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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY KSD ENERGY LTD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Donal Sayers KC & Stephen Toal KC (instructed by McNamee McDonnell Solicitors) for the Applicant
Aidan Sands KC (instructed by the Crown Solicitor's Office) for the Proposed Respondent

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HUMPHREYS J

Introduction

[1] The applicant is a limited liability company which carries on business in the field of renewable energy. It owns and operates a fuel burning anaerobic digestion generating 400 kW station at Dublin Road, Killeen, Co Armagh.

[2] The Department for the Economy sought to incentivise the generation of renewable energy by the creation of the Northern Ireland Renewables Obligation ('NIRO'), a legal requirement imposed upon electricity suppliers to generate specified amounts of electricity from renewable sources.

[3] In order to demonstrate compliance with NIRO, a supplier had to produce renewables obligation certificates ('NIROCs') in accordance with a legislative calculation. NIROCs were issued to generators in respect of each megawatt hour of electricity produced and these could then be sold to suppliers.

[4] The legislation underpinning this obligation was the Renewables Obligation Order (Northern Ireland) 2009 ('the 2009 Order') which provided for a scheme of accreditation administered by the Office of Gas and Electricity Markets ('Ofgem') on behalf of the Northern Ireland Authority for Utility Regulation. Applications for accreditation were assessed in line with eligibility criteria set out in article 50 of the

2009 Order. By virtue of the Renewables Obligation Closure Order (Northern Ireland) 2015, the NIROC scheme closed to new applicants on 31 March 2017 which was the date upon which the applicant applied for accreditation of its generating station at Killeen.

[5] By this application for leave to apply for judicial review, the applicant seeks to challenge the decision made by Ofgem, the proposed respondent, on 15 March 2023 whereby it declined to revisit its decision to refuse the applicant's application for accreditation made on 29 April 2022. By way of an amendment to the original Order 53 statement, the applicant also seeks to impugn the original decision of 29 April 2022.

The Evidence

[6] The court has had the benefit of considering the extensive correspondence passing between the parties over the course of more than six years. The following represents a summary of the chronology of events:

(i)	31 March 2017	Application for full accreditation made
(ii)	27 June 2017	Queries raised by Ofgem
(iii)	22 November 2017	Ofgem raise outstanding queries
(iv)	19 February 2018	Ofgem ask if intend to continue application
(v)	13 March 2018	Ofgem still seeking answers to queries
(vi)	20 April 2018	Ofgem send 'final reminder'
(vii)	30 May 2018	Ofgem 'last attempt to contact you'
(viii)	28 January 2019	Application identified as dormant
(ix)	10 February 2019	Agent replies – application 'progressing'
(x)	12 August 2020	Notification to cancel unless respond
(xi)	13 August 2020	Agent replies – queries were all answered
(xii)	14 August 2020	Ofgem explain information not provided
(xiii)	18 August 2020	Agent says is chasing commissioning letters
(xiv)	18 August 2020	Ofgem extend deadline to 1 September 2020
(xv)	4 September 2020	Agent sends commissioning certificates

(xvi)	20 November 2020	Ofgem seeking further information
(xvii)	11 December 2020	First Ofgem 'Minded to Refuse' letter
(xviii)	29 January 2021	Second Ofgem 'Minded to Refuse' letter
(xix)	10 February 2021	Agent will supply further information
(xx)	11 May 2021	Third Ofgem 'Minded to Refuse' letter
(xxi)	10 June 2021	Agent provides further information
(xxii)	29 July 2021	Ofgem advises of still outstanding matters
(xxiii)	3 August 2021	Ofgem seeking further information
(xxiv)	10 August 2021	Agent waiting for documentation from NIE
(xxv)	30 November 2021	Ofgem confirm FMS approved
(xxvi)	12 January 2022	Fourth Ofgem 'Minded to Refuse' letter
(xxvii)	9 February 2022	Agent response including ITA Report
(xxviii)	29 April 2022	Notification of Refusal of Accreditation
(xxix)	4 May 2022	Agent strongly disagrees – meeting sought
(xxx)	28 July 2022	Applicant solicitors ask for reversal
(xxxi)	15 August 2022	Ofgem state cannot revisit decision
(xxxii)	20 January 2023	Connection agreement signed
(xxxiii)	9 February 2023	Agent asks for discussion
(xxxiv)	10 February 2023	Agent says all issues now resolved
(xxxv)	15 March 2023	Ofgem reiterate that cannot revisit decision
(xxxvi)	2 June 2023	PAP letter from new solicitors
(xxxvii)	14 June 2023	Judicial review proceedings commenced

[7] The decision impugned in these proceedings is contained in an email from Ofgem to the applicant's agent dated 15 March 2023 and stating as follows:

> "From 2017, we have sent regular requests for information, explaining what is required, in order to fully assess this application. These requests for information were repeated in Minded to Refuse letters sent on 11 September 2020, 29 January 2021, 11 May 2021 and 12 January 2022. In each of these cases, only partial or inconsistent information was provided by your client in response. We repeatedly communicated to your client the information that remained outstanding, but this did not result in the production of all the outstanding information that was required.
>
> Following a further review of the evidence provided, a final Decision letter was sent on 29 April 2022 refusing the application and explaining the reasons for that decision. It is not possible to now revisit that decision."

[8] This email restated the position as advised to the applicant's former solicitors some seven months previously when Ofgem responded in precisely the same terms.

[9] Facing the proposed respondent's objections based on the delay in pursuing the challenge, the applicant has sought to expand the ambit of the application to encompass the refusal decision of 29 April 2022 and to ask the court to extend the time for the bringing of such a claim.

[10] The 29 April 2022 letter from Ofgem set out the history of the requests for information from May 2017 onwards and the four 'Minded to Refuse' letters. It then states:

> "Our Minded to Refuse letters as outlined above gave you the opportunity to provide new evidence in respect of the Application. The most recent MTR generated responses from Paul Kingston on 9 February 2022 and 16 February 2022.
>
> A full review of all the information provided to Ofgem in respect of this matter has been completed, including:
>
> - The information provided with the accreditation application, correspondence and any additional documents provided in response to queries
>
> - Your responses to the Minded to Refuse letters

> Following our due assessment and consideration of the further submissions, I am writing to inform you that we are refusing the application. This letter gives the reasons for this decision."

[11] There then follows an explanation of Ofgem's role in the administration of the NIRO scheme, including the grant of accreditation to eligible generating stations. The relevant legislative provisions are set out. The following reasons are then given for the refusal of accreditation:

(i) No valid grid connection agreement

Ofgem had not been furnished with a signed grid connection agreement in place between the applicant and NIE Networks. Permission had not been granted for the station to operate a generator with a 400 kW capacity and a 150 kW export capacity in parallel with the network.

(ii) Insufficient evidence of commissioning date

The evidence provided did not enable Ofgem to accurately determine when the two generators were commissioned.

(iii) Insufficient evidence of fuel and equipment delivery date

No invoice was provided for the delivery of fuel and the associated Pressure Reduction Skid, which is required when commissioning using compressed natural gas. The February 2022 invoice provided related to a company and an address that had no relationship to the Dublin Road station.

(iv) Inconsistent and insufficient evidence of engine capacity and total capacity

The application and the documentation furnished contain inconsistent and contradictory information in relation to capacity of the generating station.

(v) Insufficient evidence to determine the declared net capacity

Similarly, the information supplied indicated different load values and therefore no determination could be made of the declared net capacity of the station.

[12] Ofgem drew the conclusion that it was unable to make a determination on the eligibility of the installation for accreditation under the legislation in light of the absent and contradictory information supplied. The application was therefore refused.

[13] None of the reasons set out in the refusal decision were new. They all featured as issues raised in the Minded to Refuse letters.

[14] The validity of the position adopted by Ofgem was acknowledged by the applicant's then solicitors, Pinsent Masons, in the letter dated 28 July 2022 when they commented:

> "Our client was not properly briefed or advised on Ofgem's legal and regulatory obligations under the NIRO and the strict requirements which must be demonstrably satisfied by applicants. Having now been made fully aware of such requirements, our client seeks to collate and issue the full supporting evidence base for its application with our support."

[15] Ofgem was invited at this stage to reverse its refusal decision and afford a further opportunity to the applicant to collate and provide the outstanding documentation. The response from Ofgem on 15 August 2022 was unequivocal:

> "We repeatedly communicated to your client the information that remained outstanding, but this did not result in the production of all of the outstanding information that was required.
>
> Following a further review of the evidence provided, a final Decision letter was sent on 29 April 2022 refusing the application and explaining the reasons for that decision. It is not possible to now revisit that decision."

[16] The grounding affidavit for the application was sworn by the director of the applicant company Kevin Donnelly. He avers that the company has spent close to £5M to set up the machinery and associated buildings at the Dublin Road premises. Accreditation is therefore of crucial importance to the future viability of the company. He deposes to the fact that the applicant engaged a consultant, Paul Kingston, who held himself out as having expert knowledge of the accreditation scheme. It was Mr Kingston who communicated with Ofgem and had access to the portal through which all information was supplied.

[17] Mr Donnelly explains that the refusal decision of 29 April 2022 was not challenged at the time because Mr Kingston advised that it would be easily resolved once the requisite signed agreement from NIE had been obtained. Mr Donnelly sets out that there was a breakdown in the relationship between the company and Mr Kingston.

[18] There is no reference in Mr Donnelly's affidavit to the four Minded to Refuse letters or to instruction of Pinsent Masons or the correspondence which passed between the solicitors and Ofgem. These are startling omissions.

[19] The defects in the applicant's evidence were sought to be addressed by Stephen Donnelly, the original deponent's son, in an affidavit sworn on 25 October 2023. He admits that the company received the letter of 12 August 2020 threatening to cancel the application and the four subsequent Minded to Refuse letters.

[20] The same deponent then seeks to address the omission of the Pinsent Masons correspondence from the evidence which sought to ground the judicial review application. He states that the company was advised to seek out specialist advice. He says:

> "We then sought advice from Pinsent Masons and they concluded that we should not bring a judicial review challenge until we first obtained the consent letter from NIE…Thereafter we chased the NIE until that consent letter was obtained. Subsequently we went back to our family solicitor to update him on the advice received from Pinsent Masons and he informed us that the prospective judicial review challenge was more straightforward than he anticipated as it did not actually require specialist knowledge…"

[21] No explanation at all is offered as to why this highly significant advice and related correspondence was not referred to in the grounding affidavit of Kevin Donnelly nor in the affidavit from the solicitor instructed on the part of the applicant company. This will have implications in relation to the duty of candour as discussed below.

Legislative Provisions

[22] Article 50 of the 2009 Order provides:

> "(1) Paragraphs (2) to (10) shall apply to the granting and withdrawing of preliminary accreditation and accreditation of generating stations by the Authority, and paragraphs (3) to (5) are subject top paragraph (2).
>
> (2) The Authority must not grant accreditation or preliminary accreditation to a generating station under this Article—
>
> (a) if it cannot issue NIROCs in respect of electricity generated by that station by virtue of Article 17 (excluding generating stations), or

(b) if, in its opinion, the station is unlikely to generate electricity in respect of which NIROCs may be issued.

(3) Where a generating station in respect of which—

(a) consent under Article 39 of the Electricity Order has been obtained; or

(b) planning permission under the Planning (Northern Ireland) Order 1991 has been granted,

has not yet been commissioned, the Authority may, upon the application of the person who proposes to construct or operate the generating station, grant the station preliminary accreditation.

(4) Where a generating station has been commissioned, the Authority may, upon the application of its operator (or, where NIROCs relating to electricity generated by that generating station are to be issued to an agent by virtue of Article 33, that agent), grant the station accreditation.

(5) Where a generating station has been granted preliminary accreditation (and such preliminary accreditation has not been withdrawn) and an application for its accreditation is validly made the Authority must not grant that application if it is satisfied that—

(a) there has been a material change in circumstances since the preliminary accreditation was granted such that, had the application for preliminary accreditation been made after the change, it would have been refused;

(b) the information on which the decision to grant the preliminary accreditation was based was incorrect in a material particular such that, had the Authority known the true position when the application for preliminary accreditation was made, it would have refused it; or

(c) there has been a change in applicable legislation since the preliminary accreditation was granted such that, had the application for preliminary accreditation been made after the change, it would have been refused;

but otherwise the Authority must grant the application.

(6) The Authority may, in granting preliminary accreditation or accreditation under this Article, attach such conditions as appear to it to be appropriate.

(7) Where any of the circumstances mentioned in paragraph (8) apply in relation to preliminary accreditation or an accreditation which the Authority has granted, (whether or not under this Article) and having regard to those circumstances the Authority considers it appropriate to do so, the Authority may—

(a) withdraw the preliminary accreditation or accreditation in question;

(b) amend conditions attached to the preliminary accreditation or accreditation under paragraph (6);

(c) attach conditions to the preliminary accreditation or accreditation.

(8) The circumstances referred to in paragraph (7) are as follows—

(a) in the Authority's view there has been a material change in circumstances since the preliminary accreditation or accreditation was granted;

(b) any condition attached to the preliminary accreditation or accreditation was granted has not been complied with;

(c) the Authority has reason to believe that the information on which the decision to grant the preliminary accreditation or accreditation was based was incorrect in a material particular;

(d) there has been a change in applicable legislation since the preliminary accreditation or accreditation was granted such that, had the application for preliminary accreditation or accreditation been made after the change it would not have been granted.

(9) The Authority must notify the applicant in writing of—

(a) its decision on an application for preliminary accreditation or accreditation of a generating station;

(b) any conditions attached to the preliminary accreditation or accreditation; and

(c) any withdrawal of preliminary accreditation or accreditation.

(10) In providing written notification under paragraph (9), the Authority must specify the date on which the grant or withdrawal of preliminary accreditation or accreditation is to take effect and, where applicable, the date on which any conditions attached to the preliminary accreditation or accreditation are to take effect.

(11) In paragraph (3), the reference to the person who proposes to construct the generating station shall include a person who arranges for the construction of the generating station."

[23] Article 50(4) gives Ofgem the power to accredit a station when it has been commissioned. In this context, 'commissioned' is defined by article 2 as meaning:

> "the completion of such procedures and tests in relation to that station as constitute, at the time they are undertaken, the usual industry standards and practices for commissioning that type of generating station in order to demonstrate that that generating station is capable of commercial operation."

The Test for Leave

[24] The test for leave to apply for judicial review is, by now, well established. An applicant must show an arguable case, with realistic prospects of success, which is not subject to a discretionary bar such as delay or alternative remedy – see *Re Ni Chuinneagain's Application* [2022] NICA 56.

Delay

[25] Order 53 rule 4 of the Rules of the Court of Judicature (Northern Ireland) 1980 require an application for leave to apply for judicial review to be brought:

> "within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made."

[26] In *Re Sheehy's Application* [2024] NIKB 5, I recently summarised the principles to be applied in any case where the issues of delay and the extension of time arise:

> "(i) If there has been delay, an applicant must specifically seek an extension of time and each period of delay should be explained;
>
> (ii) The court will examine whether any good objective reason for the delay has been established;
>
> (iii) Time may be extended for good reason consideration of which may include substantial hardship to any person, prejudice to any party or good administration, and the public interest in proceeding;
>
> (iv) Delays in the processing of applications for public funding alone may not constitute 'good reason.'"

[27] The applicant's central complaint in this case is the refusal of the application for accreditation. This occurred on 29 April 2022 at which stage the company took legal advice on the merits of pursuing an application for judicial review and elected not to do so. It was informed by Ofgem on 15 August 2022 that it was not possible to revisit that decision. Proceedings ultimately issued on 14 June 2023.

[28] Insofar as the challenge relates to the refusal of accreditation, the grounds for judicial review first arose on the date of the decision itself, 29 April 2022. The Order 53 rule 4 requirement means that proceedings ought to have been commenced by 29 July 2022.

[29] If the application concerns the decision to refuse to revisit the refusal of accreditation, the grounds for this application first arose on 15 August 2022 and proceedings ought to have been commenced by 15 November 2022.

[30] In the first scenario, therefore, there has been delay of some 11 months whilst in the second the delay is around seven months.

[31] The applicant seeks to categorise its challenge as relating to the 'decision' of 15 March 2023 to refuse to reopen the refusal. In reality, of course, this was not a decision at all but merely a repetition of the position which was made explicitly clear to the applicant on 15 August 2022.

[32] It is a wholly impermissible tactic to seek to elicit from a public authority a repetition of a previous decision and then to classify it as a fresh decision for the purposes of a judicial review application. In *R (AK) v SSHD* [2021] EWCA Civ 1038, Lewis LJ made the point pithily:

> "It is well-established that a claimant must challenge the decision which in reality determines the legal position. A

> claimant cannot avoid the application of the time-limits by writing to the defendant and then seeking to characterise a response as a fresh decision." (para [50])

[33] There has therefore been delay in this case, either from the April 2022 decision or the August 2022 refusal to revisit. It is therefore necessary for the court to consider whether any good reason has been established to extend the time for the bringing of the application.

[34] The applicant's evidence in this regard is limited to an averment that a decision was made to take no action in respect of the original refusal decision until the relevant NIE consent was in place. There is no evidence at all as to why no action was taken in respect of the refusal to revisit that decision in August 2022.

[35] That alone is fatal to the applicant's case. The impugned decision of May 2023 is identical to the one taken in August 2022. That is when the grounds for judicial review first arose, and time began to run. It is therefore incumbent on the applicant to set out the good reason for delay which it has manifestly failed to do. It is not sufficient to say that a 'pragmatic' approach was being taken or that there is no prejudice to Ofgem or good administration generally or, indeed, that there is substantial prejudice to the applicant company.

[36] The applicant had the benefit of legal advice and made a commercial decision not to pursue to challenge either to the refusal or the decision not to revisit. No good reason having been shown for the delay of either seven or 11 months, the application is time barred and leave to apply for judicial review is refused.

[37] This disposes of the applicant's case but, having heard argument at the leave application, I propose to address the merits of the grounds advanced.

Duty of Candour

[38] Before doing so, it is necessary to return to the issue of the duty of candour. As the Court of Appeal made clear in *Taylor v Department for Communities* [2022] NICA 8, applicants for judicial review are under a duty of candour from the inception of proceedings until their conclusion.

[39] The grounding affidavit of Mr Donnelly failed to make any reference to correspondence passing between the parties which was of central relevance to the question of whether the applicant had established an arguable case for judicial review. Leave applications are still properly regarded as ex parte, albeit that the modern approach involves proposed respondents being invited to participate at an early stage. As such, there is a duty imposed on applicants of full and frank disclosure. This entails the disclosure of all material facts, including those which may be adverse to one's case – see the judgment of Beatson LJ in *R (Mohammad Khan) v SSHD* [2021]

EWCA Civ 416 at paras [35] to [51]. This duty was not complied with in the instant case.

[40] Mr Donnelly states specifically, at paragraph [9] of his affidavit:

> "After the refusal letter of 29 April 2022, Paul Kingston instructed me to continue to work with NIE in order to obtain the letter that was outstanding. At the same time the other proofs were collated so they could all be presented together when they were in order. That was done and it led to the refusal to reopen our application for accreditation on 15 March 2023."

[41] This averment is fundamentally misleading. The omission of the advice from Pinsent Masons and the correspondence passing between that firm and Ofgem represents a serious breach of the duty of candour.

[42] Also absent from the affidavit is any reference to the four Minded to Refuse letters. Each of these was sent to Mr Donnelly's email address as well as that of his agent Mr Kingston. Again, this is a serious and significant breach of the duty.

[43] The court alluded to this question at a review hearing and, as a consequence, further evidence was filed on the part of the applicant. In his affidavit, Stephen Donnelly accepts that the Minded to Refuse letters were received but offers no explanation whatsoever for their omission from the evidence which sought to ground the judicial review application.

[44] In a section of his affidavit entitled "Pinsent Masons/duty of candour", he explains that Pinsent Masons were instructed and offered advice. He completely fails to explain why the duty of candour was not complied with at the time proceedings were incepted.

[45] Strikingly, no affidavit was filed by Kevin Donnelly explaining why the applicant failed to comply with its duty of candour. As such, the breach remains unremedied. It is quite evident that had it not been for the production of a complete suite of correspondence by the proposed respondent, the court would have been invited to determine the application for leave on a wholly erroneous basis.

[46] In light of the decision which I have made in relation to delay, it is unnecessary to determine whether this breach of the duty of candour would, on its own, have been sufficient to warrant a refusal of leave. Suffice to say the approach taken by the applicant is to be deprecated.

The Grounds for Judicial Review

[47] The grounds advanced by the applicant are as follows:

(i) The decision was irrational in that the applicant was unable to provide proofs until these were made available by NIE, and it was unreasonable to refuse to reopen that decision;

(ii) The proposed respondent failed to take into account material considerations including that proper proofs were provided and the amount of money spent by the applicant;

(iii) Ofgem misdirected itself as to the law in that it failed to form the necessary opinion under article 50(2)(b) of the 2009 Order.

[48] Ground (ii) was clearly unarguable and was not pursued with any enthusiasm in the applicant's skeleton argument or at hearing. The evidence reveals that the applicant was given multiple opportunities to provide all relevant information and documentation to Ofgem and, on each occasion, responses were delivered. The decision to refuse was taken following a review of all available material. It cannot be said that any material consideration was not taken into the reckoning.

[49] Equally, it could not conceivably be argued in this context that it was irrational to refuse an application because proofs were outstanding from a third party.

[50] The merits of the application therefore turn on two discrete legal issues: firstly, was Ofgem functus officio after it issued the April 2022 refusal and secondly, did it apply the correct test under article 50(2)(b) of the 2009 Order?

Functus Officio

[51] 'Functus officio' means simply 'having performed the office' and is a long established principle of administrative law. It serves to ensure finality in that a decision making process has a defined end point. This, in turn, allows for the commencement of any appeal or review process. If a decision can be altered or amended without limitation, then the legal rights and obligations which flow from it can never be said to be certain. It, along with the doctrine of res judicata, serves to promote the strong public interest in finality.

[52] The law has, however, recognised certain limited exceptions to the absolute application of the principle. In *R (Sambotin) v London Borough of Brent* [2018] EWCA Civ 1829 Peter Jackson LJ commented:

> "Once a public authority exercising a statutory power has decided how the power is to be exercised, it will lack further authority and be *functus officio*. Any later attempt to remake the decision will be outside the authority's powers (*ultra vires*). Aside from these limits on powers, there is a

> strong and obvious public policy interest in finality, which allows individuals to rely on statutory decisions without having to worry that they may later be changed. Nevertheless, in the interests of justice and of good administration there are certain limited circumstances in which public authorities can reconsider final decisions: where there has been fraud (*R v LB Southwark ex p Dagou* (1995) 28 HLR 72) or fundamental mistake of fact (*Porteous v West Dorset DC* (2004) HLR 30). Moreover, an authority is not to be taken to have made a final decision where its enquiries are incomplete (*Crawley Borough Council v B* (2000) 32 HLR 636)." (para [3])

[53] Ofgem's position is that its enquiries were complete by April 2022 and there is no evidence of any fraud having been perpetrated or fundamental mistake of fact committed. The statutory framework does not include any express power to reopen or revise a decision made under article 50 of the 2009 Order and, in these circumstances, there is no basis for such a power to be implied.

[54] By article 50(1), the rest of that article applies to the "granting and withdrawing of…accreditation of generating stations"

[55] Article 50(4) gives a discretionary power to grant accreditation "where a generating station has been commissioned." By article 50(2) Ofgem is mandated not to grant accreditation in certain circumstances including:

> "if, in its opinion, the station is unlikely to generate electricity in respect of which NIROCs may be issued."

[56] Article 50(5) deals with cases where preliminary accreditation has been granted and the operator makes an application for accreditation. Such an application must be granted unless one of three circumstances arises. This sub-article contains the only reference to refusal of an application.

[57] The applicant contends that the only permissible courses of action for a decision maker are to either grant or not grant an application for accreditation. If the latter course of action is taken, then it must remain open to an applicant to supply further information or to clarify or rectify an application which has not been granted. This, it is said, promotes the overall statutory aim of maximising renewal energy production.

[58] On this basis the applicant contends that Ofgem ought not to refuse an application at all, and if it purports to do so, it cannot be functus officio.

[59] This analysis is forced to ignore the express references to refusal of applications in article 50(5) and, if correct, would lead to a system of never-ending, rolling applications. It is correct to observe, as illustrated by the facts of this application

process, that Ofgem afforded many opportunities to the applicant to furnish information and documentation. This is reflected in the fact that no fewer than four Minded to Refuse letters were issued. However, it is quite a different proposition to claim that such a process could never be brought to an end. This would clearly be inimical to legal finality and good administration, as Laing LJ held in *R(Piffs Elm) v Commissioner for Local Administration in England* [2023] EWCA Civ 486:

[60] I reject as unarguable the applicant's interpretation of the legislative framework. Ofgem was entitled to take the view that a process had reached the end of the line and, moreover, was entitled to refuse an application. This is evident both from the language of the statute itself and also from first principles. If a public authority has a power to grant an application, it must have a concomitant power to refuse.

[61] It is common ground that there is no mechanism prescribed by the statute for the revision or review of an Ofgem decision in this context. There is no evidence of any fraud, fundamental mistake of fact or any other reason why, exceptionally, a power to revisit the decision ought to be inferred. The implication of such a power was not necessary for the operation of the statutory scheme. I have therefore concluded that Ofgem was functus officio once its decision to refuse the application was made in April 2022 and it was correct to say, both in August 2022 and May 2023, that it was not able to revisit the matter.

[62] This ground of judicial review is therefore unarguable.

Article 50(2)(b)

[63] The April 2022 refusal letter states:

> "The lack of a valid grid connection agreement and inconsistent evidence received by Ofgem means that we are unable to make a determination on the eligibility of the installation for accreditation under the legislation."

[64] In its PAP response, Ofgem further states:

> "A final determination was made on the basis that the respondent was unable to confirm as required under…Article 50(1) and Article 50(2)(b) the applicant would generate electricity in respect of which NIROCs may be issued. The agreement with the Grid was crucial for the following reasons…"

[65] The correspondence goes on to explain that the agreement would demonstrate that electricity generated by renewable energy could be transmitted and integrated

into the grid infrastructure, that all technical requirements were met and that proper metering and billing could take place, enabling NIROCs to be issued.

[66] The applicant contends that this decision is flawed as Ofgem has not formed the opinion as required by article 50(2)(b) but had only reached the stage where it was "unable to confirm" and therefore the process ought to have continued.

[67] It is important to read the decision letter of 29 April 2022 as a whole. In it, Ofgem expressly refers to the statutory provisions including, in particular, article 50(2)(b). It goes on to state, in detail, the reasons for the decision to refuse, including the lack of a grid connection agreement:

> "There is no signed grid connection agreement in place with NIE Networks and KSD Energy Ltd. NIE Networks has never granted permission for the station to operate a generator with a 400 kW capacity and a 15kW export capacity in parallel with their network."

[68] The conclusion drawn is that the lack of an agreement and the inconsistent information received meant Ofgem could not make a determination on eligibility or confirm the date of commissioning. When one gives this document a fair reading, in the context of the statutory provisions, it is clear that Ofgem had formed the requisite opinion under article 50(2)(b). The decision maker is not obliged to use the precise statutory language in order to communicate the decision and reasons for it. To argue otherwise is merely to engage in an exercise in semantics.

[69] I have therefore determined that this ground is also unarguable. In any event, since it first arose in April 2022, it is hopelessly and irredeemably out of time.

Conclusion

[70] For all these reasons, the application for leave to apply for judicial review is dismissed.