month period shall not be eligible for RHI payments.

(9A) Where an accredited RHI installation falls within the small or medium biomass tariffs set out in Schedule 3A and the tariff for the installation falls to be determined for the period mentioned in paragraph (7B) —

(a) the tariff for the initial heat generated by the installation in any 12 month period commencing with, or with the anniversary of, the date of accreditation (regardless of whether that date falls before or after the coming into operation of section 2 of the Northern Ireland (Regional Rates and Energy) Act 2018) is the relevant Tier 1 tariff specified in Schedule 3A;

(b) the tariff for further heat generated in that same 12 month period up to a maximum of 400,000 kWhth is the relevant Tier 2 tariff specified in Schedule 3A; and

(c) any further heat generated in that same 12 month period shall not be eligible for periodic payments.

(9B) Where an accredited RHI installation falls within the small biomass tariff set out in Schedule 5—

(a) the tariff for the initial heat generated by the installation in any 12 month period commencing with, or with the anniversary of, the date of accreditation (regardless of whether that date falls before or after the coming into operation of section 3 of the Northern Ireland (Regional Rates and Energy) Act 2019) is the Tier 1 tariff specified in Schedule 5;

(b) the tariff for further heat generated in that same 12 month period is the relevant Tier 2 tariff specified in Schedule 5.

(9C) Where an accredited RHI installation falls within either of the medium biomass tariffs set out in Schedule 5—

(a) the tariff for the initial heat generated by the installation in any 12 month period commencing with, or with the anniversary of, the date of accreditation (regardless of whether that date falls before or after the coming into operation of section 3 of the Northern Ireland (Regional Rates and Energy) Act 2019) is the relevant tariff specified in Schedule 5; and

(b) any further heat generated in that same 12 month period shall not be eligible for periodic payments.

(10) For the purposes of paragraphs (9) to (9C)], "the initial heat" means the heat in kWh generated by an accredited RHI installation running at its installation capacity for 1,314 hours.

(11) Despite regulation 1(3) of the Renewable Heat Incentive Scheme (Amendment) Regulations (Northern Ireland) 2017 (S.R. (NI) 2017 No.32) (which provides for those Regulations to cease to have effect on 31 March 2018), paragraphs (3) to (10) and Schedule 3A continue to have effect as amended by those Regulations in relation to heat generated before 1 April 2018.

[21] It is now well known that initially the uptake for the RHI scheme was low. However, by March 2015 the level of demand for the RHI scheme was increasing. The greatest surge in applications came, as we shall see, just as it was realised that the scheme costs would outstrip what was originally predicted and the Assembly decided that the scheme would have to be closed to new entrants. This was towards the end

of 2015 and ultimately resulted in the scheme being closed to new entrants in 2016. Unsurprisingly measures were also taken in parallel to try to remedy the original regulatory structure which was costing too much.

[22] Steps to amend the RHI scheme as originally devised were mandated by subsequent regulations made in 2015 and 2016. In summary, the 2015 Regulations made changes to those businesses accredited after 2015 by introducing different tariff structures. In very broad summary, the existing tariff of 6.4p/kWh remained payable for the first 1314 hours and then dropped to 1.5p. There was also the introduction of an annual heat generation cap of 400,000 kWhth per installation above which the subsidy was not payable.

[23] The 2016 Regulations went further. These regulations introduced a power to suspend entry into the RHI scheme. The power was exercisable where it appeared to the Department that "it does not have or is unlikely to have sufficient funds available to it." The scheme was thereafter suspended on 18 February 2016. That remains the current position.

[24] The shape of the revised RHI scheme was informed by expert reports. Before commenting on the core features of these reports we pause to observe that the contents and recommendations of these reports remain disputed by the appellants.

[25] In May 2018 Ricardo Energy and Environment published its report ("the Ricardo report") upon the Department seeking a review of the tariffs payable to small and medium sized biomass boiler owners. The Ricardo report was able to use actual data from the operation of the scheme since 2012. The report noted, in particular, that the original assumptions made in respect of capital costs and 'load factor' (ie the amount of time that boilers would be in use) were erroneous. The actual data revealed that capital costs were significantly lower and the load factor much higher (an average of 43% compared to an assumed 17%).

[26] In the Ricardo analysis, even if no further payments were made post April 2019, some 75% of boiler owners would achieve a rate of return of 22% or more over the 20 year period based on payments made under the 2012 and 2017 Regulations. In his judgment Humphreys J. highlighted the fact that the applicant Forgrave challenges much of the evidence used by, and the analysis contained in, the Ricardo report as being 'fundamentally flawed.' It is said by Mr Forgrave that the data gathered is too limited, incorrect assumptions have been made around fuel prices and allowable costs have been miscalculated. He stated that the use of oil as the counterfactual fuel was inappropriate as liquified petroleum gas ("LPG") was used in the poultry industry. Therefore, it was argued that all these variables, when properly assessed, would result in a different calculation of a rate of return. We will return to whether the competing forensic positions can be resolved in due course.

[27] The Department carried out an analysis of the rate of return considering the Ricardo report. It revealed that when one takes account of the payments made to date,

a scheme operator would still generate an average rate of return of 59% even on the proposed 2019 tariff reductions.

[28] Following receipt of the Ricardo report, the Department engaged in a process of public consultation on the future of the RHI Scheme commencing in June 2018. This invited comment on eight possible options which it is unnecessary to describe in detail.

[29] The responses received informed a Consultation Report published on 31 January 2019. The Department analysed the various options and responses against five criteria, namely:

(i) Affordability;

(ii) Rate of return;

(iii) Impact on scheme participants;

(iv) Supporting the generation of renewable heat;

(v) Operability.

[30] Having undertaken the above analysis the Department concluded that it ought to implement the 'hybrid tariff' identified in the Ricardo report. This involved the retention by all operators of past payments with the payment of future tariffs which, it was estimated, would deliver an overall rate of return of 19%. In parallel, the Department engaged with the EU Commission on the question of approval for the altered scheme. A pre-notification of the options was sent out in November 2018 which identified the Department's preferred option.

[31] In an email dated 30 November 2018 the Commission advised that there was "insufficient evidence at this stage" to approve a rate of return higher than 12%. The issue of enforcement action to recoup past payments was also raised.

[32] The minutes of a meeting dated 11 December 2018 reveal that EU officials made it clear that it would be impossible for the Commission to approve an amended scheme which delivered a rate of return of 19%.

[33] The ultimate position of the Commission, as set out in correspondence dated 25 January 2019, was that the previous decisions of 2012 and 2017 provided cover for a rate of return of the scheme of 12% for the average benefitting project. It stated:

> "Unless the UK authorities wish to seek authorisation for increasing the level of aid average projects receive, or for granting new aid under the scheme in a different form to that approved in the 2012 decision, it does not appear that a new notification nor new decision is required. We note

> that at this stage it is unclear what basis there would be for authorising a higher rate of return than 12% given all required investments have already taken place."

[34] It was made clear that this was a preliminary and not a formal view of the Commission. However, the Department clearly took this correspondence into account. This resulted in a tariff at a mid-point between the Ricardo base and hybrid tariffs which did not implement recoupment of any monies already received. The appellants dispute the methodology that was applied and the fairness of this outcome.

[35] The consultation process summarised above led to the passing of the Northern Ireland (Regional Rates and Energy) Act on 1 April 2019 ("the 2019 Act"). The 2019 Act introduced new tariffs for the RHI Scheme (section 3 and the Schedule). It also made provision for a voluntary buy out scheme to be established by the Department (section 4). The Department also committed to the establishment of a Hardship Unit. To date no such arrangements have been put in place.

[36] Given the haste with which the 2019 Act was passed the Northern Ireland Affairs Committee ("NIAC") instigated an inquiry. This made the following conclusions and recommendations in June 2019:

> **"The Legislative process**
>
> 1. There were many opportunities to avoid the use of emergency procedures for this Bill. For two years, it was clear to the Department for the Economy that the tariffs for the NI RHI scheme would need to change again. As there was no other mechanism for achieving this, it was also apparent that legislation would be required. We are concerned that officials did not notify the Secretary of State of the urgent need for legislative change until February 2019. Earlier notification could have allowed the Secretary of State to secure more time in Parliament for the Bill. Moreover, the EU Commission had approved a year-long extension of the 2017 scheme in order to allow development of the new tariffs. If payments were due to end on 1 April, then the Department should have asked for a short extension of 3–6 months to pass the necessary legislation. We have no reason to believe the Commission would have denied the Government the chance to legislate in a full and proper manner. (Paragraph 23)
>
> 2. Even under the constrained timeframe, however, more time could have been given to this Bill. It is evident that rushing Northern Ireland related legislation through Parliament has become the norm. This is unacceptable. It

does not allow us to properly perform our role as parliamentarians and it is not good enough for the people of Northern Ireland. The Secretary of State must commit to ending the practice of passing Northern Ireland related legislation under emergency procedures as a matter of course. Until the Assembly and Executive are restored, Westminster must be able to offer a reasonable level of scrutiny and accountability. If the Northern Ireland Office considers there is sufficient urgency to warrant emergency procedures, this Committee should be informed so that we can assess the rationale and offer our view. (Paragraph 24)

The 2019 tariffs

3. The matter of what the European Commission approved in 2012 is a crucial one. The Department has maintained that its hands were tied and that it had to reduce payments in order to comply with the Commission's state aid approval. We acknowledge that the Department has had to balance the reduction in payments with the risk of further detrimental action by the Commission. The EU Commission stated, in December 2018, that there was insufficient evidence at that stage to approve a higher rate of return. If there is now scope to challenge the Commission on its interpretation and offer further evidence then we encourage the Department to do so. (Paragraph 33)

4. In calculating the new tariffs, the Department for the Economy has focused on a narrow range of costs to participants, such as the cost of a boiler and some associated costs. The Department has also used kerosene as the only counterfactual for fuel costs. The NI RHI scheme was, from the outset, different to the GB scheme and to the proposed ROI scheme. However, we are deeply concerned about the stark difference in payments over the lifetime of the GB and NI schemes. The matter of legitimate expectation of payment is one that forms part of an appeal case, which must run its course. Regardless of what the courts may decide is legally owed, we believe there is a moral imperative for the Department to look at any reasonable wider investment decisions participants have made. We recommend that the Department revisit the tariffs to determine if they should include:

- Parity with the Great Britain scheme or the Republic of Ireland scheme where costs are comparable;
- Parity with the Great Britain scheme or the Republic of Ireland scheme on any additional costs that are included;
- Counterfactuals in different circumstances are considered, rather than just kerosene;
- That investment decisions made by participants be considered.

The Department should report back to the Committee in response to this report any evidence in relation to the above points. (Paragraph 49)

5. We are deeply concerned by the differing payments between GB, NI and RoI Renewable Heat schemes. The contrast between the Northern Ireland and Republic of Ireland schemes may prove to be the most damaging. A farmer in Northern Ireland will receive a maximum of £2,200 per year, whilst a farmer only a mile away across the border could receive over £5,000. This is not insignificant and could affect the competitiveness of Northern Ireland's farms. The Department for the Economy, and ultimately the UK Government must look at the tariff structure and underlying calculations for the Republic of Ireland scheme. If there is cause for complaint, then there may be a very short window in which the initial decision must be challenged by the UK Government. If there is unfairness, then harm could be prevented. It may be, however, that the costs involved in the Irish scheme are correct, which would suggest that there are costs within the Northern Ireland scheme that need revisiting. In any event, this must be investigated as a matter of urgency. (Paragraph 55)

Ongoing impact

6. There is little detail regarding the buyout offer and we hope that this offers an opportunity to assist some participants. Currently, the vast majority of participants, including those who have submitted evidence to us, are not eligible for the scheme. We do not wish to prolong any delay in opening the scheme, but it is clear some changes are required to include more people. Our recommendations are not exhaustive, and we would

welcome any additional changes that would allow more people to be brought within the ambit of the scheme. We recommend that the buyout scheme be made available as soon as possible. In calculating any offer, the Department should look at:

- the costs in each individual case so as to make the correct comparisons for that participant. There must not be a one-size-fits-all calculation in terms of costs;

- the wider costs to participants, including indirect costs. A distinction should be drawn between indirect costs, and any overcompensation on the rate of return for the narrow scheme costs;

- participants should have the option to challenge the Department's calculation and submit their own cost analysis before accepting or rejecting an offer. The Independent panel in charge of the Hardship Unit should review all evidence where there is a dispute; and

- The buy-out scheme must be adequately funded to cover payments to participants that includes indirect costs

If any of these recommendations require legislative change, we recommend the Northern Ireland Office secure time at Westminster at the first opportunity. (Paragraph 63)

7. We consider that the financial needs of participants can best be met by revisiting the tariffs and subsequently adjusting, as set out in paragraph 49, and by improving the buy-out option, as set out in paragraph 63. The Hardship Unit should be progressed with the following principles:

- Assessing financial hardship must include looking at a participants' costs in the round. The Department must take into account the fact that people have made investment decisions;

- The Unit must inform the calculation of buyout payments and any decisions must be challengeable;

- Hardship should not be defined on narrow grounds. Criteria should be developed with input from participants. We recommend the Department share the draft criteria with the Northern Ireland Affairs Committee.

We further recommend that in response to this report, the Department set out, specifically, additional ways in which the Hardship Unit will assist those assessed as suffering hardship. (Paragraph 68)

8. A sad outcome of the RHI saga in Northern Ireland is the erosion of trust in Government-backed schemes. Northern Ireland is currently ahead of the rest of the UK in respect of renewable electricity generation and nobody wishes to see businesses return to fossil fuels. We call upon Moy Park to supply the Committee with figures of participants reverting to fossil fuels. Participants will be considering their options over the next year, and some may revert when there is expensive repair work due on their boiler. The Department could and should do more to incentivise NI RHI participants to stick with biomass. We recommend that the tariff calculation be amended to allow a more realistic cost for servicing and repairs of biomass boilers. This could help prevent participants reverting to fossil fuels if their boiler breaks down and they are faced with upfront costs they cannot afford. We further recommend that the Department track rates of reversion to fossil fuels amongst participants and report any trends to this Committee." (Paragraph 75)"

[37] Following the NIAC recommendations, another review was carried out by a body called Cornwall Insight. Its report was published in February 2020. Its key recommendations were:

(i) Oil should remain the relevant counterfactual fuel;

(ii) The Department should review and revise upwards the Tier 1 tariffs;

(iii) The Tier 2 tariffs should remain unchanged at 0p/kWh.

[38] At the same time, the Department received the report from Buglass Energy Advisory which was to deal with the question of hardship. This report concluded that many of the scheme operators had suffered economic hardship because of the reduced cash flow following tariff reductions. The report considered some of the possible

remedies available, including a further review of tariffs or the use of a buy-out scheme, without recommending any solution.

[39] To complete the picture we must also refer to the Department's consultation on the future of the RHI scheme, which closed on 9 April 2021. Two options were raised, namely closure with compensation or revised tariffs. From the evidence it appears that most boiler owners preferred revised tariffs.

[40] Paras [96]-[98] of the Department's skeleton argument usefully explain both options as follows:

> "… While it is not possible to predict the final specifics of each option, Mr Rodgers has described in considerable detail, how the Department proposes to approach the preparation of both options. In summary:
>
> (i) Both options will be prepared after taking account of all of the information and evidence available to the Department. This includes evidence relating to capital invested by participants obtained from the now completed programme of inspections of all accredited installations. The Department has evidence of the actual capital and operating costs experienced by operators, together with a substantial body of evidence regarding usage patterns.
>
> (ii) The Department will commence by preparing the proposed revised tariff option. It proposes to maintain the original methodology of delivering full recovery of eligible capital costs plus a 12% IRR over 20 years, with projected usage assumptions informed by the actual usage of participants. The tariff will also reflect additional operating costs (compared with oil alternatives) including fuel costs, maintenance costs, and barrier/hassle costs.
>
> (iii) The capital component of the tariff will be based upon all of the up to date evidence of costs, including direct acquisition costs and eligible capital costs. It will also be a prospective calculation only, based upon the remaining years of the scheme. The total sum would then be reduced by a discount factor, yet to be determined.

97. In the recent consultation paper, revised tariffs were used for Options 2 and 4, which were intended to facilitate consultation responses. During the adjournment appeal hearing in the Court of Appeal, it was contended on behalf of the appellant that the foundation tariff within the consultation paper was based on the 2019 Act tariffs and that it was therefore more important that the court consider this challenge at this time, in case they were implemented. Aside from the incorrect assumption that the consultation proposal would be adopted as the final decision, the consultation tariffs were not the 2019 Act tariffs. Options 2 and 4 were based on the Cornwall Insight tariffs which were then further adjusted by the Department to take account of more recent fuel prices. The following adjustment had been made by Cornwall Insight and the Department to the 2019 tariffs:

(i) Service and maintenance costs were increased to reflect the actual median service and maintenance costs identified through the inspection process and thus more favourable to participants.

(ii) Counterfactual service and maintenance costs were reduced and thus more favourable to participants.

(iii) Relative Fuel Prices. The tariffs were based upon a fuel reference period of July 2019 – June 2020. This could not have been reflected in the April 2019 tariffs. The fuel reference period coincided with a period of record low oil prices and again was favourable to participants. Cornwall used a fuel reference period of 1 January – 31 December 2019, which did not reflect the market reductions in fuel price.

98. The current position is therefore that the 2019 Act tariffs remain place. However, the Department has fulfilled its commitments to obtain updated market information and historical cost data. It has also carried out the tariff reviews which it undertook to do during the NIAC inquiry. In anticipation of political developments, it is also completing the work which is necessary to enable a final or an interim decision on the future of the Scheme to be taken by a future Executive."

[41] In his evidence Mr Forgrave has also included an independent report from Grant Thornton Accountants. This report takes issue with some of the assumptions made in the most recent consultation process in terms of assessing compensation and tariffs. In any event no revised scheme has been implemented and the matter appears to be effectively in abeyance in the absence of a NI Assembly.

[42] At this point we return to the boiler owners affected by the legislative changes we have discussed above. Their broad position is helpfully explained in the affidavit of Mr Michael Doran of 3 February 2017. Paras [13] and [14] of this affidavit describe the boiler owners how they have been affected in the following terms:

> "13. These parties included representatives of people involved in the agri-food sector in Northern Ireland, in particular, the poultry and mushroom sectors, and representatives of organisations such as the Ulster Farmers Union. There are approximately 2250 approved installations in the non-domestic RHI Scheme in Northern Ireland. Approximately 50% of these are in agriculture, approximately 900 are involved in the poultry sector, approximately 40 are involved in the mushroom sector, and approximately 100 are involved in wood drying.
>
> 14. It has become apparent through admissions made by a number of public officials and through media reports that one of the issues in terms of the operation of the Scheme may be that the Department did not correctly calculate or forecast the cost of wood-pellets, used to fuel the renewable heating systems operated under the Scheme. I believe that the Department assumed the cost of these to be in and around £200 per tonne. Whilst prices can rise and fall, currently wood pellets costs approximately £155 per tonne. Before the "cap" was introduced into the Scheme in November 2015, payment under the Scheme operated at a rate of 6.4 pence per kilowatt per hour for unlimited hours. After the "cap" was introduced, the rate paid under the Scheme was 6.4 pence per kilowatt per hour for the first 1340 hours and thereafter 1.5 pence per kilowatt hour. The cost of fuel is currently in and around 4.4 pence per kilowatt hour."

[43] We have also been referred to the steps which boiler owners took before entering the scheme and prior to accreditation. Summarising, those interested in participating in the RHI scheme had to invest upfront and then adjust to using renewable heat sources rather than fossil fuels. The available affidavit evidence also

refers to incidental costs such as those associated with constructing sheds to house the boilers.

[44] Accreditation was the gateway to payment of the subsidy. The terms of accreditation are contained in the letters sent to claimants. A sample letter dated 11 March 2014 from Ofgem to Mr Dale refers as follows:

> "The effective accreditation date is 10 January 2014 from which support payments for eligible heat will start. It is also the date on which future dates for taking meter readings and submitting periodic data is based.
>
> This letter contains important information and you should also familiarise yourself with NI RHI Guidance Volume 2. It details your ongoing obligations as a participant in the NI RHI Scheme, as well as providing more information on periodic data submission and payments.
>
> Your starting tariff in line with the published rates will be £6.10p/kwh. This rate will be subject to change, based on the Retail Price Index (RPI) adjustments, which are updated on 1 April of each year and published on the NI RHI website.
>
> Your lifetime tariff is 20 years from the date of accreditation. You will stop receiving tariff payments under the NI RHI on 10 January 2034."

Summary of the evidence

[45] What follows is a brief summary of the evidence given that the full details are set out in the first instance judgments which we adopt. Following accreditation, Mr Dale avers that he invested substantially in biomass boilers, boiler houses, fuel storage bins, ground, and electrical works to participate in the RHI Scheme. He sets out that in October 2013 his father obtained a loan of £63,000 from the Ulster Bank to assist with the capital expenditure required for the initial investment in the RHI Scheme. He said the total investment cost him approximately £120,000 but he paid the balance through savings. He also references that he obtained a further loan from the Ulster Bank in August 2015 to assist the farm expansion, an additional chicken shed and installation of two biomass boilers. The loan amount was £350,000 of which £330,000 was drawn down. Those who entered the scheme like Mr Dale had to invest upfront in terms of capital.

[46] In his evidence, Mr Forgrave, also states that he operated on a much larger scale as a poultry farmer supplying Moy Park Poultry in Northern Ireland. In his evidence Mr Forgave refers to the fact that he is an award-winning farmer and that he has been

interested in new technologies. He states that he wanted to install six 99 kilowatt biomass boilers to heat six chicken sheds on the farm. To this end he expanded the business in 2015 and erected two new chicken sheds. A further four biomass boilers were installed in October 2015 to heat the new chicken sheds. In his affidavit evidence Mr Forgrave confirms that in total he invested £508,000 in biomass boilers, biomass boiler houses, fuel storage bins, ground and electrical works, installation, legal and bank costs. Mr Forgave also refers to his borrowing and the use of his land as a security against loans.

[47] Mr Forgrave also confirms that as supplier to Moy Park, he, like others, was entitled to financial support under the company's Additional House Payment scheme.

[48] A further important characteristic of the RHI scheme highlighted by the Appellants is that it was specifically supported by government. This is illustrated by the fact that the then Minister responsible for this scheme, Arlene Foster, sent letters to the banks specifically encouraging lending in this area to farmers. The claimants also had some reassurance in that the payments were grandfathered. We have seen the contents of these letters, exhibited to affidavits and agree that they were highly encouraging and supportive, and the appellants were perfectly entitled to rely on them.

[49] Notwithstanding the official encouragement, fault lines began to emerge in the scheme as it progressed. These matters are explained in the evidence filed by the Department which we have considered. Patently, issues emerged because of the cost of the RHI scheme relative to rising expenditure and the lack of cost controls. Government reacted to these issues by introducing the RHI Scheme (Amendment) Regulations (Northern Ireland) 2017 ("the 2017 Regulations") and the 2019 Act, both of which are the subject matter of this appeal. In effect, these legal measures capped the costs and changed the tariffs. From 2016 there were no new entrants to the scheme.

[50] Undoubtedly, the import of the reduction in tariffs was keenly felt by boiler owners in the non-domestic sector. This is explained in, for example, the comprehensive affidavits of Mr Doran and Mr Trimble. We note the high level of dispute between the Appellants and the Department which is forensically discussed in this evidence. We also note and consider it important to record that there is no suggestion that any of the boiler owners acted otherwise than in good faith.

[51] Unsurprisingly, the Appellants make the case that they have suffered hardship. The simple claim is that they entered the scheme in good faith, encouraged by the then Minister with responsibility, that they invested heavily, that this was with the understanding that the payments would be guaranteed and grandfathered for 20 years, that the promise was reneged upon, and that they have lost out financially. In reply to this claim, the Respondent's case is also simply stated; that the scheme was unsustainable, and costs had to be reduced and that it was lawful to do so.

The report of the independent public inquiry

[52] Finally, we cannot complete this background section of our judgment without reference to the Report of the Independent Public Inquiry into the Non-Domestic Renewable Heat Incentive (RHI) Scheme published in 2020 and chaired by Sir Patrick Coghlin ("the report"). The report highlights the failings of government on a breath-taking scale.

[53] We do not intend to traverse the work already undertaken in the inquiry. However, we have been informed by the helpful summary and recommendations contained in Chapter 56 of the report, some of which we replicate here from para 56.3 as follows:

> "1. The non-domestic NI RHI scheme was a 'project too far' for the Northern Ireland Government. While motivated by the laudable aim of encouraging the use of renewables rather than fossil fuels in heat production, the Northern Ireland stand-alone scheme should never have been adopted.
>
> 2. The NI RHI scheme was novel, technically complex and potentially volatile, especially because of its demand-led nature and the wide range of variables (such as fluctuating fuel costs) which could affect its operation. These features together made the scheme highly risky, yet the risks were not sufficiently understood by all those who should have understood them within the Northern Ireland Government, either at the outset or at any time during the life of the scheme.
>
> 3. Without the necessary resources and capability, DETI should never have embarked on such a novel and complicated, demand-led scheme. Like Scotland, it is likely that it would have been less exposed to risk by participating in what became the GB RHI scheme. Furthermore, the external economic consultants, CEPA, advised that a competitively awarded grant scheme (known as a 'challenge fund') was projected to deliver more renewable heat at a lower cost than an ongoing subsidy like the NI RHI scheme; but DETI rejected the grant option. Although other factors may sometimes legitimately lead a Department to adopt an option which is not the best value in pure monetary terms, the merits and feasibility of the grant scheme were not considered carefully enough in this case. A challenge fund would likely have been a better and, in many respects, a safer option for DETI to adopt.

> 4. CEPA recommended a tariff for some biomass boilers which was higher than the variable cost of heat production. This should have led CEPA to recommend tiering to create a second, lower tariff for heat production above the threshold level set to reimburse additional up-front capital expenditure. This error by CEPA was not picked up or corrected by DETI and created a perverse incentive to produce excess heat, whether there was a need for it or not, in order to profit from subsidy payments. Officials in DETI failed properly to understand the damaging presence of the perverse incentive, which facilitated exploitation, throughout the period when the scheme was open to new applicants. It was first highlighted, as far as DETI officials were concerned, by the Northern Ireland Audit Office in July 2016. This lack of understanding was a significant failing.
>
> 5. The nature of the funding provided by HMT for what became the NI RHI scheme was very unusual in public expenditure terms: a specific form of Annually Managed Expenditure (AME). There were particular risks associated with it. Those risks were articulated by an official within HMT to DETI in 2011. Although this was an unconventional means for communication of such matters, some officials within DETI and DFP did initially appreciate and understand those risks. However, not enough was then done in order to mitigate them. In addition, the actual funding position was not made clear in submissions and business cases, nor was it properly explained to the DETI Minister, until late 2015. Given the volatile and demand-led nature of the scheme, and the unusual nature of the funding, and in spite of warnings of the need to stay within set budgets, insufficient steps were taken to protect the NI RHI budget."

[54] Of particular significance for this case is the finding of Sir Patrick Coghlin that safety features including overall budget control mechanisms were not introduced into the NI RHI Scheme. Sir Patrick also references the fact that there was insufficient risk management or internal audit. He refers to the fact that the regulatory impact assessment was flawed in 2012 and should not have been signed off by the then Minister.

[55] Para [17] of the Summary also states:

> "Many of the design flaws with the NI RHI were quickly identified outside DETI by other parts of the public sector and by the private sector. The potentially lucrative nature of the scheme was promoted by many in the private sector and brought to the attention of a number of public sector bodies. There was certainly no "conspiracy of silence" in this regard. Nevertheless, bodies such as Invest NI and Action Renewables, in light of what they appreciated about the scheme from an early stage, could and should have done more to make DETI aware of potential exploitation of the NI RHI scheme and to query with DETI whether the scheme was operating as intended."

[56] Sir Patrick also highlights that once difficulties were apparent there was a failure to efficiently deal with the problems. At paras [25] and [26] of the Summary he says:

> "25. The amendments introduced to the NI RHI scheme in November 2015, and any delay during the summer and autumn of 2015 leading up to their introduction, ultimately had no meaningful impact upon the costs of the scheme. This is because the amendments were ill-considered and, once they were implemented towards the end of 2015, the market quickly adapted, demand rapidly grew again and there was virtually no difference in the subsidy paid for each unit of heat before and after the changes.
>
> 26. Nonetheless, at the time of consideration of scheme amendment in the summer and autumn of 2015, it was (wrongly) thought that the proposed amendments to the NI RHI scheme would significantly improve the budget position. In that context, the period of time that elapsed between the realisation of the problem at the most senior levels in DETI in late May 2015, and the introduction of scheme amendments through the new regulations in November 2015, was excessive and there was a lack of appropriate urgency. This was particularly so in light of the known risk, and later development, of a very significant spike in applications to the scheme."

[57] Sir Patrick goes on to criticise the steps actually taken to correct failings. At para [37] he says:

> "DETI should not have ended up in the position where an urgent suspension of the scheme was required and could only be effected by means of further legislation. However,

> having reached that position in December 2015, it was right to seek to suspend or close the NI RHI scheme as quickly as possible. This involved a difficult balance between expedition and risk of legal challenge."

[58] Finally, we refer to Sir Patrick's conclusion at paras [38] and [39] which is expressed as follows:

> "38. Corrupt or malicious activity on the part of officials, Ministers or Special Advisers was not the cause of what went wrong with the NI RHI scheme (albeit the Inquiry has identified some instances where behaviour was unacceptable). Rather, the vast majority of what went wrong was due to an accumulation and compounding of errors and omissions over time and a failure of attention, on the part of all those involved in their differing roles, to identify the existence, significance or implications of those errors and omissions.
>
> 39. There is no guarantee that the weaknesses shown in governance, staffing and leadership revealed by the Inquiry's investigation of the NI RHI scheme could not combine again to undermine some future initiative."

[59] Having read Sir Patrick Coghlin's report it is plain to see that the failure of the NI RHI Scheme was profound with ongoing consequences for the Northern Ireland public. That is a matter of public record. Our task is not to rewrite this history which is now well-established but to determine three core legal questions which flow from it. These we distil as follows:

Questions on appeal

[60] (i) Were the 2017 Regulations which changed the level of tariff for the appellants lawfully made?

(ii) Should the appellants succeed on the basis of either procedural or substantive legitimate expectation given that a promise was made to them that the tariffs would be in place and grandfathered for 20 years?

(iii) Should the appellants succeed in relation to their claim that the changes to the scheme by way of legislation, in the first case by the 2017 Regulations, in the second case by the 2019 primary legislation, amount to a breach of their rights under the European Convention on Human

Rights Article 1 Protocol 1, namely the right to peaceful enjoyment of property.

[61] Questions (i) and (ii) involve consideration of domestic law, question (iii) involves an assessment of Convention compliance.

[62] Before explaining our conclusion on these matters we have examined the decisions of the two judges who heard these cases as first instance as follows. We set out their core conclusions as follows:

The decision of Colton J

[63] The first decision under appeal deals with the legality and Convention compliance of secondary legislation comprised in the 2017 Regulations. Colton J deals with the issues raised in that case under three headings. First is the vires of the regulations which changed the tariff. In determining that challenge the judge distinguished the case of *R (On the application of Friends of the Earth Limited) v Secretary of State for Energy and Climate Change* [2012] EWCA Civ 28. In this regard he applies the dicta emanating from the House of Lords decision of *Wilson v First Country Trust Ltd (No.2)* [2004] 1 AC 816 and the law in relation to retrospectivity.

[64] At paragraph [180] of his judgment, Colton J concludes that the appropriate test is that set out by Lord Rodger in para [201] of *Wilson* and that the primary criterion is fairness. Colton J's conclusion reads as follows:

> "Before applying the test, I return to the statute itself. There is nothing in section 113 which limits the power of the Department as to how it is to make provision about the making of or the calculation of payments under the scheme. The only constraint in the Act relates to the categories of person to whom payments should be made. Neither are there any temporal constraints under section 113. The 2012, 2015, 2016 and 2017 Regulations are all exercises of that power."

[65] At paragraph [185] the judge also refers to the difference between retroactive operation of legislation and prospective changes to legislation. In that regard he says:

> "It is correct therefore that the operation of the changes under the 2017 Regulations are prospective in nature. The significance of this difference is that the presumption against altering vested rights in the future is weaker than in relation to retroactive change. Notwithstanding that such a presumption is weaker, the Court of Appeal in *Friends of the Earth* took the view that there remained a presumption against the alteration of existing "*vested*

> *rights*", that is those rights which once acquired, fairness demands should not be altered."

[66] The ultimate conclusion reached by Colton J is found at para [199] wherein he states:

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

[67] In reaching this conclusion the judge decided that the *Friends of the Earth* case was not one that he should follow given the different facts. He also considered budgetary factors which he says were "clearly a hugely significant factor in the introduction of the 2017 Regulations." He therefore decided that the 2017 Regulations were within the enabling powers set by the governing 2011 Act.

[68] Colton J also decided that A1P1 was engaged. He was in no doubt that there had been an interference with the possessions of the individual Applicant. He thought that the interference was control rather than deprivation. However, he ultimately decided that a fair balance had been struck in relation to A1P1 given that the right to payment had not been extinguished, that there was no recoupment and that the 2012 Scheme had been amended on an interim basis by virtue of the regulations for one year (later extended to two).

[69] Dealing with substantive legitimate expectation, the judge drew on established authority in this area in particular the case of *Finucane* [2019] UKSC 7 subsequently decided by the Supreme Court and reported at that stage by the Court of Appeal at [2017] NICA 7. He also referred to the dicta of Laws J in *Bhatt Murphy (A Firm) and others v The Independent Assessor* [2008] EWCA Civ 755. Whilst he accepted that a promise had been made in relation to the tariff being paid for 20 years, he looked at whether or not the interference was justified as a proportionate measure in the circumstances and given the budgetary issues he decided that it was. The judge also rejected any procedural legitimate expectation claims.

[70] A considerable part of the judge's ruling from para [276] on analyses the financial evidence. The limits of the judicial review jurisdiction is recognised by the judge at para [278]. However, the judge accepts that the starting point for the Department, based on the material and information available to it at the time the 2017 Regulations were implemented, was that the overall cost of the scheme would be £1.2

billion, that the total HMT grant over the period would be £0.7 billion and, therefore, the net cost to the Northern Ireland budget would be £0.5 billion or £500 million.

[71] The judge sets out the effective proposed reductions in a useful table at para [284] which we replicate:

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

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

[72] The judge then examines some case studies. These relate to the first individual applicant and then to a number of other applicants and reference the loss that they may suffer by virtue of the difference in the regulations, ie the tariff changing.

[73] A table in relation to that comparing the 2012 and 2017 Regulations is also helpfully provided at para [329] as follows:

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

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

[74] It is plain from the ensuing paragraphs of the judgment that there was a dispute in these cases about the exact extent of investment and costs. Colton J was clearly alive to this. We are similarly not equipped to resolve such factual disputes. The most

accurate statement we can make from the figures is that both appellants would have a reduction in income pending the new regulations.

[75] The ultimate conclusion of Colton J is found at para [367] as follows:

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

The decision of Humphreys J

[76] The decision of Humphreys J is challenged on a more discrete point. That is because by the time of the second case an Act of Parliament, namely the 2019 Act, had been enacted. Given that the change to the law was a result of primary legislation, the only relief that could be claimed in the second case was a declaration of incompatibility. As such that case focussed on the application of Article 1 Protocol 1 and the question of fair balance in the Applicant's particular circumstances.

[77] In para [34] of his judgment Humphrey's recounts the Applicant's particular circumstances. The judge helpfully sets out what the effect of the change of tariff would mean under the various regulations and under the 2019 Act at paras [44] and [45] as follows:

> "[44] Under the terms of the 2012 Regulations, the applicant was entitled to a tariff payment of 5.9p/kWh which led to an annual payment, per boiler of £26,000 before tax. The 2017 Regulations introduced a payment of 6.5p/kWh for the first 1314 hours, then 1.5p/kWh up to a maximum of 400,000 kWhth with no payment in respect of any additional kWh thereafter. This, on the applicant's

> analysis, led to a reduced annual payment of £13,000 per boiler, less than the annual running cost.
>
> [45] The legislation under challenge, the 2019 Act, reduced the tariff further to 1.7p/kWh for the first 1314 operating hours and 0p/kWh thereafter. At the time of swearing of his first affidavit, the applicant projected that this would give an annual payment per boiler of £2,200, creating a total annual shortfall of £118,000. This is said to give rise to a risk of insolvency for the applicant's business."

[78] The judge then considered the various arguments and, ultimately, at paragraph [107] in looking at the proportionality and fair balance of the 2019 Act, sets out the various factors to take into account as follows:

> "(i) The applicant was entitled to rely upon, and did rely on, the representations that the 2012 tariffs were guaranteed and 'grandfathered';
>
> (ii) In reliance on this he expended significant capital and incurred bank debt;
>
> (iii) Responsibility for the flaws in the original scheme rests with the Department;
>
> (iv) The amendments introduced by the 2019 Act do not require the applicant to repay any element of 'overcompensation';
>
> (v) The applicant has already recovered, even on his own figures, over double his capital outlay on the biomass boilers and associated infrastructure;
>
> (vi) The 2019 Act was the product of expert advice and public consultation, albeit that the ultimate terms of the legislation were not consulted upon;
>
> (vii) Had the 2012 Regulations continued in existence, the applicant would have received a massive windfall;
>
> (viii) Had the 2017 Regulations remained in force, the applicant would have received a less significant, but still considerable, windfall;

> (ix) The applicant has sustained, and will sustain, an obvious loss of cash flow as a result of the 2019 Act;
>
> (x) However, the overall purpose of the scheme was to incentivise the conversion to the use of renewables to produce heat, not to provide a source of cash flow for commercial businesses;
>
> (xi) The original scheme was fundamentally flawed, and action was required in order to protect the public purse;
>
> (xii) The European Commission had expressed its opinion, in strong terms, that any scheme delivering a rate of return of over 12% was unlikely to attain the requisite approval;
>
> (xiii) The courts must recognise the margin of appreciation afforded to national legislatures."

[79] The judge then determined at para [108]:

> "In the final analysis, I am particularly influenced by the fact that the applicant has received over £1.1M in subsidies since he was accredited for the scheme in 2014. … It simply cannot be said that the applicant has been subjected to an excessive burden by reason of the interference with his economic interests under the scheme when he has received, to date a return on capital investment of between £604,000 and £764,000."

[80] The judge then commented:

> "I have therefore concluded that the fair balance called for between the general interest and the interest of the individual has been achieved in this case."

Consideration

[81] It will be apparent from the above that we have been greatly assisted by the comprehensive way both judges dealt with the cases before them at first instance in what were complicated cases with much evidence and technical data. That is why we have borrowed from and endorse much of their analysis. We will deal with the matters arising on appeal under the broad headings of domestic and Convention law as follows

Questions (i) and (ii) : The domestic law issue

[82] The first two questions we set out at para [54] herein involve consideration of the vires of the 2017 Regulations. In determining the legal questions which arise we begin by reference to the terms of the enabling Act, namely section 113 of the 2011Act. The terms of this primary legislation dictate whether the subsequent 2017 Regulations fall in or outside its scope. The regulations are subordinate legislation.

[83] *Craies on Legislation* 12th Edition at para 3.4.1 is of assistance in understanding the point and reads as follows:

> "Subordinate legislation has already been defined as legislation that owes its existence and authority to other legislation. Implicit in this is the proposition that the potential scope of this subordinate legislation is limited by the extent of authority delegated. So, whereas, as in the case of an Act of Parliament one starts with the assumption that Parliament can do anything that it wishes to do, subject to certain limitations established by way of judicial presumptions or legislative control, in the case of subordinate legislation one starts with the opposite assumption, namely that the Minister or other office holder can do nothing by way of legislating unless it is clearly within the contemplation of the power conferred. The result is that while Acts of Parliament are immune from challenge in the courts except to the extent that Parliament has expressly provided, subordinate legislation may be challenged on the ground that it is not an exercise of the kind that was contemplated when the relevant power was conferred."

[84] We recognise that in some cases subordinate legislation made by means of delegated power has been found to be ultra vires. In *Regina (Public Law Projects) v Lord Chancellor* [2016] AC 1531 the Lord Chancellor had exceeded his power. In that case the Supreme Court ruled as follows:

> "In order to uphold the supremacy of Parliament over the Executive, subordinate legislation would be declared invalid if it had an effect or had been made for a purpose which was outside the scope of the statutory power pursuant to which it had purportedly been made; and that, where Parliament had used general words to confer a power to amend primary legislation by amendment of secondary legislation, a purported exercise of that power which was within the literal meaning of those general words might nevertheless be outside Parliament's

> contemplation, and although the court would not cut down the scope by an artificial reading of the power, any doubt about its scope would be resolved by restrictive approach."

[85] In *Regina (Rights of Women) v Lord Chancellor and the Secretary of State for Justice* [2016] EWCA Civ 91 the Lord Chancellor also exceeded the scope of the power vested in him in relation to legal aid when restricting eligibility for victims of domestic violence by way of an imposed month requirement and exclusion of financial abuse. In *Regina (Unison) v Lord Chancellor (Equality and Human Rights Commission and another intervening)* [2017] UKSC 51 access to courts was the issue and the court decided that the Lord Chancellor had overstepped his power in that case in relation to the setting of fees for employment tribunal cases thereby preventing effective access to the courts and causing discrimination. All of the examples we have discussed above are fact sensitive and differ from the case at hand.

[86] However, the case of *Secretary of State for Energy and Climate Change v Friends of the Earth* [2012] EWCA Civ 28 arises in a similar context and therefore has been of more relevance in our consideration. That case concerned a scheme known as the Feed in Tariffs ("FIT") scheme which was introduced to enable electricity supply companies to make payments to small scale producers of low carbon electricity. The purpose of the scheme was to encourage members of the public to become involved in the low carbon generation of electricity by different methods including the use of solar panels. The uptake of solar panels was double what was expected and the costs of installing solar panels had fallen. In consequence the tariffs payable were providing higher rates of return than the 5-7% anticipated and consultation in December 2011 proposed a reduced rate for claimants going forward. This was not challenged post the consultation after which modification came into effect but was challenged for those eligible in the three and a half months before the modifications were brought into effect. The question identified by the court was with whether it was within the power conferred on the Secretary of State by the Energy Act 2008 to make a modification which reduced the tariff in respect of installations becoming eligible for payment prior to the coming into force of the modification.

[87] We can understand why the Appellants rely heavily on this authority. This is because the Appellants argue that the 2017 Regulations retrospectively alter the law applicable to them in relation to tariffs. They invoke the presumption against retrospective operation of statutes which they say applies equally to delegated legislative powers.

[88] *Craies on Legislation* at paras 10.3.18 and 10.3.19 discusses this principle as follows:

> "As a general rule, a power to make subordinate legislation does not confer the power to make provision having retrospective effect unless it does so expressly, but if the

> statutory scheme is clearly intended to have retrospective effect and certain details of the scheme are left to be supplied by subordinate legislation, the subordinate legislation will be treated as having retrospective effect (and may be so treated whether or not it contains express provision to that effect).
>
> The presumption against retrospection applies as strongly in relation to subordinate legislation and enabling powers as in relation to primary legislation, if not, more strongly."

[89] The point at issue which is highlighted in the footnote to the above quoted section is explained as follows:

> "216. Retroactive changes change the law in relation to events which have taken place in the past. Retrospective changes alter existing rights, but only in relation to the future. The presumption against altering vested rights in the future is weaker than in relation to retroactive change … although it is weaker there remains a presumption against the alteration of existing vested rights, that is, those rights which, once acquired, fairness demands should not be altered."

[90] To our mind the Appellants' argument does not grapple with the difference between retroactive change and retrospective alteration to a fixed rate affecting vested rights. The import of the 2017 Regulations was not to change eligibility post accreditation up to 2017 but to alter the tariff to be applied to those within the scheme with effect from 2017 for a one-year period which was ultimately extended by another year. The purpose of this was to conduct a review of a scheme which had been clearly costing the public purse significantly more than was anticipated.

[91] The key principle in play in a vires challenge to subordinate legislation was highlighted in the Supreme Court in *R (Public Law Project) v SoS Justice* [2016] UKSC 39 by Lord Neuberger thus:

> "23. Subordinate legislation will be held by a court to be invalid if it has an effect, or is made for a purpose, which is ultra vires, that is, outside the scope of the statutory power pursuant to which it was purportedly made. In declaring subordinate legislation to be invalid in such a case, the court is upholding the supremacy of Parliament over the Executive. That is because the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned.

Accordingly, when, as in this case, it is contended that actual or intended subordinate legislation is ultra vires, it is necessary for a court to determine the scope of the statutorily conferred power to make that legislation.

…

26. The interpretation of the statutory provision conferring a power to make secondary legislation is, of course, to be effected in accordance with normal principles of statutory construction."

[92] We adhere to the House of Lords decision in *Wilson v First Country Trust (No.2)* [2003] UKHL 40, a decision which examines the non-retrospectivity of the Human Rights Act 1998. At para [19] Lord Nicholls said as follows:

> "19. The answer to this difficulty lies in the principle underlying the presumption against retrospective operation and the similar but rather narrower presumption against interference with vested interests. These are established presumptions but they are vague and imprecise. As Lord Mustill pointed out in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 524-525, the subject matter of statutes is so varied that these generalised maxims are not a reliable guide. As always, therefore, the underlying rationale should be sought. This was well identified by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712, 724:
>
> > 'the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.'
>
> Thus, the appropriate approach is to identify the intention of Parliament in respect of the relevant statutory provision in accordance with this statement of principle."

[93] In *Wilson* Lord Rodger refined the broad statement of principle into several more specific principles of interpretation. At para [192] Lord Rodger referred to the fact that it is the inherent prerogative of Parliament to change the law with prospective effect in a manner which changes an existing situation. Statutes of this nature do not engage the presumption. At para [193] and following, Lord Rodger identified statutes which operate in this manner to be the true target of the principle of construction. However, he disapproved of the use of a test based upon the identification of a vested right focusing instead upon the principle of fairness. He expressed the relevant approach in the following way at para 196:

> "196. The presumption is against legislation impairing rights that are described as "vested." The courts have tried, without conspicuous success, to define what is meant by "vested rights" for this purpose. Although it concerned a statutory rule resembling section 16(1)(c) of the Interpretation Act 1978, the decision of the Privy Council in *Abbott v Minister for Lands* [1895] AC 425 is often regarded as a starting point for considering this point. There Lord Herschell LC indicated, at p 431, that, to convert a mere right existing in the members of the community or any class of them into an accrued or vested right to which the presumption applies, the particular beneficiary of the right must have done something to avail himself of it before the law is changed. The courts have grappled with this idea in a series of cases which Simon Brown LJ surveyed in *Chief Adjudication Officer v Maguire* [1999] 1 WLR 1778. It is not easy to reconcile all the decisions. This lends weight to the criticism that the reasoning in them is essentially circular: the courts have tended to attach the somewhat woolly label "vested" to those rights which they conclude should be protected from the effect of the new legislation. If that is indeed so, then it is perhaps only to be expected since, as Lord Mustill observed in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co* [1994] 1 AC 486, 525A, the basis of any presumption in this area of the law 'is no more than simple fairness, which ought to be the basis of every general rule.'"

[94] The test suggested by Lord Rodger (which was applied by Colton J in this case) is found at para [201]:

> "201. … an appropriate test might be formulated along these lines: Would the consequences of applying the statutory provision retroactively, or so as to affect vested rights or pending proceedings, be "so unfair" that

> Parliament could not have intended it to be applied in these ways? In answering that question, a court would rightly have regard to the way the courts have applied the criterion of fairness when embodied in the various presumptions."

[95] Strikingly, there was no issue taken with the above formulation during the hearing before us. No different or contrary legal test was suggested. Therefore, we adopt the test articulated by Lord Rodger and apply it to the facts as follows.

[96] The questions that arise for consideration by this court relate to the fact that the 2017 Regulations changed the entitlements of those accredited within the RHI Scheme going forward from 2017. Significantly, they do not make tariff changes prior to that date or require a repayment of monies already received or make any attempt to clawback those monies. Rather, they are prospective in effect.

[97] The legal question is whether the 2017 Regulations were beyond the scope of the rule making power in section 113. The search for an answer to this question involves a reading of the legislation, in its context, and a consideration of the effect of the change wrought by the 2017 Regulations. The legal test to apply is that set out at para [84] above from *Wilson* - ie. would the consequences of applying the statutory provision so as to affect vested interests be so unfair that Parliament could not have intended it to be applied in this way?

[98] To answer this question we first turn to the language used in the 2011 Act. We agree with the argument that there were broad and flexible powers provided to the Department as the rule maker which are open ended in nature and directed towards setting up a renewable heat scheme. Counsel have referred to parts of the provisions contained in section 113. Section 113(2)(a) empowers the Department to make provision for payments to be made in specified circumstances to three categories of operator. See para [14] above.

[99] Section 113(2)(b) also confers broad powers upon the Department to make provision about the calculation of such payments. The explanatory notes, for what they are worth, to the 2011 Act refer to this provision as broad and flexible. Section 113(9)(b) of the 2011 Act makes clear that the Department's powers include the power to make rules which are incidental, supplementary, or consequential. In addition, section 113(9)(c) refers to the power to make regulations which may be transitory, transitional provisions or savings. This section did not feature in argument but is relevant we think as these were interim, non-permanent measures, pending a full review of the scheme. In addition, section 113(e) allows for Regulations to make provision for different cases or circumstances or for different powers.

[100] To our mind the effect of these provisions is flexibility and breadth. Significantly, the provisions are without limitation. Nowhere in the 2011 Act does it expressly preclude decreasing payments or altering payments. However, we cannot

think that given that this was the setting up of a scheme that such a power could be absolutely preclude. It is certainly not expressly precluded, nor do we think that the intention of the legislature was to preclude it given the breadth of the provisions.

[101] We must bear in mind the fact that the 2017 Regulations were not the first set of regulations made dealing with RHI. Post 2012 there were also 2015 and 2016 Regulations, as we have said. There is no argument that the legislation allowed for the closure of the scheme which was what the 2016 Regulations did. Rather, the argument is that the 2017 Regulations offended against those already accredited and who had a guarantee for 20 years at the same tariff. This is clearly not a case where there is retroactive change from the date when the law was enacted, namely 2012. Rather, this is classically an interference with pre-existing or vested rights in that a fixed tariff was promised.

[102] There is in law a presumption against interference with such vested rights. Colton J. explains the strength of this principle in vivid terms at para [205] of his judgment when he says that "the 2012 Regulations created clear and specific entitlements to those accredited under the scheme. They were not relying on Government policies or ministerial statement but on unambiguous Ministerial statements. Thus, there are strong private interests created under the 2012 Regulations. In addition to the private interests arising there is also a strong public interest in ensuring that citizens can rely on Government commitments given through statutory Regulations. This is particularly so when citizens acting on reliance of the Regulations incur capital expenditure on heating installations." We agree with these sentiments.

[103] However, in this case the Department was faced with a crisis in relation to a significant overspend in a scheme which had been incorrectly set up by government in Northern Ireland and threatened the public purse. It is hard to conceive of more critical or striking circumstances which required action. Sir Patrick Coghlin has said that the action taken was far too late in the day which is another governmental failing of breath-taking ineptitude. The "light bulb" moment as it has been termed, only came when it was realised that the money needed to pay under the 2012 scheme would outstrip the NI Block grant from which it was to come. A reparatory course was mandated by the NI Assembly before which the regulations were laid. However, something had to be done to avoid a crisis. These were truly exceptional circumstances and as such we think that a lawful course was followed. That may not be the outcome in every case of this nature, but it is in this case.

[104] Fundamentally, the context informs the determination of fairness adopting the test set out by Lord Rodger that we have referred to above. Was the scheme so unfair as to be ultra vires? Notwithstanding the fact that the payments to the accredited boiler holders were to change, we do not consider that this could be so unfair as to be ultra vires, for the reasons set out by the Department in its skeleton argument as follows:

(i) The primary effect of the 2017 Regulations is prospective. The amendments to Regulation 36 and Schedule 3 of the 2012 Regulations will operate only for future payments.

(ii) It has been demonstrated by evidence that the tariffs originally set by the 2012 Regulations did not achieve their stated objectives. They have delivered overcompensation on a substantial scale. In the absence of change, the 2012 tariffs would have presented a grave threat to the Northern Ireland block grant for years to come.

(iii) In particular, the 2012 tariffs were based upon significantly inaccurate assumptions about almost all aspects of the tariff. The 12% rate of return, assumed operators would use 50kw boilers, operating 17% of the time, with a capital cost of £608 per kw. Compared against an oil equivalent it was estimated that operators would receive an incentive of £3,362 per annum. By 2017 it was clear that most operators actually used the bigger 99kw boilers. Average capital costs had been calculated on the basis of £374 per kilo watt and boilers were being used, on average 41% of the time, with no clear tariff or annual cap. Depending upon usage levels, operators were receiving payments of up to £29,000-30,000 per annum. The average user was receiving £12,250 approximately per annum, per boiler, representing a rate of return on capital investment of 54.8%.

(vi) Therefore, operators with higher usage levels achieved even higher rates of return on capital. This amounted to gross overcompensation, well in excess of the 12% permitted by the State Aid authorisation. The 2017 tariffs were estimated to reduce rates of return for the average user to 21.1%. This was, in fact, in excess of the 12% rate of return on capital originally anticipated

(v) The 2017 Regulations set a duration of 12 months only. This, over the course of a 20 year life span of the scheme, is not an excessive period and the regulations were to facilitate a review of the scheme.

(vi) Finally, by the time of the 2017 tariff changes being introduced, the majority of participants had already received support payments in excess of their initial capital investment.

[105] Accordingly, we do not discern, applying the test of fairness, that the change occasioned by the 2017 regulations was beyond the broad rule making powers conferred by the Energy Act 2011 upon the Department. We reach this conclusion having found that section 113 of the 2011 Act is broad and flexible. Such a course is not specifically precluded and, given the language used and the context, we cannot think that Parliament would have precluded such a course. In addition, we are influenced by the fact that this was an interim transitory measure until a permanent solution was found.

[106] In reaching this this conclusion we do not consider that the case of *Secretary of State for Energy and Climate v Friends of the Earth and others* supports the appellants' case in the absolute way it has been suggested. A similar scheme was involved, and the court determined that the adjustment of a fixed rate of return was beyond the Energy Act 2008 mandate. This rationale is encapsulated in para [40] which reads as follows:

> "[40] The concept of a rate of payment fixed during the period of generation by reference to the date the installation became eligible for payment is fundamental to the Scheme. It provides an assurance as to the rate of return to an owner who has paid a capital sum prior to the installation coming into operation, subject to an adjustment in accordance with RPI. That the Scheme provides for a fixed rate of return during the period of generation is crucial to resolution of this appeal. Identification of the concept of a fixed rate does not depend upon any Explanatory Note, although those notes underline that concept. The fixed return to the owner assured by the Scheme was rightly described by Mr Grodzinski as analogous to the fixed rate of return on a Government bond."

[107] This was a case which involved a solar energy scheme in which entrants were to create energy and to be paid by the energy companies for electricity generated. So, this was the business, there was a capital investment required but there was no subsidiary business requirement. We agree with the Department's arguments that the RHI Scheme was different. The heat which would be generated by the boilers was intended to be used to replace existing sources of heat to support other businesses but primarily and substantially the poultry business. The operator was not being encouraged to generate excess heat. It was intended that the operator would use it for the purpose for which he would have otherwise generated heat using fossil fuels and so, to support his primary business.

[108] Therefore, we agree with the Department's submission that the purpose of the subsidy was to incentivise conversion, not unnecessary heat generation or, as in *Friends of the Earth*, the generation of electricity for commercial purposes, which could of course be sold on. Therefore, the factual bases of the cases are different. The component parts of the subsidy under the NI RHI Scheme are different to that in *Friends of the Earth and* so the case is distinguishable.

[109] In addition, the terms of section 41 of the Energy Act 2008 are different as they related to modification of licence and specifically refer to decrease only by way of formula. In any event the assessment of fairness when considering whether the presumption against altering vested or pre-existing rights clearly depends on the circumstances of each case. This case has features which we have explained make it

exceptional in terms of governmental failure and the regulations were temporary whilst a solution was found.

[110] Accordingly, for the reasons given, which are broadly in line with those provided by Colton J we do not consider, applying the legal test to this subordinate legislation, that it is a retroactive regulation. Rather, it makes a retrospective change for the future. Therefore, it is retrospective on a prospective basis. As such, it seems to us, that in looking at the vires of the legislation the context of the scheme is key. This RHI scheme was to incentivise the use of renewable heat sources within a reasonable budget, not to overcompensate businesses or to otherwise support businesses. The 2017 Regulations resulted in a return of approximately 21% which is greater than the EU State Aid stated aim but fair, we consider, given that the original rate of return under the 2012 Regulations was over 50% plainly due to the miscalculation of the fuel costs which founded part of the basis for the tariff.

[111] In any event we think the issue has become overshadowed given subsequent events. The original case was taken as an emergency in 2017. The second case was taken as an emergency in 2019. We understand why. However, events have moved on and notwithstanding the Appellant's valid sense of grievance, we are now past the hiatus and adjudicating upon this case against a different contextual backdrop. The 2019 Act ultimately determined the final shape of the scheme and is a piece of primary legislation which to our mind should now be the focus of this case.

[112] Lest we are wrong in our analysis we also point out that if a finding had been made that the 2017 Regulations were ultra vires, it would not automatically have led to the relief that the Appellants seek. That is because of the terms of section 81 of the Northern Ireland Act 1998 which reads as follows:

> "(1) This section applies where any court or tribunal decides that—
>
> (a) any provision of an Act of the Assembly is not within the legislative competence of the Assembly; or
>
> (b) a Minister or Northern Ireland department does not have the power to make, confirm or approve a provision of subordinate legislation that he or it has purported to make, confirm or approve.
>
> (2) The court or tribunal may make an order—
>
> (a) removing or limiting any retrospective effect of the decision; or

> (b) suspending the effect of the decision for any period and on any conditions to allow the defect to be corrected.
>
> (3) In deciding whether to make an order under this section, the court or tribunal shall (among other things) have regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected."

[113] If vires were found, we predict that further delay would have been occasioned in consideration of the legality of regulations now superseded by primary legislation. The reality of this situation is that this consideration may have resulted in the same outcome given the crisis with which the NI Assembly was faced and the need to restore finances for the public good.

[114] That leaves the arguments on substantive legitimate expectation and procedural legitimate expectation. These did not feature greatly in the legal debate as standalone arguments under domestic law although substantive legitimate expectation was allied to the A1P1 argument.

[115] The Supreme Court has dealt with the issue of legitimate expectation in the case of *Finucane* [2019] UKSC 7. At para [62] of that decision after a review of all the relevant authorities the court said:

> "62. From these authorities it can be deduced that where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context. And a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it. This is quite different, in my opinion, from saying that it is a prerequisite of a substantive legitimate expectation claim that the person relying on it must show that he or she has suffered a detriment."

[116] In this case it is beyond controversy that a legitimate expectation is established. It is patently clear to us that accredited boiler owners were to be guaranteed a fixed tariff for 20 years. It is not sustainable at all to argue against this, particularly in the light of the letter sent by the then Minister in charge to financial institutions and the evidence filed in the case. We need say no more about this issue because this case really comes down to justification and whether the justification for the change is lawful. We can deal with this in relatively short compass. The justification given by the Department is clearly financial. It is also based on a significant and startling failure

of government to see that the scheme was based on false premises which have been well explained in the public inquiry report as set out in the foregoing paragraphs.

[117] This issue is perfectly explained by Laws LJ in *Bhatt v Murphy v Independent Assessor* [2008] EWCA Civ 755 at para [41] where he says:

> "… Thus, a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often, they must balance different, indeed opposing, interests across a wide spectrum. Generally, they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel. … This entitlement – in truth, a duty – is ordinarily repugnant to any requirement to bow to another's will, albeit in the name of a substantive legitimate expectation."

[118] In this case the frustration of a substantive legitimate expectation, which we do think exists, in fairness to all the boiler owners who are caught by the change provided by the 2017 Regulations, is to be balanced with the public interest in providing proper financial relief rather than overcompensation for a scheme that was fundamentally flawed. Fairly early on, after there was a rush into this scheme, the sheer scale of the threat to public finances clearly justified the introduction of a remedial measure. That was expressed to be of a temporary nature to allow a review of the scheme and to look at whether it could be brought within a reasonable budget, within EU State Aid parameters and within a fair boundary. We do not consider that we need to retrace the steps set out in detail by Colton J under the heading 'The Financial Evidence.'

[119] We are not equipped to make definitive financial findings in a case such as this other than in very broad terms. The 2017 Regulations brought the scheme more into line with the authorised percentage gain which was around about 12% rather than the more inflated figures that emerge from the evidence. That is really all that should be done in a judicial review in relation to financial calculations as this is not a court which deals with evidence in a forensic way and, indeed, has heard no evidence on that point. Accordingly, we reject the substantive legitimate expectation argument based on a lawful justification.

[120] The procedural legitimate expectation argument was not pursued with any vigour. That is unsurprising as there was public consultation on the 2017 Regulations and a regulatory impact assessment carried out. This claim does not hold water.

[121] It is also important to note that the action taken to address the weaknesses of the RHI Scheme and to address budgetary pressures was approved by the Executive and is within its power. We do not consider that there is any freestanding common law obligation of consultation in this case. Fairness did not require it, and, in any event, it was plainly in the public domain that there were issues in relation to this scheme. The arguments made relying on legitimate expectation therefore fail.

Question (iii): The Convention Issue

[122] Next, we turn to the final argument based on A1P1. This is the argument which we consider gains most traction and which can rightly be raised by the two individuals both in the 2017 regulations case and in the 2019 Act case and potentially by other small and medium boiler owners.

[123] In the 2019 Act case, the only relief that can possibly be granted is based on a Convention argument as the legislation at issue in 2019 was an Act of Parliament which reduced tariffs further to a level that the Applicant in that case, Mr Forgrave, takes issue with. We have considered very lengthy skeleton arguments in relation to this issue and the comprehensive judgment of the trial judge.

[124] A1P1 provides:

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

[125] It follows from the above text that the first or jurisdictional question that this court needs to determine is whether either of the individuals who claim breach of Convention rights enjoy a possession. The argument against this is that a prospective loss of future income is not a possession.

[126] In this respect some uncertainty as to the applicability of A1P1 to social insurance benefits was clarified in the Grand Chamber decision case of *Stec and Others v the United Kingdom* [2006] All ER (D) 215 (Apr). In that case the court noted that in

most States, there existed a wide range of social security benefits designed to confer entitlements which arise as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding A1P1 to be applicable.

[127] In support of this view we refer to the ECHR Guide to A1P1 updated 31 August 2022 which provides as follows at para 68:

> "Article 1 of Protocol No. 1 imposes no restriction on the Contracting States' freedom to decide whether or not to have in place any form of social-security scheme, or to choose the type or amount of benefits to provide under any such scheme (Sukhanov and Ilchenko v Ukraine, § 36; Kolesnyk v Ukraine (dec.), §§ 89 and 91; Fakas v Ukraine (dec.), §§ 34, 37-43, 48; Fedulov v Russia, § 66). If, however, a Contracting State has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements.

[128] Domestically, in *Breyer Group and others v Department of Energy and Climate Change (DCC)* [2015] EWCA Civ 408 the court considered the Strasbourg and domestic jurisprudence in this area. That decision dealt with a distinction between marketable goodwill and capacity to earn future profits. The court held that the former since it could be capable of being capitalised as a form of asset could be protected as opposed to an expected stream of future income which could not be capitalised. It was clear that the court considered that existing enforceable contracts could constitute a possession within A1P1.

[129] The case of *In the matter of an Application by Denise Brewster* [2017] UKSC 8, is also of some relevance. This case concerned the question of whether future pension rights were capable of being a possession. The court determined that they were in keeping with *Stec* where, as we have said, future welfare benefits were seen to constitute a possession.

[130] Staying in the domestic sphere, we are also bound by *R(Mott) v Environment Agency* [2018] UKSC 10. This case dealt with A1P1 rights. Given what is said in *Mott* it is tolerably clear that there is no difference between a control and a deprivation and that all conditions are met in the present case. That is because whilst the right to payment has not been extinguished, the usage of the heat and the ability to generate heat have been controlled and the use of a tiering mechanism and a capping mechanism in the 2017 Regulations result in a deprivation. Either way, this takes us it seems, when looking at A1P1, to the issue of justification and fair balance. Therefore, the case of *Mott* as we have said, is the applicable test.

[131] A particularly impactful section of the *Mott* decision for present purposes is from para [32] onwards as follows:

> "32. The Strasbourg cases show that the distinction between expropriation and control is neither clear-cut, nor crucial to the analysis. Viewed from the Agency's point of view, and that of the public, the restrictions imposed in the present case were (as found by the Court of Appeal) a proper exercise of the Agency's powers to control fishing activity in the interests of the protection of the environment. We were not referred to any case in which such action has been treated as amounting to expropriation merely because of the extreme effects on particular individuals or their businesses. However, it was still necessary to consider whether the effect on the particular claimant was excessive and disproportionate.
>
> 33. Mr Maurici is right to emphasise the special importance to be attached to the protection of the environment. However, this does not detract from the need to draw a "fair balance", nor from the potential relevance of compensation in that context. As Mr Hockman pointed out, the potential need for compensation is recognised in other parts of the 1975 Act itself.
>
> 34. Compensation played a part in a Strasbourg case close to the present on the facts. *Posti v Finland* (2003) 37 EHRR 6 concerned a claim by two fishermen who operated under leases granted by the Finnish state. They complained that restrictions imposed by the government to safeguard fish stocks had failed to strike a fair balance under A1P1. The court held that the fishing restrictions were a control, rather than deprivation of property, and that the interference was justified and proportionate; the interference "did not completely extinguish the applicants' right to fish salmon and saltwater trout in the relevant waters", and they had received compensation for losses suffered (para 77).
>
> 35. By contrast in *Pindstrup Mosebrug A/S v Denmark* (2008) (Application No 34943/06), absence of compensation did not prevent the court ruling inadmissible a claim in respect of restrictions on the commercial exploitation of a peat bog, regarded as

> geologically and biologically unique. The court upheld the assessment of the domestic courts that the effect on the claimants was not unduly severe, having regard to the findings that they had not invested in production facilities for the purpose of exercising their extraction rights at the bog and that they had access to the extraction of considerable amounts of peat elsewhere.
>
> 36. Against that background I am unable to fault the judge's analysis of the applicable legal principles in this case. As already noted, he did not find it necessary to categorise the measure as either expropriation or control. It was enough that it "eliminated at least 95% of the benefit of the right", thus making it "closer to deprivation than mere control." This was clearly relevant to the "fair balance." Yet the Agency had given no consideration to the particular impact on his livelihood. The impact was exacerbated because the method chosen meant that by far the greatest impact fell on him, as compared to others whose use may have been only for leisure purposes. Indeed, the judge might have gone further. He thought that the lease might have retained "some small value" if sold for leisure rather than commercial use. However, as Mr Hockman pointed out, even that is doubtful given the strict limits in the lease on the power to assign."

[132] The ultimate conclusion is found within para [37] as follows:

> "37. As the Strasbourg cases show, the national authorities have a wide margin of discretion in the imposition of necessary environmental controls, and A1P1 gives no general expectation of compensation for adverse effects. Furthermore, where (unlike this case) the authorities have given proper consideration to the issues of fair balance, the courts should give weight to their assessment."

[133] At this point we will deal with the so called *Bosphorus* presumption which is drawn in aid by the respondents in this case. This presumption emanates from the case of *Bosphorus Airways v Ireland* [2006] 42 EHRR 1. In that case the Grand Chamber held that considering the protection of fundamental rights afforded by EC law, there was a presumption that Ireland did not depart from ECHR requirements when implementing binding EC law obligations. This was described:

> "In the court's view, State action taken in compliance with such legal obligations is justified as long as the relevant

> organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides ... By "equivalent" the Court means "comparable": any requirement that the organisation's protection be "identical" could run counter to the interest of international co-operation pursued ... However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection.
>
> If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation." [paras 155 & 156]
>
> "… it cannot be said that the protection of the applicant's Convention rights was manifestly deficient with the consequence that the relevant presumption of Convention compliance by the respondent State has not been rebutted." [para 166]

[134] In *O'Sullivan McCarthy Mussel Development v Ireland* [2018] (EU: 44460/16), the measure in question related to the deprivation of mussel seed fishing permits in Co Kerry. Ireland had been the subject of infringement proceedings in relation to its failure to implement obligations under EU Environmental Directives. The court held that whilst Ireland had to comply with the Directives and the CJEU judgment, it was not wholly deprived of a 'margin of manoeuvre' in that there remained some scope for negotiation with the Commission, as was illustrated by subsequent successful implementation of interim measures. The *Bosphorus* presumption did not therefore apply in that case.

[135] The court then considered whether the interference achieved a fair balance between the general interest and the individual's fundamental rights. It ultimately held that there was no violation of A1P1 since the interference did not constitute an individual and excessive burden for the applicants. It was persuaded to that conclusion by the weight of the objectives being pursued by the State "in achieving full and general compliance with the obligations under EU environmental law." (para 130).

[136] In *The Salmon Net Fishing Association of Scotland* [2020] CSOH 11, a group of salmon fishermen challenged a compensation scheme set up to assist those adversely affected by a prohibition on the retention of salmon caught in coastal waters. This had

come about as a result of infraction proceedings brought against the UK by the Commission arising out of the failure to implement the Habitats Directive. It was not argued that this was a case of the operation of the *Bosphorus* presumption but that the compliance with obligations under EU law was a matter of legitimate general interest of considerable weight.

[137] We agree with the analysis of Humphreys J on this issue and conclude that the *Bosphorus* presumption does not apply on the facts of this case. We therefore turn to questions of justification with A1P1 as follows.

[138] Core to the question of justification is the reason provided by a Member State for any interference. The case of *Sporrong and Lonnroth v Sweden* [1982] 5 EHRR 35 at para [61] frames the question of interference by way of reference to three rules as follows:

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

[139] In *James v UK* the court said that the three rules are not distinct in the sense of being unconnected: the second and third rules are concerned with instances of interference with the right to peaceable enjoyment of property and should therefore be constructed in the light of the general principle in the first rule.

[140] In *Sporrong and Lonnroth* the ECtHR also articulated the need for a fair balance in the following way:

> "… the court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individuals' fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1."

[141] The ECtHR added the requisite balance will not be struck if the person or persons concerned must bear what is described as an "individual and excessive burden." The clear thrust of the jurisprudence, as we read it, is to assimilate the assessment under the sole principle of fair balance.

[142] These principles are consistently applied in the domestic decisions to which we have been referred. In *Cusack v London Borough of Harrow* [2013] UKSC 40 the Supreme Court at para [39] affirmed the guidance laid down in para [31] of *Thomas v Bridgend County Borough Council* [2012] QB 512 which distilled the legal requirements into the following questions:

> "Secondly, although not spelt out in the wording of the article, claims under any of the three rules need to be examined under four heads:
>
> (i) whether there was an interference with the peaceful enjoyment of 'possessions';
>
> (ii) whether the interference was 'in the general interest';
>
> (iii) whether the interference was 'provided for by law'; and
>
> (iv) proportionality of the interference."

[143] It follows from the above discussion that in order to be compatible with the general rule set forth in the first sentence of the first paragraph of A1P1, an interference with the right to the peaceful enjoyment of "possessions", apart from being prescribed by law and in the public interest, must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The issue of whether a fair balance has been struck becomes relevant only once it has been established that the interference in question served the public interest, satisfied the requirement of lawfulness and was not arbitrary.

[144] When the law is applied to these appeals the focus is therefore firmly upon whether a fair balance has been struck. That is because it is accepted that the public interest element is satisfied by the need to protect public funds in the context of a scheme which overran and jeopardised fiscal stability in Northern Ireland.

[145] Within these parameters this court must ascertain whether by reason of the State's action or inaction the person concerned had to bear a disproportionate and excessive burden. In assessing compliance with that requirement, the court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective."

[146] The search for balance is inherent in the Convention infrastructure. This issue is also most often decisive for the determination of whether there has been a violation of A1P1. In terms of methodology, the court normally conducts an in-depth analysis of the proportionality requirement, unlike the more limited review of whether the

interference pursued a matter of public interest. The purpose of the proportionality test is to establish first how and to what extent the applicant was affected. Numerous factors are taken into consideration by the court in this examination. There is no fixed list of such factors. They vary from case to case, depending on the facts of the case and the nature of the interference concerned. We mention a few examples which highlight the considerations in play.

[147] For instance in the case *Kurban v Turkey* [2020] ECHR 75414/10, the court noted that the margin of appreciation enjoyed by Contracting States, when the issue involves an assessment of candidates for public procurement and as regards the policy choices as to the mandatory or discretionary exclusion of candidates, is quite broad, though the fair balance principle must still apply.

[148] Generally, where a public interest issue is at stake, it is incumbent on the public authorities to act in good time, and in an appropriate and consistent manner (*see Fener Rum Erkek Lisesi Vakfi v Turkey* (2015) 60 EHRR 15*, Novoseletskiy v Ukraine* (2006) 43 EHRR 53).

[149] An adjudicating court will also have regard to the conduct of the parties to the proceedings as a whole including the steps taken by the State (*see Beyeler v Italy* (2003) 36 EHRR 5, *Bistrović v Croatia* (2007) ECHR 25774/05). A State is not barred from taking reparative steps even if they emanate from negligence or mis-management.

[150] Some typical factors relevant to the examination of the fair balance test in the context of A1P1 are procedural issues, choice of measures, substantive issues which feed into the fair balance test, issues concerning the applicant and compensation for the interference with property as an element of balance.

[151] One of the significant factors for the balancing test under A1P1 is whether the applicant attempted to take advantage of a weakness or a loophole in the system (*National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v the United Kingdom* (1998) 25 EHRR 127, *OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and Others v France* [2004] ECHR 232,). This is not a negative factor in the present case as it is accepted that all applicants were acting in good faith and were genuine.

[152] In Convention terms, compensation is material to the assessment of fair balance and, notably, whether the contested measure does not impose a disproportionate burden on the applicants (see *The Holy Monasteries v Greece*, (1998) 25 EHRR 640, §71; *Platakou v Greece* [2001] ECHR 14). However, from the jurisprudence we can discern that this is not an absolute or immutable requirement. That is because the significance of compensation varies in the court's assessment depending on what is at stake.

[153] From our review of the Strasbourg jurisprudence it appears clear that the taking of property under the second sentence of the first paragraph of A1P1, without payment of an amount reasonably related to its value, will normally constitute a

disproportionate interference. However, the cases we have read are highly fact specific and so invariably outcomes will vary depending on the circumstances of a particular case. For instance, in *Depalle v France* [2012] 54 EHRR 17 the absence of compensation was not found to be disproportionate in the overall circumstances of the case. In that decision the Grand Chamber said that in a situation where a measure controlling the use of property is in issue, the lack of compensation is a factor to be taken into consideration in determining whether a fair balance has been achieved.

[154] Although of some vintage, we return to *James and others v the United Kingdom* [1986] 8 EHRR 123. That case determined that the court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this domain. The court will respect the legislature's judgment as to the compensation due for expropriation unless it is manifestly without a reasonable foundation.

[155] Hence, whilst in many cases of lawful expropriation only full compensation can be regarded as reasonably related to the value of the property, that rule is not absolute. The provision does not therefore guarantee a right to full compensation in all circumstances since legitimate objectives of "public interest" (such as those pursued in measures of economic reform or designed to achieve greater social justice) may call for less than reimbursement of the full market value.

[156] The foregoing discussion of the European jurisprudence points to the fact that the circumstances of each case will dictate the outcome as to whether State interference with the A1P1 right can be justified within the margin of appreciation which is recognised as wide in this area.

[157] With these principles in mind we turn to the facts of the cases before us. In the first appeal concerning the effect of the 2017 Regulations, the individual circumstances of the applicants are analysed by Colton J. Those regulations were time limited for one year. Notwithstanding a deprivation or control on the tariff there was still benefit obtained from the tariff. Therefore, we find that a fair balance was struck in agreement with the trial judge.

[158] We agree with Colton J's conclusion as regards A1P1 in the first appeal which is encapsulated in para [432] of his ruling as follows:

> "[432] To date DA has already received payments amounting to £226,589 against capital costs of £111,000 in his application form. On the basis of the methodology underpinning the scheme this has already resulted in a 204.1% payment as a percentage of capital spend. If he continues to receive payments on the original basis it is estimated that he will receive a total of £2,549,276. Under the old tariff he would continue to receive an annual payment of £117,443 as opposed to a revised annual

> payment of £49,617, which on the respondent's figures is well in excess of the annual payment for a 12% rate of return, being £32,259. These figures demonstrate that the second applicant in this case, absent the 2017 Regulations, will receive payments way beyond what was anticipated for this scheme. They clearly constitute '*overcompensation.*' The reduced figures payable are much closer to the original intention of the scheme."

[159] This is a clear and compelling analysis which provides an answer to the first case regarding the 2017 Regulations. The subsequent case brought against the 2019 Act is not so straightforward given that the 2019 Act represented a much more significant reduction, which applied to Mr Forgrave and a cadre of other small and medium biomass boiler owners.

[160] Our approach follows that of *R(AR) v Chief Constable Greater Manchester* [2018] UKSC 47 which was discussed by the Supreme Court recently in *Re H-W* [2022] UKSC 17. As to the role of the appellate court on a proportionality review para [64] of *R(AR)* refers:

> "64. In conclusion, the references cited above show clearly in my view that to limit intervention to a "significant error of principle" is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle - whether of law, policy, or practice - which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be "wrong" under CPR 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said (*R(C) v Secretary of State for Work and Pensions* [2016] EWCA Civ 47; [2016] PTSR 1344, para 34): Page 27:
>
> > "… the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong."

[161] Whilst the court afforded the opportunity for further submissions on the appellate task no contrary legal arguments were made and so we proceed on the basis that we are conducting a review of Humphrey J's analysis at first instance.

[162] Having conducted our review we agree with Humphrey's J. there is a compelling case that the respondent's objectives in bringing forward the 2019 Act were legitimate, namely the protection of the Northern Ireland budget, the public interest in ensuring value for money in public expenditure, the decision-making constraints as regards State Aid compliance and the UK's obligations under the Renewable Energy Directive. The judge analyses each of these factors between paras [93]-[100] of his judgment and we can see no error there.

[163] The only question is as to how Humphreys J. determined fair balance and proportionality. Before explaining our answer to this question, we will deal with the argument that Humphreys J. may have applied the wrong test when conducting fair balance by his reference to the "manifestly without reasonable foundation" threshold at para [109] of his judgment. There the judge said that "the *Belane Nagy* threshold of manifestly without a reasonable foundation is high one." He referred to this principle when also expressing his conclusion on fair balance. Therefore, the appellant makes the point that he has conflated two issues in that "manifestly without reasonable foundation" only applies to the aim and should not enter fair balance.

[164] From the foregoing discussion of the law in this area the valid question arises as how the judge approached the fair balance exercise. Whilst there is a wide margin of appreciation afforded to the State in terms of justifying intervention it cannot be said that the manifestly without reasonable foundation comes into fair balance. With that proposition we wholeheartedly agree. However, we are not so convinced that the judge has erred in law.

[165] On an overall view we think that the judge appreciated the difference between legitimate aims and fair balance. The judgment must be analysed as a whole, rather than compartmentalised paragraph by paragraph. The wording of para [109] is somewhat clumsy but we do not think this invalidates the decision the judge made particularly given the way he proceeded to consider the factors that went into the fair balance assessment. The thrust of his decision flows from para [107] wherein he lists the factors he has considered in assessing fair balance. This paragraph contains factors which are both positive and negative for the appellant.

[166] Properly analysed, para [101] of the judgment highlights the correct legal test, which is whether the impugned measure constitutes an unfair and excessive burden on the applicant. Para [107] of the judgment appears to us to include all relevant issues in trying to strike the fair balance. There was no argument made about that. At para [108] the judge identifies the deciding factor which was the £1.1m received in subsidies by Mr Forgrave since he was accredited. We can well see how the judge reached this conclusion given the extent of overcompensation in Mr Forgrave's case, allied to the fact that no monies were to be paid back. The conclusion that it simply cannot be said

that the Appellant has been subjected to an excessive burden by reason of the interference with his economic interests under the scheme when he has received, to date a return on capital investment of between £604,000 and £764,000, is sound.

[167] The only valid criticism to be made is how the judge considered loss over a 20-year period given the fact the commercial choice made by Mr Forgrave to convert to renewable energy with associated guarantees. We were told that may mean that the appellant is now going to run a loss, on the Appellant's figures, of £118,000 per year. The point raised by Mr Forgrave and recognised by the judge at para [42] of his judgment is that:

> "A rate of return is of no consequence if I am unable to pay my bills as they fall due…a projected 20 year rate of return does not equate to having the cash flow needed to meet short term bank commitments."

[168] The fundamental problem with this argument is tied to the purpose of the RHI scheme, as it was only ever intended to incentivise the move away from fossil fuels by subsidising the additional costs of renewable energy. It was not intended to prop up businesses. The problem is exacerbated by the conflicting financial evidence in this case. Notwithstanding this the judge was asked to assess this matter without oral evidence and within the parameters of a judicial review.

[169] A striking feature of this case, referred to by both judges at first instance, is the amount of complicated forensic evidence some of which is disputed and conflicting. The courts in England have addressed the issue of how to deal with disputed evidence in a judicial review application. The Divisional Court in *R v (On the application of The Good Law Project Ltd and Runnymede Trust v The Prime Minister and the Secretary of State for Health and Social Care* [2022] EWHC 298 (Admin) endorsed the approach set out in Sir Clive Lewis's book, Judicial Remedies in Public Law (6th Edition, 2020) at para 9.121. He said:

> "If there is a disputed fact not capable of being resolved on the documentary evidence, and no cross-examination is allowed, courts will proceed on the basis of the written evidence presented by the person who does not have the onus of proof. As the onus is on the claimant to make out his case for judicial review, this means that in cases of conflict on a critical matter which are not resolved by oral evidence under cross-examination, the court shall proceed on the basis of the defendant's written evidence."

[170] The appellate court is even less equipped to deal with conflicting evidence of this nature than the first instance court. Overall, we do not find a valid reason why we would interfere with the conclusion of Humphreys J, particularly as he was asked to determine the matter based on the affidavit evidence he had at that point in time.

As we have highlighted above, where conflict arises in such conflicting forensic evidence the Respondent's evidence must prevail. Therefore, on the particular facts of Mr Forgrave's case as presented to Humphreys J, the claim fails. We cannot say whether another case would result in the same outcome as fair balance depends on individual circumstances.

[171] As to the broader panorama, the fact remains that no revised tariffs or compensation have been put in place to date. The 2019 Act was not intended to be a permanent solution. The affidavit of Richard Rodgers informs us that proposals are being considered to deal with the specific matter that arises, in that there are options for keeping the Scheme open and for closure with compensation.

[172] It is plain to see that government needs to deal with the RHI Scheme going forward by way of compensation or provision of a revised tariff for all. This point arises in a context where the RHI Scheme has led to erosion in faith of government in our jurisdiction. An entirely justifiable element of the case advanced by Mr Forgrave emanates from a frustration with the delay in settling a final fair scheme of tariffs.

[173] We understand that a previous composition of this court determined that the judgment given should inform the shape of the revised scheme. Adopting that position there is now no valid reason why choices cannot be made by the Department. A1P1 is clearly engaged in these cases. There is an interference with this Convention right. The interference is for a legitimate aim to protect public money. The only issue that remains is whether a fair balance is struck in an individual case.

[174] We trust that as clarity has now been provided on the legal issues, renewed focus will now be applied to settling a proper permanent solution for boiler owners who acted in good faith. To our mind this should be over the next number of months rather than years. We would have hoped that a consensual solution could be reached on revised tariffs/compensation. If there is prevarication, we understand that further litigation may be the only option although we would hope that it will not come to that.

Overall Conclusion

[175] We conclude this judgment by recognising the position small and medium biomass boiler owners have been left in by virtue of a botched scheme. We have sympathy for those who have been adversely affected by the mistakes that have been made and who have probably lost faith in government. However, we must answer the legal questions which require us to consider not just individual interests but the wider public interest.

[176] Our answer to the questions posed at para [60] is as follows:

(i) The regulations were lawfully made and so the vires challenge is dismissed.

(ii) The challenge based on procedural and substantive legitimate expectation based on domestic law principle is dismissed.

(iii) The A1P1 challenge brought by Mr Forgrave to the 2019 Act is dismissed.

[177] Finally, we recognise that A1P1 compliance may fall to be reconsidered in future depending on circumstances or if there is delay with progression of the revised scheme.

[178] Accordingly, we dismiss the appeals. We will hear from the parties as to costs.