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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY WGS GREEN ENERGY LIMITED FOR JUDICIAL REVIEW

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Mr Michael Potter (instructed by BLM Law Solicitors) for the Applicant
Mr Michael Egan (instructed by the Crown Solicitor) for the Respondent

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LARKIN J

Introduction

[1] The applicant, WGS Green Energy Limited, 'WGS', is a subsidiary company of the Woodvale and Shankill Community Housing Association. WGS was founded to provide sustainable, environmentally gentle ('green') energy for its parent housing association, which provides sheltered accommodation for elderly and disabled persons. In this application the applicant challenges a determination by the Office of Gas and Electricity Markets ('OFGEM') of 18 June 2019 refusing accreditation under the Renewable Heat Incentive ('RHI') scheme in respect of three installations.

[2] This challenge follows an earlier challenge by the applicant to (i) an accreditation decision by OFGEM of 31 March 2018 refusing accreditation under the RHI scheme in respect of the same three installations (ii) a decision by OFGEM of 25 June 2018 declining to review its decision at (i) and (iii) a decision of 8 November 2018 by the Department of the Economy declining to review the decision at (i). These decisions were quashed by McCloskey J (as he then was) on 29 March 2019 and the learned judge directed that the accreditation applications should be reconsidered by OFGEM, with the order reciting an undertaking by OFGEM that this decision would be taken by personnel "with no previous involvement in the application." The OFGEM decision of 18 June 2019 is the product of that

reconsideration and was challenged directly by way of the present application without any review being sought either from OFGEM itself or from the Department.

The RHI Scheme

[3] Given the controversy associated in recent years with the RHI scheme in Northern Ireland, it may seem unnecessary to offer any description of that scheme. In summary, it is a programme of the Northern Ireland Department once known as the Department of Enterprise Trade and Investment ('DETI'), now known as the Department for the Economy ('DfE'), designed to provide long term financial support for renewable heat installations in order to encourage the generation of heat from renewable sources of energy. This form of encouragement is designed to help the United Kingdom achieve the objective set for it by Directive 2009/28/EC of meeting 15% of its non-transport energy needs through renewable and low carbon energy sources and technologies by 2020.

[4] Although DETI had, and DfE now has, policy responsibility for the RHI scheme in Northern Ireland, the scheme has been administered by officials in OFGEM . OFGEM is a non-ministerial department and has been described as the 'executive arm' of the General Electricity Markets Authority ('GEMA'), which is the regulator for electricity and gas markets in Great Britain. In this judgment I will refer to the relevant department as DfE even when it may be anachronistic to do so.

[5] RHI was established in Northern Ireland by the Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012, 'the 2012 Regulations', made under powers conferred on DfE by section 113 of the Energy Act 2011. In this judgment a reference to a Regulation or Regulations without additional descriptor is to the 2012 regulations.

[6] Section 114 of the Energy Act 2011 confers power on DfE and GEMA to enter into arrangements under which GEMA may carry out any functions of DfE under the RHI scheme. Arrangements under those powers were made by DfE and GEMA for a number of RHI functions, including those at issue in this application, to be discharged by GEMA/OFGEM.

[7] The RHI scheme provides for periodic support payments to its participants. These payments are designed to do two things; (1) to compensate participants for the additional costs of using renewable heating technologies, and (2) to offer a return on participants' investment in the scheme and so incentivise the installation and use of renewable energy and technologies. By regulation 36 of the regulations periodic support payments accrue from the tariff start date (an expression defined in regulation 2 and considered below) and run for twenty years.

Suspension of the RHI Scheme in 2016

[8] Around the end of January 2016 rumours circulated that the RHI scheme was closing to new applicants. On 11 February 2016 the DfE Minister announced that he intended to close the scheme to new applicants from 29 February 2016. The Minister's decision was driven by the understanding within his department from late 2015 that RHI payments would exceed the amount allocated by HM Treasury in respect of such payments.

[9] To give effect to Ministerial intention, an amendment necessary for that purpose in the 2012 Regulations was effected by the Renewable Heat Incentive Schemes (Amendment) Regulations (Northern Ireland) 2016, 'the 2016 Regulations.' Following a notice issued under regulation 23A (2) of the 2012 Regulations introduced by regulation 4 of the 2016 regulations, the RHI scheme was suspended with respect to new applications from 29 February 2016.

[10] Ms Clifton in her affidavit on behalf of OFGEM (paragraphs 41-44) sets the number of applications to the RHI scheme in chronologically significant context. Between 1 November 2012 (when RHI came into force) and the end of August 2015 831 applications were received. In contrast, between September and November 2015 (in advance of less financially attractive tiering) 982 applications were received. While the months of December 2015 and January 2016 saw only 7 applications, news of the closure of the scheme to new applicants resulted in 318 applications in the month of February 2016.

The Applications for Accreditation

[11] On 28 February 2016 the applicant completed and submitted three online application forms for accreditation under the RHI scheme to OFGEM. These were submitted on behalf of the applicant by Action Renewables Limited, an environmental consultancy company.

(i) Application reference NIRHI00018705 was for an installation located at 'Mount Eden', 129-131 Woodvale Road, Belfast BT13 3EB.

(ii) Application reference NIRHI00018706 was for an application located at 'Cambrai Court', 258 Cambrai Street, Belfast BT13 3XA.

(iii) Application reference NIRHI00018707 was for an installation located at 'McCallum Court', 78 Woodvale Road, Belfast BT13 3BU.

[12] Each application sought accreditation for a 198 kW th capacity installation, consisting of 2 boilers each of 99 kW th capacity.

The Correct Statutory Test

[13] Although the Order 53 statement covers much ground and criticises OFGEM for unfairness and irrationality, it seemed to me, following the helpful written submissions and position papers that the central issue in this case was whether or not OFGEM had applied the correct statutory test to the applicant's three applications for accreditation.

[14] Was it correct, as OFGEM considered, that the installations covered by the applicant's applications to the RHI scheme needed, as a condition of the validity of those applications, to meet the eligibility criteria by 29 February 2016 at the latest? Following submissions from counsel on the morning of 9 March 2021 I decided to deal with the statutory test as a preliminary issue. In doing so I was mindful of the admonitions against deceptive shortcuts but resolution of this issue was plainly capable either of entirely concluding the case or, at least, of narrowing the issues and so saving time and costs.

[15] This course cannot have been expected by counsel. I am bound to express my thanks to Mr Michael Potter (who appeared for the applicant) and Mr Michael Egan (who appeared for the respondent) for their clear and focussed submissions. I am also bound to express my admiration for the considerable forensic acumen and resource that they both deployed in the argument on this issue.

[16] Although the approach of OFGEM is set out in paragraph 12 of its decision of 18 June ("Your client's installations did not meet eligibility criteria by 29 February 2019 (an error for 2016) as such its applications are refused.") Ms Clifton in her affidavit puts the matter more fully this way (paragraph 49(f));

> *"… applications for accreditation that were submitted before 1 March 2016 but which related to installations that did not meet the eligibility criteria by that date were not regarded as applications made under regulation 22 before 1 March 2016 for the purposes of the NI RHI."*

[17] A consequence of this approach, according to Ms Clifton, is that an application made before 1 March 2016 in respect of an installation that did not meet the eligibility criteria before 1 March 2016 remained ineligible even if after 29 February 2016 all eligibility criteria were subsequently complied with before OFGEM had made a decision on the application (see paragraph 49 (g) of Ms Clifton's affidavit).

[18] This consequence is said by Ms Clifton to be "an important aspect of the scheme suspension. If the relevant provision had not been made in the way it was, then the suspension could have been deprived of much of its intended effect" (paragraph 49(h)). This 'intended effect' would have been impaired, suggests Ms Clifton, in two ways: (1) significantly more applications would have been granted with a correlatively higher level of spending, and (2) DfE would have been

deprived of certainty as to its financial commitment to the RHI scheme during such time as the applications remained undetermined.

[19] Keeping prudent control of public spending and spending public money only for wise purposes are such obviously important aspects of good government as not to require amplified justification. If the RHI scheme (or any scheme involving the disbursement of public money) is becoming relatively or absolutely unaffordable, then it makes good sense – to say nothing of any public duty – to bring the scheme under proper financial control.

[20] An aspect of proper financial control is knowledge, or the capacity to acquire knowledge, of the extent of actual or potential liabilities. When, however, Ms Clifton contrasts her interpretation of the suspension of the RHI scheme (and the certainty intrinsic to that interpretation) with its alternative (and, at least implied, lack of certainty), this contrast seems insufficiently grounded in the facts, at least as they appear in this case. The determination of the three applications for accreditation by OFGEM in March 2018, some two years from the making of those applications, necessarily meant that DfE languished throughout this time in that financial uncertainty deplored by Ms Clifton – a financial uncertainty that was indissociable from applications having to be determined, and an uncertainty that could not be dispelled by OFGEM's interpretation of the RHI suspension.

[21] Although Ms Clifton refers to "the relevant provision" she does not identify what it is. Its context in the suspension of the RHI scheme suggests that the 'relevant provision' must be either the notice issued by DfE on 18 February 2016 under regulation 23A (2) of the 2012 Regulations introduced by regulation 4 of the 2016 Regulations (Northern Ireland) 2016 or regulation 23A itself. The notice reads, in relevant part, as follows:

> *"… The Department under regulation 23A (2) of the 2012 Regulations … hereby:*
>
> *1. Suspends the operation of the Non-Domestic Renewable Heat Incentive Scheme under the 2012 Regulations insofar as that scheme relates to:-*
>
> *(a) applications for accreditation under regulation 22;*
>
> *…….*
>
> *with effect from 29 February (the date of suspension). Accordingly no such applications may be made or granted after 11.59 pm on that date."*

[22] This notice is faithful to the terms of its enabling provision, Regulation 23A (2) of the Regulations which reads, relevantly for this application, as follows:

> *"(2) Where paragraph (1) applies, the Department may, by notice published in such a manner as it may think appropriate, suspend the operation of the scheme in relation to the making of –*
>
> *(a) applications for accreditation under regulation 22;*
>
> *…..*
>
> *made after a date specified in the notice ("the date of suspension") and accordingly after that date and while the notice remains in force no such applications may be made or granted.*

[23] The expression "no such applications may be made or granted" must refer only to applications made after the relevant date; such applications cannot validly be made. There is no prohibition directed in regulation 23A against granting applications made before the relevant date but not determined until after that date. The words "or granted" are unnecessary but embody the drafter's cautious wish to provide for the eventuality that, contrary to regulation 23A(2) an application is made after the date of suspension.

[24] It is, of course, possible to set a wide range and variety of conditions for the validity of an application, that it must, by way of example, be made on a set form, or contain specified information, or be accompanied by other documents. But the validity of an application is normally distinct from, and not determined by, a successful outcome to the application. If one considers – and this will be a painfully topical example for many parents – the post-primary school transfer process in Northern Ireland, and a scenario arising under that process in which three single parents make an application through the Education Authority portal and each parent seeks the admission of his or her only child to school A. One parent, X, does not include a document required by the school as a condition of making a valid application to it; the other parents, Y and Z, include that document. Only the child of Z is admitted to the school as having satisfied the relevant admissions criteria. In this example both Y and Z have made valid applications (only one of which was successful) and only X failed to make a valid application.

[25] Plainly, a different approach can be taken to the conditions of validity. It would be possible to construct a legislative scheme in which a valid application was defined as an application that, when made, would inevitably be successful. A feature or consequence of such a scheme is that all applications are successful and that an unsuccessful application was never, in fact, an application at all.

[26] In this case a key question concerns the meaning of the expression "applications for accreditation under regulation 22" in regulation 23A(2), it being

acknowledged sensibly by both parties that suspension of the RHI scheme is confined (relevantly for this case) to these applications. Mr Egan draws attention to regulation 22(6) and argues that in order to constitute an 'application for accreditation under regulation 22' an application must satisfy the requirements of regulation 22(6).

[27] Regulation 22(6) provides as follows:

> *"(6) Where an application for accreditation has, in the Department's opinion, been properly made in accordance with paragraphs (2) and (3) and the Department is satisfied that the plant is an eligible installation the Department must (subject to regulation 23 and regulation 46(3)) –*
>
> *(a) accredit the eligible installation;*
>
> *(b) notify the applicant in writing that the application has been successful;*
>
> *(c) enter on a central register maintained by the Department the applicant's name and such other information as the Department considers necessary for the proper administration of the scheme;*
>
> *(d) notify the applicant of any conditions attached to the accreditation;*
>
> *(e) in relation to an applicant who is or will be generating heat from solid biomass, having regard to the information provided by the applicant, specify by notice to the applicant which of regulations 28 or 29 applies;*
>
> *(f) provide the applicant with a written statement ("statement of eligibility") including the following information –*
>
> *(i) the date of accreditation;*
>
> *(ii) the applicable tariff;*
>
> *(iii) the process and timing for providing meter readings;*
>
> *(iv) details of the frequency and timetable for payments; and*
>
> *(v) the tariff lifetime and tariff end date."*

[28] Regulation 22(6) does not have as its primary purpose the setting of conditions for the validity of an application for accreditation. Its primary purpose is to impose a conditional duty on DfE to do the things set out in regulation 22(6)(a) to (f). That duty is conditioned on (A) the Department being of opinion that an application has been "properly made in accordance with paragraphs (2) and (3)" of regulation 22 and (B) the Department being satisfied that the plant covered in the application is an eligible installation. It should be noted that paragraph (3) of regulation 22 applies only in instances of ownership by more than one person and permits the Department to make further requirements with respect to an application in such circumstances.

[29] The natural construction of regulation 22(6) is that an application for accreditation will be properly made if it, in the opinion of the Department, complies with the requirements of paragraphs (2) and (3) of regulation 22. If the Department does not consider that the installation covered in the application is eligible then the application will not be a successful application but it will have been, nonetheless, a proper application.

[30] In regulation 22(1) general provision is made that an owner of "an eligible installation" may apply for accreditation. I do not consider this expression to be of interpretive assistance on the requirements of a valid application. It is not given as one of the elements of a properly made application in regulation 22(6). The expression "eligible installation" is used also in regulation 22(3) in the context of requirements that may be imposed by the Department "where an eligible installation is owned by more than one person." If the expression "eligible installation" in regulation 22(1) and (3) is to avoid the kind of circularity that would mean that the Department could impose the requirements in regulation 22(3) only if it had already concluded that the installation was "eligible", the expression must be considered, and I so consider it, a shorthand formulation for an installation for which eligibility is claimed.

[31] When the definition of "eligible installation" in regulation 2 ("means a plant which meets the eligibility criteria"), is considered with regulation 4(1) (beginning "A plant meets the criteria for being an eligible installation (the 'eligibility criteria' if -") any circularity is avoided when regard is had to the need for evaluation of the conditions set out in regulation 4(1)(a) to (d). Put simply, eligibility may be hoped or aimed for in an application for accreditation but it is not a status that an applicant must grant, or can grant, to his own application; that status can only be granted by the DfE or OFGEM.

[32] Debate on whether the expression "application for accreditation under regulation 22" in regulation 23A(2)(a) means an application both (i) properly made and (ii) inevitably accreditable or simply an application that is properly made is moved towards resolution helpfully, I think, by two of the definitions contained in regulation 2, one of which follows the other.

[33] The first of these is "Date of accreditation." This expression has been defined as meaning (as respects an RHI installation that has been accredited):

> *"the later of (a) the first day falling on or after the date of receipt by the Department of the application for accreditation on which both the application was properly made and the plant met the eligibility criteria; and (b) the day on which the plant was first commissioned."*

While this definition contemplates the possibility that an application can be properly made *and* meet the eligibility criteria on the same day, it also contemplates that these events can occur on different dates (the application is received by the Department on Day 1, for example, and the plant meets the eligibility criteria on Day 10) and that the events of (1) making a proper application for accreditation and (2) meeting the eligibility criteria are separate. It is to be noted, also, that the words "and the plant met the eligibility criteria" are inconsistent with an interpretation that would make the validity of an application depend upon the simultaneous satisfaction of the eligibility criteria.

[34] The second is "tariff start date" which follows and applies the definition of date of accreditation.

[35] While the 2012 Regulations could have been more happily expressed with respect to the definition and use of "eligible installation" I consider that any residual absurdity that clings to it should not shout down the good sense of its neighbours. In taking this approach I have been guided by the judgment of the Irish Court of Queen's Bench in In *Ellis v O'Neill* 4 Irish Common Law Reports (1856) 467 at 483 in which Crampton J offered an approach based on a once classic formulation of Burton J:

> *"The rule laid down upon the subject by the late venerable Judge Burton, in the case of Warburton v Ivie is founded in good sense, and has received the sanction of high authority; it is thus – 'I apprehend it (says Judge Burton) to be a rule in the construction of statutes, that in the first instance the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with, any expressed intention, or any declared purpose, or if it would involve any absurdity, repugnance or inconsistency in its different provisions, the grammatical sense must then be modified, extended or abridged, so as to avoid such an inconvenience but no further.'* [my emphasis].

[36] I have no hesitation in tempering such absurdity, repugnance or inconsistency that may be said to arise from the definition or use of "eligible installation" in regulation 2, regulation 4 and regulation 22(1) and (3).

[37] More importantly, there is relevant Court of Appeal authority. In *Re Greenbelt (NI) Ltd* [2019] NICA 47 at [106] Stephens LJ (with whom the Lord Chief Justice agreed) noted an acceptance by DfE, regarded by the court as correct, "that it was not essential under the Regulations to achieve eligibility at the date of the application. It is sufficient pursuant to the Regulations to achieve that by the date of accreditation. On this basis that part of the decision of the formal review officer dated 6 February 2017 which refers to "at the point of application" or to "use prior to application" is incorrect."

[38] While *Re Greenbelt NI Ltd* is not a case about the meaning and effect of Regulation 23A and the notice issued under it, and while the passage cited contains a concession by counsel, albeit one approved by the court, these factors do not, given the analysis offered above, cause me to doubt its applicability to this case.

[39] Mr Egan accepted that before the coming into force of Regulation 23A, it was the practice of OFGEM to have granted applications that it may not have granted had it been obliged to determine them by reference solely to their contents at the time of application. He said that the change effected by Regulation 23A prevented this.

[40] I cannot agree. There is nothing in Regulation 23A that purports to alter the procedure for determining applications for accreditation or the criteria by which they are determined or the requirements that applications must meet, other than the erection of a bar to applications after 29 February 2016.

[41] OFGEM are to be commended for setting out their approach to the determination of the applications for accreditation by the applicant in this case so clearly and forthrightly. This has enabled me to deal with this case as a matter of statutory interpretation. My conclusion is that OFGEM has erred in considering that an application must be both properly made and contain all of the elements of accreditation by 29 February 2016. An application must, indeed, be properly made by 29 February 2016 but it need not by that date contain all of the elements necessary for accreditation. All of these necessary elements must be present, however, before an application for accreditation can succeed.

[42] I will make an order of certiorari quashing the decision of OFGEM refusing the applications for accreditation by the applicant. The effect of this order is that the applications for accreditation by WGS remain undetermined. I do not know – and have refrained from inquiring into – OFGEM's view on whether or not these accreditation applications now satisfy the application eligibility criteria in the 2012 Regulations, but these applications should be determined on the basis of the material now available to OFGEM and relevant to that issue.

The date of accreditation/tariff start date

[43] In paragraph 71 of Ms Clifton's affidavit she expresses the belief that had the applications been accredited their "RHI date" (a term I take to be a compendious way of expressing the date of accreditation and the tariff start date) would have been 28 February 2016. For the reasons given above, this is incorrect. If accreditation results from the determination by OFGEM then the relevant accreditation date and tariff start date will be the later day of either the day on which the applications meet the eligibility criteria or the day on which the plant was first commissioned.

Procedure

[44] I have not heard argument on the procedural fairness claims of the applicant and it would not be right, therefore, to express a concluded view on these. It would, I think, be helpful if, in the consideration following the order of certiorari, decision-making by officials with an existing knowledge of, and previous involvement in, the accreditation applications were avoided.