Neutral citation number: [2022] UKFTT 00416 (GRC)

Case Reference: NV/2020/0030 [V]

First-tier Tribunal
(General Regulatory Chamber)
Environment

Heard by the Video Hearing Service
Heard on: 31 March 2022 and 1 April 2022
Decision given on: 16 November 2022

Before

JUDGE O'CONNOR, CHAMBER PRESIDENT
JUDGE NEVILLE

Between

CAROL HEANEY

Appellant

and

(1) THE SECRETARY OF STATE FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY

(2) GDFC ASSETS LIMITED

Respondents

and

THE ENERGY CONSUMERS COMMISSION

Intervener

Representation:

For the Appellant:	In person
For the First Respondent:	Mr C Streeten and Mr M Brett, counsel instructed by GLD
For the Second Respondent:	Ms K Urell, counsel instructed by Capital Law
For the Intervener:	Mr Alistair Wilcox, Senior Policy Officer

Decision: The appeal is allowed.

Substituted Decision Notice: The Tribunal imposes the sanction of cancellation of Ms Heaney's energy plan with effect from 19 March 2019.

REASONS

Executive Summary

1. The background to this appeal is set out from paragraph 2. For the convenience of the parties we first summarise our main conclusions, cross-referenced to the relevant paragraphs:

   a. The Secretary of State was correct to find that HELMS, when providing Ms Heaney with an energy plan, was in breach of paragraph 2.7, and paragraphs 18, 47A and 54 of Annex B, of the Code of Practice. [31-37, 110-115]

   b. Certain statutory requirements are 'qualifying conditions'. If any qualifying condition is not met, then an energy plan will not be a Green Deal plan [30]. In this case:

      i. A subsequent registered EPC does not invalidate an earlier EPC. A qualifying assessment was undertaken. [48-51]

      ii. The term 'improvements' at s.4(3) of the Energy Act 2011 refers to the generic improvements listed at Schedule 1 of the Green Deal (Qualifying Energy Improvements) Order 2012/2105. A change in the configuration of solar panels prior to installation did not breach a qualifying condition. [52]

      iii. The Tribunal finds that HELMS did not comply with the obligation under regulation 30(3) to notify Ms Heaney in writing of the amount of the first year instalments attributable to each improvement. The Framework Regulations, at regulation 3, requires any notice to be given in writing. Nor, the Tribunal finds, was such notice given orally. This was a breach of a qualifying condition and Ms Heaney's energy plan is not a Green Deal plan. [59-67]

      iv. The restriction of a bill payer to an electricity supplier that takes part in the Green Deal does not breach regulation 34. [68-69]

      v. Where the Framework Regulations refer to improvement-specific instalments or improvement-specific savings, this does not include separate finance charges and interest. [70-72]

      vi. There is no requirement for the improvement-specific savings period for solar panels to be capped at the period for which FIT payments will be received. [73-80]

   c. The appropriate sanction should be decided according to the principles set out by Judge Macmillan in her preliminary issues ruling issued on 29 December 2021 ("the Preliminary Decision") [30], and in this decision.

   d. Breach of a qualifying condition does not automatically lead to cancellation. The adverse consequences for the bill payer are nonetheless so serious that cases where a lesser sanction is proportionate are likely to be rare. Each case

must be considered on its facts. In Ms Heaney's case, the Tribunal considers cancellation to be the appropriate sanction. [81-109]

e. The effective date from which a sanction can be effective is, in cases where HELMS was the provider and GDFC Assets Ltd is now the payee, the date of complaint to the Secretary of State. Here, that date is 19 March 2019. [116]

f. If we had not found that a qualifying condition was breached, then our decision on the 30% reduction imposed by the Secretary of State would have been as follows:

   i. 'Substantive loss' and harm need not be pecuniary. [129-130]

   ii. The Secretary of State is not required to produce a overly-precise or forensic calculation of the exact financial loss claimed by a complainant, and is entitled to take a balanced approach to evidence and fact-finding. [131-134]

   iii. In each case recognition should be given to other types of harm, the public interest factors engaged in cases of non-compliance, and deterrence. The Secretary of State is entitled to apply a percentage figure reduction to achieve this outcome on a broad brush basis. [133-134]

   iv. The Tribunal previously decided as a preliminary issue that the effect of a sanction on the relevant person is only relevant to proportionality in exceptional circumstances, and that any 'windfall' benefit to the bill payer is only relevant to the level of harm suffered and redress. By reason alone of that ruling, the Secretary of State placed undue weight on irrelevant factors when deciding on the appropriate sanction. We would have allowed the appeal and remitted the decision to the Secretary of State. Had the Secretary of State not erred in placing the weight he did on those factors, we would have dismissed the appeal and confirmed his decision. [135-139]

The Green Deal

2. Energy efficiency improvements to residential properties, like insulation and solar panels, reduce carbon emissions and save money on energy bills. One barrier to installation is the initial cost, homeowners often unable or unwilling to spend thousands of pounds on improvements that may not achieve an overall saving for a number of years. The Energy Act 2011 created the 'Green Deal', a new way of financing that cost. The scheme includes a Green Deal loan. Like conventional finance, under a Green Deal plan the initial cost of purchase and installation is met by way of an interest-bearing loan to the homeowner by the provider or a finance company, repayable in instalments. Unlike conventional finance, those instalments are paid by an additional charge taken direct from the property's energy bills. The homeowner pays an extra amount each month to their energy provider (or is subject to additional deductions from a pre-payment meter) until the Green Deal loan is repaid. Each time the home is sold or rented, then subject to notification and consent the balance of the loan and the liability to make repayments will transfer to the new owner or tenant.

3. As well as the Green Deal loan, further contribution to the cost of Green Deal plan improvements may come from government energy efficiency grants, proceeds from assigning micro-generation feed-in tariffs to a third party, and a top up payment by the homeowner. Green Deal plans, and indeed any other arrangement to pay for improvements, are types of "energy plan" as defined by s.1 of the Act. To qualify as a Green Deal plan, the energy plan entered into by the parties must meet various requirements. Those requirements are set out in the Act and in the Green Deal Framework (Disclosure, Acknowledgement, Redress etc) Regulations 2012 ("the Framework Regulations").

4. This is the meaning of some of the other terms used in the Green Deal scheme that are relevant to this appeal:

    a. 'Improver'– This is the owner or occupier of the house, and after installation they are also known as the 'bill payer'. If they then sell or rent the house, then subject to notification requirements the liability to pay instalments transfers to the new owner or tenant. That new person will then be the 'bill payer'.

    b. 'Improvement' – An energy efficiency improvement made to a property. The Secretary of State has specified the energy saving improvements which qualify for the scheme at Schedule 1 of the Green Deal (Qualifying Energy Improvements) Order 2012/2105.

    c. 'Green Deal provider' ("hereafter, the provider") – This is the person with whom the improver contracts to supply and install the improvements, and in practice is also the company who sold the plan to the improver. All Green Deal providers must be registered with and authorised by the Secretary of State, and compliance with the Code of Practice is a condition of continued registration. If a provider breaches certain requirements, then on a complaint by the bill payer the Secretary of State is empowered by Part 8 of the Framework Regulations to impose a sanction. This is the case whether or not the energy plan is also a Green Deal plan. The following sanctions are relevant to this appeal:

        i. Suspension or withdrawal of the provider's authorisation;

        ii. A compliance notice, requiring the provider to take specified steps to address the breach of the requirements;

        iii. Reduction (not to be confused with the remedy for misrepresentation), being a requirement to reduce the liability of the bill payer to make payments from (in this appeal) the date of the complaint and to refund any instalments already paid since;

        iv. Cancellation, meaning a requirement to cancel the liability of the bill payer and any subsequent bill payer to make any payments at all after the date of the complaint and to refund any instalments already paid since.

d. 'Relevant person' – The above sanctions are imposed on 'the relevant person'. This is the provider or, where its authorisation has been withdrawn, the person entitled to receive the ongoing instalments.

e. 'Energy Performance Certificate' ("EPC") – These are now familiar to anyone who purchases or rents a residential property. An EPC rates a property's energy efficiency rating, gives information about its energy use and typical energy costs, and makes recommendations on how to reduce that energy use and save money. A property's EPC can be freely accessed online. There are separate EPC registers in Scotland and England & Wales.

f. 'Occupancy Assessment' – An EPC makes assumptions about the typical energy use of a property. A necessary step prior to a Green Deal plan is an Occupancy Assessment, that tailors the saving figures to better reflect the actual household's energy use.

g. 'Standard Assessment Procedure' ("SAP") – This is a standardised methodology used by assessors to assess the energy and environmental performance of dwellings, including for an EPC and related assessments.

h. 'Green Deal Advice Report' ("GDAR") – This is the first formal step under the scheme, and required by s.4 of the Act. It is produced by an accredited 'Green Deal Assessor', who develops the recommendations made by a valid EPC and tailors them to the specific circumstances, needs and preferences of the property and the improver.

i. 'Green Deal Improvement Package' ("GDIP") – An approved software tool by which a Green Deal Assessor or a Green Deal Provider is required to tailor and record the package of measures recommended by the Green Deal Assessor following a qualifying assessment.

j. Feed-in Tariff' ("FIT") – The FIT scheme was designed to promote the uptake of renewable and low-carbon electricity generation. It required electricity suppliers to make payments to homeowners for both the electricity generated, and the electricity exported to the electricity grid. Eligibility, scheme length and payment rates varied over the years, and the scheme has been closed to new entrants since 31 March 2019.

5. In this appeal, we also have:

a. 'HELMS' – Home Energy & Lifestyle Management Limited ("HELMS") was an authorised provider, and sold Ms Heaney what purported to be a Green Deal plan. It also advanced the funds for the improvements, and was initially entitled to receive the instalments in return. After multiple sanctions were imposed on HELMS by the Secretary of State arising from mis-selling of Green Deal plans, it was dissolved on 31 January 2018.

b. 'GDFC' – As was common practice, HELMS sold its right to receive future instalments. This was to the Green Deal Finance Company Limited, and the right to receive Ms Heaney's instalments was assigned to GDFC Assets Limited

("GDFC"). It remains the current payee and, because HELMS' authorisation was withdrawn, is the 'relevant person' upon whom the sanction has been imposed by the Secretary of State.

The Facts

Ms Heaney's Energy Plan

6. Carol Heaney owns and lives in a semi-detached house in Kilmarnock. In September 2013 she was visited by a door to door sales agent who told her about a Green Deal scheme where she could obtain energy efficiency improvements at reduced cost. For reasons given later in this decision, we have found that the nature of her Green Deal plan was misrepresented. The agent told her that she need pay only £1,000 herself, the rest of the cost being met entirely through a government grant. It was only after installation that she realised deductions were being made from her energy costs, and that she had taken out a loan.

7. Following a visit by a Green Deal assessor on 25 September 2013, an EPC ("the September EPC") and Occupancy Assessment were produced dated 25 September 2013. The September EPC gave the property an E rating, with the potential to rise to C if its recommended improvements were installed. Those recommended improvements eligible for the Green Deal were floor insulation, upgraded heating controls, a new condensing boiler, flue gas heat recovery, 2.5 kWp photovoltaic solar panels ("Solar PV") and a wind turbine. A Green Deal Advice Report was produced ("the September GDAR").

8. Subsequent actions by HELMS are confusing and unexplained. In October 2013 a notice was produced informing Ms Heaney that a credit agreement had been executed, providing for the installation of some of the recommended improvements and accompanied by pre-contract information. The agreement was defective, had not been executed by Ms Heaney, and no steps were ever taken on it. At some point between September and October Ms Heaney signed an agreement transferring the benefit of her FIT to a third party. Scottish Power wrote to say that they had been told a Green Deal plan had been agreed and that, once the improvements had been installed, Ms Heaney would pay instalments "through the Green Deal charge which will be included on the energy bill you receive from us."

9. A second Green Deal Advice Report ("the November GDAR") was subsequently produced, dated 21 November 2013. It is not based on the September EPC, instead referring to a subsequent EPC under a different reference that specifies both the date of the certificate and the date of the actual assessment as being 21 November 2013 ("the November EPC"). Some of the details and recommended improvements are different to those on the September EPC.

10. A third EPC was then produced, dated 13 December 2013 ("the December EPC"). It specifies the date of assessment as having been 25 September 2013, but proceeds on the erroneous basis that the improvements detailed in the defective credit agreement had actually been installed. It explains how the current C rating could be improved to a B by installing a thermostat and a jacket to the hot water cylinder, solar water heating and a wind turbine.

11. Nothing happened then happened until 17 April 2014, when HELMS remodelled the savings figures using the GDIP. Ms Heaney had questioned the delay earlier on, but had been told that the grant money 'had dried up', her £1,000 deposit was safe, and they would be back in contact.

12. An agent visited again in August 2014. Her account was subsequently summarised by the Financial Ombudsman Service ("FOS") as follows:

    As her boiler was quite old by then she was interested in taking things forward. She says she was only interested in a new boiler but the sales person told her that, because of the type of government scheme it was, if she wanted the boiler she'd have to have the solar panels as well.

    Ms Heaney says the sales person also told her that because of the type of house she had she could get wall cladding, underfloor insulation and loft insulation. This would make the house even warmer. And she could get payments for the extra energy made by the solar panels.

    Ms Heaney says she trusted the sales person because he said he was working with the government. There was a lot of paperwork and she signed the documents the sales person gave her. He said he was in a hurry to get to another appointment and that she should just sign them. He didn't explain what they were or gave her time to read them. She says she had no idea she was taking out a loan.

13. Ms Heaney had signed up to an energy plan providing for improvements costing £19,900, comprising:

    a. A condensing boiler - £2,000;

    b. External wall insulation - £10,200;

    c. Solar PV - £7,000;

    d. Floor insulation - £700.

14. It appears that the above cost was funded as follows: (using rounded figures)

    a. £3,800 from the assignment of the FIT income to PV Solar Investments Ltd, a sister company of PVSI;

    b. £1,350 cashback from the Scottish Government's Green Homes energy scheme;

    c. £1,000 paid by Ms Heaney;

    d. £7,684 from the Green Deal loan taken out by Ms Heaney;

    e. £6,066 from an unknown source, but thought likely to be an Energy Company Obligation grant.

15. Annual interest of 6.94% was charged on the loan, together with a £63.24 initial set-up charge and a 5p daily charge for the life of the loan. The repayment period was different for each of the improvements listed above, respectively 12 years, 25 years, 23

years and 25 years. The total repayable by Ms Heaney over the lifetime of the £7,684.10 loan was £15,660.43. The credit agreement and accompanying pre-contract credit information were, so far as we have been told, compliant with the Consumer Credit Act 1974. A section 61A notice was produced on 2 October 2013 stating that the credit agreement had been executed.

16. Over the coming months the improvements were installed. The requirement to pay instalments began on 27 November 2014.

Ms Heaney's complaint

17. Supported by the Citizens Advice Bureau, Ms Heaney complained to GDFC on 1 November 2018. She had not previously known where to raise any complaint, but had read an article about Green Deal mis-selling. The complaint was on the basis that Ms Heaney had been told that she would face no cost other than the initial £1,000 due to a government scheme, that she would make extra money from the Solar PV because of the FIT scheme and that she would see significant reductions in her energy bills. Instead she had signed up to a loan where instalments were taken from her electricity bills for over 24 years, she saw no income from the FIT because it had been assigned, and her electricity bills had not come down. She complained that the agent who attended her home used pressure techniques including always claiming to be in a hurry, pushing papers in front of Ms Heaney and telling her to sign them on the basis that they were standard documents, and that he kept skipping to each new form without explaining what they were.

18. GDFC offered to reduce the loan, but Ms Heaney rejected their offer as too low. She submitted her complaint to the Secretary of State on 19 March 2019. Under s.32 of the Act, the Secretary of State has delegated the initial review of Green Deal mis-selling complaints to FOS. It produced a report dated 13 September 2019. Having summarised Ms Heaney's complaint, as already set out at paragraph 12 above, FOS upheld it. It described Ms Heaney's testimony as "very persuasive and plausible", and concluded that if Ms Heaney had understood the arrangement, and the savings risks associated with it, then she would not have entered into it given that all she was really interested in was a new boiler. She had no prior interest in Solar PV. It recorded Ms Heaney's circumstances, which included that she was on a low income, single and had full-time care of her granddaughter. The extra payments had caused her financial difficulty and distress. While the FOS could not be certain of what had been said by the sales agent, HELMS had breached the Code of Practice:

> *By failing to inform Ms Heaney that her Solar PV system may not generate the savings necessary to cover her Green Deal repayments, by failing to explain the effect that transferring her FIT payments would have on savings and by failing to explain to her about the finance agreement, HELMS breached paragraph 2.7 of the CoP as well as Annex B paragraphs 18, 47A and 54.*

19. The FOS recommended the penalty of reduction be imposed, referring to financial loss by Ms Heaney, HELMS' unfair and dishonest behaviour in inadequately explaining the cost of the Solar PV and failing to explain to Ms Heaney that she was signing a credit agreement.

20. The complaint was passed back to the Secretary of State, who retains the final decision on whether a breach has occurred and the sanction that should follow. Having considered the complaint and FOS report, an Intention Notice was sent to Ms Heaney and GDFC on 19 December 2019. It set out provisional findings that HELMS had behaved dishonestly and unfairly (in the same terms as found by FOS), and proposed a penalty of reduction whereby monthly payments would be reduced to £34.18 from the date of the complaint to the Secretary of State. Representations were sought from GDFC and Ms Heaney. GDFC did not respond. Ms Heaney argued that the methodology by which calculation of energy savings was conducted was flawed, and that the energy plan did not meet the requirements of a Green Deal so ought to be cancelled entirely.

The Sanction Notice

21. The Secretary of State's final conclusions on liability were in line with those recommended by FOS. They included that Ms Heaney did not know that she was taking out a loan, and would not have entered into the plan otherwise; that she was mis-sold the plan by HELMS "failing to explain that absent the FIT payments, Ms Heaney's actual savings would be less than the estimated savings"; and that there was no "discussion of whether the loan instalments are offset by the savings achievable, based on the actual energy usage of the property to which the Plan is attached."

22. The Sanction Notice summarised its findings by reference to the Code of Practice ("CoP"), as follows:

> 18. *Regulation 24 requires, among other things, compliance with the CoP. The Secretary of State finds, on the balance of probabilities, that the following provisions of the CoP have been breached in this case:*
>
> > a. *Paragraph 2.7, requires that a Provider must not mislead customers by act or omission. In failing to adequately explain the costs and savings associated with the Plan, HELMS breached the CoP. Ms Heaney states that she was told that she was agreeing to pay £1,000, the remainder of the cost of the measures would be paid for by the government. The Secretary of State notes the finding by the Financial Ombudsman Service that Ms Heaney reasonably thought that the solar panels were not funded by a loan and accordingly is satisfied, on the balance of probabilities, that this provision has been breached.*
> >
> > b. *Annex B paragraph 18, requires a discussion of whether the loan instalments are offset by the savings achievable, based on the actual energy usage of the property to which the Plan is attached. The Secretary of State notes the finding by the Financial Ombudsman Service that Ms Heaney was not aware that she was entering into a loan and accordingly is satisfied, on the balance of probabilities that this information was not discussed with Ms Heaney as required under the CoP.*
> >
> > c. *Annex B paragraph 47A, requires the improver, before a plan is entered into, to be provided with the savings estimates, savings period, first year instalments and payment period for each improvement. Although this*

information is included in the Plan documentation, the Secretary of State considers that HELMS should have advised Ms Heaney of the terms of the loan, in a clear and concise way. It is reasonable to assume that had Ms Heaney understood the arrangement, and the savings risks associated with it, she would not have entered into the Plan.

d. Annex B paragraph 54, requires the Provider to notify and discuss with the bill payer that the costs under the plan will be added to the property's electricity bills. The Secretary of State agrees that whilst this information is included in the Plan documentation, he considers, on the balance of probabilities, that it was not discussed with Ms Heaney when the Plan was entered into, particularly given the finding that she was not aware that the Plan was funded by a loan

19. The Secretary of State notes that the Plan documentation provides an explanation as to how the scheme works. However, it is considered that someone in a sales situation similar to that faced by Ms Heaney is likely to rely on the verbal assurances and explanations provided by the sales representative with whom they are meeting rather than to analyse the Plan documentation in detail during that meeting. In support of this, it is noted that Ms Heaney has a lack of understanding as to how the Plan operates and that she states she was rushed into signing the documentation without being given time to read it.

20. Accordingly, for the reasons given above, the Secretary of State is satisfied that, on the balance of probabilities, HELMS breached paragraph 2.7 of the CoP as well as Annex B paragraphs 18, 47A and 54 and, consequentially, regulation 24 of the Framework Regulations.

23. It was also found that the plan was sold based on an inflated savings figure. The Sanction Notice also took into account previous findings about HELMS. A 2014 audit of HELMS had concluded that it was non-compliant, or only partially compliant, with 27 requirements of the Code of Practice. Over 150 complaints had been received by the Secretary of State. Trading Standards Scotland, Citizens Advice Scotland and the Information Commissioner had all conducted investigations. In 2015 the Information Commissioner had imposed a fine on HELMS of £200,000 for issues relating to cold calling and breaches of marketing rules. In 2018 Citizens Advice Scotland released a report called ‘Bad Company’, raising concerns about practices used by HELMS, including pressure selling, misleading information and misrepresentation. Ms Heaney’s account was consistent with that wider pattern of behaviour by HELMS.

24. As to the correct sanction to impose, the Secretary of State took a different approach to FOS. He applied his Guidance on Green Deal Sanctions and Appeals (“the Sanctions Guidance”) to first decide whether Ms Heaney was found to have suffered substantive loss. He held that she had, given the financial loss she had suffered from the failure to explain that the savings she would achieve might not be sufficient to pay the instalments for which she would be liable. The Secretary of State then applied the Sanctions Guidance’s stepped approach, where a less severe sanction would be imposed for a less serious breach, and a more severe sanction for a more serious breach or where there had been repeated breaches. As there had been substantive loss, it was

considered appropriate to impose either reduction or cancellation under regulation 67.

25. The Secretary of State considered the breach to be severe. Rather than a technical or administrative breach, there had been a deliberate misrepresentation. The extra payments had caused Ms Heaney financial difficulty and distress, and was part of a pattern of behaviour by HELMS that constituted a series of repeated breaches. Reduction or cancellation were available as sanctions, and the Secretary of State considered cancellation to be disproportionate. Ms Heaney still had the benefit of the improvements, and there was a need to ensure that GDFC was not disproportionately penalised for HELMS' mis-selling. Reduction fulfilled the objectives of discouraging breaches of the Framework Regulations and providing redress to Ms Heaney by attempting to put her in the position she would have been had the breach not occurred.

26. As it had been found that savings figures had been over-inflated, the Secretary of State calculated the reduction figure by first calculating the savings Ms Heaney would actually achieve from the improvements. This would then be compared with the actual loan advanced. For improvements other than Solar PV, this was done according to a reduced data version of SAP, a representative sample of housing stock, and energy prices taken from current Treasury data. For the Solar PV, the Secretary of State took Energy Savings Trust's estimated figure of £120 annual savings for all domestic properties. When those figures were applied to the loan amount falling after the date of the complaint to the Secretary of State, the savings did still exceed the cost. A reduction of 30% was imposed, later explained by the Secretary of State as follows:

> *In cases where the calculation results in a small or no reduction, which could be for reasons that are not related to the savings associated with the measures such as a late effective date, a minimum reduction of 30% to the plan is applied. This is to recognise that the severity of the breaches occurred and the substantive loss the consumer has or is likely to suffer, whilst at the same time recognising that it is not possible to ascertain an exact level of reduction without applying a disproportionate effort.*

27. This is calculated in the Sanction Notice as a reduction of £4,968.13, implemented as a reduction to the instalments payable from the date of complaint including a corresponding partial refund of those made between that date and the Sanction Notice. We should observe that we have been unable to reconcile those figures with the ones appearing in the documentation. A 30% reduction of £4,968.13 assumes an outstanding balance of £16,560.43. The initial advance was specified as £7,684.10 on both the executed credit agreement and the subsequent statements from GDFC show an initial loan of £7,684.10, with a total payable over the full period being £15,660.43. On the 2019 statement, the outstanding loan balance on 15 March 2019 (the closest date to when the complaint was made on 19 March 2019) is £12,551.83. This may well be a matter for which the parties have an explanation, but given our eventual conclusion on the appeal we have not considered this necessary.

The appeal

28. Regulation 87 of the Framework Regulations gives a right of appeal against the sanction decision, which Ms Heaney has exercised. GDFC also had a right of appeal,

which it did not exercise. GDFC has nonetheless been added as a second respondent to the appeal as the body against which the sanction decision has been made. The Energy Consumers Commission ("ECC") has been given permission to intervene, and the Tribunal has received written and oral submissions from its senior policy officer Mr Wilcox. The ECC was established in July 2020 by the Scottish Government as an independent body to support Scottish energy consumers. The two respondents have criticised the ECC for straying beyond the proper boundaries of its intervention. We have been mindful to ensure that the procedure has been fair, that the parties know the case they have to meet and that they have had a proper opportunity to do so.

29. The parties are agreed that the Tribunal is not restricted to a review of the Secretary of State's decision, and reaches its own decision. This includes making any necessary findings of fact, according to the standard of the balance of probabilities and with the ability to have regard to evidence that was not before the Secretary of State when his decision was made. Yet the Tribunal does not simply start afresh and disregard the decision under appeal. As held in R. (Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court [2011] EWCA Civ 31, at [45], and Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 at [45]-[46], it pays careful attention to the reasons given by the Secretary of State, bearing in mind that the legislative scheme gives him primary decision-making responsibility to the Secretary of State, in an area where he is required to exercise his judgement according to his particular expertise and for which he bears democratic accountability. The weight to attach to the Secretary of State's reasoning is for the Tribunal to decide in light of its fullness and clarity, the nature of the issues and the facts as it finds them to be.

Preliminary Decision

30. This appeal and a number of others raised issues that were considered suitable to be decided as preliminary issues. They were decided by First-tier Tribunal Judge Macmillan (as she then was) in a decision dated 29 December 2021 ("the Preliminary Decision"). A copy is annexed, but for present purposes its conclusions can be briefly summarised as follows:

    a. In order for an energy plan to be a Green Deal plan, it must meet all the requirements set out in s.1(3) and s.4(a)-(e) of the Act read with s.4 and s.5, and regulations 30-36 of the Framework Regulations read with regulation 29. These are each 'qualifying conditions'. Different interpretations of the legislative scheme put forward by GDFC and the ECC were rejected. This ruling therefore provides the list of qualifying conditions with which an energy plan must in every case comply if it is to be termed a Green Deal plan.

    b. A FIT transfer agreement is not one of the terms of a Green Deal plan prohibited by s.5(3) of the Act.

    c. Regulation 35 contains a qualifying condition that a Green Deal plan must contain a guarantee for the improvements that meets the requirements of Schedule 3. The Code of Practice, at Annex B, contains additional requirements. Judge Macmillan ruled that failure to provide a guarantee complying with the

Framework Regulations would be a breach of a qualifying condition, but that simply breaching the requirements of the Code of Practice would not.

d. Judge Macmillan gave further guidance on the correct approach to determining the appropriate sanction:

   i. Cancellation may only be imposed in the present context where the bill payer has suffered, or is likely to suffer, substantive loss. Paragraph 4.8 of the Sanctions Guidance incorrectly set out the law in this respect. Beyond that, the Sanctions Guidance correct set out the approach to determining the issue of substantive loss.

   ii. There were six relevant considerations when determining the appropriate sanction:

      1. Identify whether there has been a breach of a relevant requirement;

      2. Decide whether the breach is sufficiently severe to warrant a sanction being imposed, or whether there has been a series of breaches by the Green Deal provider either at the same property or at different properties;

      3. Assess the seriousness of the breach(es) overall, and decide whether the sanctions of a compliance notice, financial penalty or withdrawal are appropriate, by deciding whether the severity of these sanctions is proportionate to the seriousness of the breach;

      4. Decide whether the bill payer has, or is likely to suffer, substantive loss by reference to suffering harm;

      5. Decide with the sanctions of cancellation or reduction are proportionate, by reference to both the severity of the breach under the harm caused to the bill payer.

   iii. Judge Macmillan gave rulings on other disputed matters as to sanction:

      1. It is the responsibility of the Secretary of State to ensure that of that related breaches by a provider are taken into account when identifying an appropriate sanction, but beyond this it was for the parties to provide the necessary information;

      2. Relevant factors in assessing the proportionality of a particular sanction may be include the maintenance of public confidence in regulatory compliance, and deterrence;

      3. A 'windfall benefit' to a billpayer is relevant to sanction, but it ought not to operate as an effective bar to cancellation – there may be other relevant factors including, for example the suffering of harm of a different nature or the serious of the breach(es) may outweigh the windfall benefit;

4. Considerations such as a negative impact upon the bill payers mortgage position or their ability to obtain insurance or not to be excluded as relevant, provided that the Secretary of State is satisfied that they are effects of the breach(es) for which the sanction is imposed;

5. Assessment of proportionality does not, contrary to GDFC's submissions (and to a lesser extent, we observe, the position of the Secretary of State), require an assessment of fairness *inter partes* – the impact of the sanction upon the provider and/or the relevant person would only be relevant in exceptional circumstances.

iv. Where the identity of the payee changes between the date of breach and the date of complaint, the latter stands as the 'effective date' from which the sanctions of reduction and cancellation can be imposed.

v. Conduct before the effective date can still be taken into account when assessing the seriousness of the breach(es), whether substantial loss and harm has been suffered, the level and impact of any harm and the proportionality of a particular sanction.

Findings of Fact

31. We next make the findings of fact necessary to decide the appeal. The factual conclusions in the Sanctions Notice are supported by all the parties save for GDFC. Ms Heaney has made a witness statement, but we do not consider that it adds to the evidence that was already before the Secretary of State.

32. Ms Urell's instructions were to maintain the objections contained in GDFC's Amended Response. She had nothing to add by way of submissions and recognised that GDFC had chosen not to exercise its own right of appeal against the Sanction Notice. We still address the facts for ourselves, albeit in relatively brief terms given the limited arguments put forward.

33. GDFC first reiterates its inability to advance its own evidence due to not being the original provider. Next in its Amended Response is concern that the Secretary of State's analysis paid no or insufficient attention to several factors, including the numerous documents given to Ms Heaney that prominently displayed that improvements were funded by borrowing, the ten months she had to realise what they said given the time that elapsed between the 2013 and 2014 credit agreements, and the lack of clarity of Ms Heaney's recollection of conversations. GDFC describes this as being followed by an "unacceptable inferential leap" to findings of mis-selling, whereas all the Secretary of State really had was mere uncertainty as to what actually happened. GDFC also argues that the Secretary of State's approach improperly required some matters to be discussed in person despite the Code of Practice only requiring notification in writing. GDFC does not dispute the similarity of Ms Heaney's account to known malpractice by HELMS, but does take issue with the probative value attached – while there may have been over 150 complaints, this is only 3.3% of sales. Wider concerns are described as 'prejudicial publicity and hearsay'. Similar

arguments are made concerning the FOS analysis and the weight placed on it by the Secretary of State, given its scarcity of reasoning, lack of clear findings on what happened, and that "reviews in other cases have demonstrated a fundamental lack of understanding by FOS of how the Green Deal works".

34. First, we do recognise the difficulties GDFC faces in not being the original supplier. We accept that it has only limited access to HELMS' documentation and that it would be impossible or disproportionate to obtain any evidence from the individual agents involved in selling the plan to Ms Heaney. Some of its work has had to be done in the dark, to a limited degree. Yet GDFC entered into its agreement with HELMS knowing (i) that if HELMS' authorisation were withdrawn then GDFC would be the 'relevant person' upon whom sanctions would be imposed, (ii) that compliance with the scheme's requirements by HELMS would be of vital importance to the sanction imposed, (iii) that access to documentation would be required to assess that compliance and (iv) that when companies are dissolved such access can be difficult. It was for GDFC to implement the necessary mechanisms within its relationship with HELMS, balancing any competing commercial considerations. Like GDFC's liability, its evidential capabilities arise from the bargain it struck with HELMS.

35. In any event, both a regulator and the Tribunal is entitled to work on the basis of the evidence it actually has. We therefore reject GDFC's other criticisms of the Secretary of State's approach, and the reliance he placed on the FOS analysis, which overall would place too high a forensic burden on a formal court of law, let alone a regulator. Specifically in the case of the FOS they would unacceptably contravene the principle stated by Rix LJ in R. (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service & Anor [2008] EWCA Civ 642 that "an efficient and cost-effective and relatively informal type of alternative dispute resolution should not be stifled by the imposition of legal doctrine". In all cases, what is a fair and reasonable means of determining facts depends on its context.

36. More specifically as to GDFC's criticisms, the Sanction Notice does address the documentation, the Secretary of State believing Ms Heaney's account of the high-pressure tactics used by the agent. The Secretary of State was justified in treating similarities to known mis-selling cases as relevant, and to identify a repeating pattern. His own experience of administering the Green Deal, media coverage and the work done by the Citizens Advice Bureaux Scotland plainly provided sufficient justification for concluding an overall pattern of mis-selling that matched Ms Heaney's own experience. He was entitled to view 150 complaints as a sufficient evidence base. GDFC has not explained how media coverage has been 'prejudicial', nor explained its objection to (what is technically) hearsay evidence forming part of the evidential picture. Having accepted the credibility of Ms Heaney's account that it was never explained to her that she was taking out a loan, so never realised that she did, no detailed findings were then required as what *was* said. On the contrary, we consider that credible confusion may sometimes support mis-selling by an agent. The conclusions required no great inferential leap, only legitimate assembly of what was known and what was not known to reach an overall finding on the balance of probabilities. A fact-finder need only decide the relevant fact in issue, and is not required to conclusively exclude all other possibilities before settling on what finally happened. The FOS analysis is not, as asserted by GDFC, "mere comment". In

conducting his own assessment the Secretary of State is plainly entitled to place weight on the conclusions reached by an experienced regulator in the field of financial mis-selling, not least because in this case FOS was acting as the Secretary of State's delegee under an explicit provision of the statutory scheme.

37. We have talked so far about the Secretary of State's findings. For the avoidance of doubt, our own independent consideration of the evidence leads us to draw the same conclusions. These are for the same reasons given by FOS and the Secretary of State, which we need not repeat. The surrounding evidence wholly supports Ms Heaney's account, which has remained plausible and consistent. We believe Ms Heaney's account of mis-selling and adopt the same findings as the Secretary of State.

The issues to be decided in this appeal

38. The parties have helpfully agreed the issues to be considered in this appeal:

Issue 1 – Does Ms Heaney have a 'Green Deal plan'?

Issue 2 – What is the correct way to calculate the "improvement-specific savings period" for micro-renewable technologies such as solar-PV?

Issue 3 – If the agreement into which Ms Heaney has entered is not a Green Deal plan, is the only appropriate sanction one of cancellation?

Issue 4 – If there is a Green Deal plan, was HELMS in breach of its obligations under the Framework Regulations or the Code of Practice?

Issue 5 – What is the effective date of the sanction in Ms Heaney's case?

Issue 6 – Applying the principles established by the determination of the preliminary issues, was the Secretary of State's decision on the particular facts of this case to impose a reduction correct?

Issue 7 – If the answer to Issue 6 is positive, was the methodology used by the Secretary of State to calculate the level of the reduction (as set out in the Sanction Notice) correct?

Issue 8 – If the answer to either Issue 6 or Issue 7 is negative, what is the appropriate sanction / level of reduction in this case?

Issue 1 – Does Ms Heaney have a 'Green Deal plan'?

39. The Preliminary Decision sets out the 'qualifying conditions' for a Green Deal plan. Unless all of them are met, an energy plan is not a Green Deal plan. The parties' arguments were originally structured around four issues. The fifth issue was identified during the hearing, and permission given to the parties to address it in subsequent written submissions.

A. Was a qualifying assessment conducted?

40. Section 4(2) of the Act requires that a 'qualifying assessment' must be carried out by a person authorised by virtue of the Framework Regulations to act as a Green Deal Assessor. By way of section 3(9), regulation 7 defines a qualifying assessment as an energy efficiency assessment carried out by a Green Deal assessor in accordance with the assessor services specification and in accordance with the Code of Practice.

Ms Heaney's case

41. Ms Heaney first argues that there was no "qualifying assessment" at the time of entering into the plan. Filing a new EPC for a property causes the current EPC to be marked 'Historic' on the Scottish EPC register, and any related Occupancy Assessment and GDAR to be archived. Ms Heaney argues that the production of the November EPC therefore invalidated the September EPC and Occupancy Assessment, and in turn the November EPC and GDAR were invalidated by the December EPC. It follows, argues Ms Heaney, that from 13 December 2013 there was no 'valid' November EPC, Occupancy Assessment or GDAR. The resulting energy plan relies on those documents so cannot meet the requirements of section 4(2) and regulation 7.

42. The second argument is that the improvements made did not match those that were recommended. Section 4(3) provides a qualifying condition that the "Green Deal assessor has recommended the energy efficiency improvements." The relevant recommendations are contained within the GDAR and the subsequent April 2014 GDIP, both of which (in this case) were completed by a Green Deal assessor. They recommend the installation of Solar PV, oriented south and with a peak output of 3.5 kWh (3.5 kWp). Both documents estimated the annual savings accordingly. Subsequently included in the contract and actually installed however, was a 4 kWp system made up of 2.5 kWp south-facing and 1.5 kWp north-facing. It is argued that this improvement was never recommended by a Green Deal assessor, breaching the qualifying condition at section 4(3).

43. Mr Streeten and Mr Urell described this point as having been raised by the ECC rather than by Ms Heaney. We observe that Ms Heaney's Amended Reply does raise the issue at paragraph 74.1.3, and consider it to still properly fall within Ms Heaney's case despite Mr Wilcox having done most of the heavy lifting. There is no argument distinct to the ECC that we need set out on this topic.

The Secretary of State's case

44. On the qualifying assessment point, the Secretary of State argues that the energy plan was based on the November EPC and GDAR which remained valid. Nothing prevents reliance upon an EPC simply because it is not the latest in time. While it is correct that previous EPCs are watermarked 'historic' on the register, this has no legal significance.

45. On the improvement point, Mr Streeten supported Ms Urell's argument that "the energy efficiency improvements" at section 4(3) are the generic improvement recommended by the Green Deal assessor – here, Solar PV. Section 2 defines "energy efficiency improvements, in relation to a property", which includes measures

specified by the Secretary of State. He has done so in the Green Deal (Qualifying Energy Improvements) Order 2012, the Schedule to which includes a range of generic descriptions of improvements that includes "photovoltaics". Accordingly, section 4(3) is satisfied by the installation of the recommended "photovoltaics". Mr Streeten did observe that the failure to update the estimated savings might breach paragraph 12 of Code of Practice, but this fell within the sanction provisions rather than standing as a breach of a qualifying condition.

GDFC's case

46. GDFC adopts the Secretary of State's arguments as to the qualifying assessment. Ms Urell further submitted that the April 2014 GDIP explicitly references the November EPC and GDAR, so there can be no question of reliance upon the obviously erroneous December EPC. Nothing in the legislative scheme rules out the existence of more than one EPC at the same time. As to watermarking, reference is made to the FAQ section of the Scottish EPC Register which confirms that once an EPC has been lodged it cannot be edited or deleted. Further support could be found in the assessor services specification.

47. While joining with Mr Streeten on the interpretation of section 3(4), Ms Urell also argued that the difference between the two systems was *de minimis*.

Consideration

48. We reject the argument that producing an EPC for a property invalidates a prior EPC. Neither section 3 nor regulation 7 directly refer to an EPC, instead requiring "an energy efficiency assessment of a property". This term is not defined. This is in contrast to other provisions in the regulations that do directly refer to an EPC, for example those concerning disclosure obligations.

49. Regulation 7 does provide that the energy efficiency assessment be done "in accordance with the assessor services specification." Paragraph 65 of that specification requires the assessor to check the existence of a "valid and suitable" EPC prior to the assessment visit. Paragraph 66 then sets three conditions that must be fulfilled for an EPC to be considered "suitable for Green Deal purposes", one of which is that it "has been lodged and is valid as per the requirements for EPBD in the relevant country." Paragraph 67 requires an advisor to validate the contents of the EPC during the assessment visit, and produce and lodge a new EPC if there are inaccuracies. We also note the obligation under paragraph 73 to check that "a valid domestic EPC" still reflects the property. Regulation 7 does also refer to the Code of Practice, but this contains nothing relevant to the current issue.

50. "EPBD", above, refers to the Energy Performance of Buildings Directive 2010/31/EU, implemented in Scotland by means of the Energy Performance of Buildings (Scotland) Regulations 2008. Regulation 6 of those regulations provides that an EPC becomes invalid one year after its production, but is silent on the consequences of a subsequent EPC being produced. Regulation 10 confirms both that an EPC must be kept on the register for a period of at least ten years and cannot thereafter be altered, whereas Green Deal information may be altered where it is updated in accordance with the Framework Regulations.

51. We reject Ms Heaney's arguments that there was no qualifying assessment as required by section 3 due the invalidity of an underlying EPC. It can be seen that nothing in the statutory scheme operates to invalidate an EPC upon a subsequent EPC being produced or lodged. It is obviously wise for the register to watermark earlier reports, alerting the requester to a subsequent report, but the practice is not included in the 2008 regulations' provisions on invalidity and is of no legal effect.

52. We also agree with the respondents' arguments on the qualifying condition at section 4(3). It is satisfied by the generic improvement, in the terms set out in the Order, having been recommended by the assessor. Of course, alteration of the detail of those recommendations may nonetheless engage the Code of Conduct.

B. Did the plan breach the 'golden rule'?

53. Regulation 30(1) provides a qualifying condition that the first year instalments must not exceed the estimated first year savings, and that the payment period must not exceed the savings period. This is known as the golden rule. Ms Heaney had initially argued this point by setting the December EPC estimated saving rates against the instalments payable under credit agreement. It was only later that a copy of the November EPC was obtained showing higher estimated rates, so this argument is no longer pursued.

54. The argument on the golden rule survives to a certain extent in relation to the savings period on the solar panels, but the parties have addressed this by reference to the second issue.

C. Were the notification requirements met?

55. Regulation 30(3) provides as follows:

(3) The Green Deal provider must, before the plan is entered into, notify the improver of—

(a) the improvement-specific first year savings;

(b) the improvement-specific savings period;

(c) the amount of the first year instalments attributable to each improvement (the "improvement-specific instalments"); and

(d) the period over which instalments are to be payable for each improvement (an "improvement-specific payment period").

56. The parties agree that compliance with this qualifying condition is in issue before the Tribunal. We begin with some points concerning interpretation. First, by virtue of regulations 27 and 28 the references to savings in regulation 30(3) still concern estimated savings. But the same does not apply to instalments, and we interpret regulation 30(3)(c) as requiring notification of the *actual* improvement-specific instalments to be paid under the plan. There is no basis upon which to import the word "estimated", given the absence of the word from the regulation and that the actual figures would obviously be known when drawing up the agreement. This accords with the obvious purpose of the provision, which is to enable the improver to

verify that the plan will meet the golden rule at regulation 30(1). The second point is that "improvement-specific" is defined by reference to the "improvement" in question. Regulation 2 defines "improvement" as "an energy efficiency improvement in respect of a property", which is the same term already discussed in relation to section 4(3). Arguments such as the configuration of solar panels must be approached accordingly.

57. The Sanctions Notice found that while the necessary information had been given on paper, the final sentence of (the related) paragraph 47A of the Code of Practice had still been breached because the information had still not been properly explained. This position has shifted somewhat, both respondents' Amended Responses now putting Ms Heaney to proof that notification was never given. No documents have been put before us that contain the required notification. The only document containing any first year improvement-specific payment figures is the Occupancy Assessment under the heading "Expected Green Deal repayment in year 1". These are 'expected' figures and must be subject to the wide range of estimated costs in the first column of figures. We cannot see that this meets regulation 30(3)(c), which requires the actual instalments payable rather than estimates, and the final products installed did not match all those listed anyway – we have already accepted the respondents' separate point that the precise products are determined at a later stage. The GDAR and November EPC do not contain the information, nor does any of the documentation surrounding the loan despite containing the total amounts payable. In his submissions on regulation 30(4), Mr Wilcox engaged the Tribunal in elaborate reverse engineering of what some of the figures might have been. We accept Ms Urell's post-hearing submission that those figures cannot be calculated with any confidence. The first annual statement from GDFC contains daily rate figures broken down by improvement, but that is both insufficient and too late.

58. Mr Streeten confirmed that there are no documents available to the parties that contain the required notification. He told us that his client's experience was instead "that salespeople do provide explanations orally" and that he had encountered these in other cases on telephone recordings. Ms Heaney had not denied being provided with the information, saying that she could not recollect having been provided it. Ultimately, he submitted, whether she had been given the information was an evidential question for the Tribunal, but Ms Heaney's lack of a positive denial meant she could not meet her burden of proof. Ms Urell agreed, pointing out that events took place some 8 years ago and that it was no surprise that Ms Heaney could not remember now.

Consideration

59. Contrary to the respondents' submissions, regulation 30(3) cannot be satisfied by oral notification. Regulation 3 provides as follows:

> *3. Notices*
>
> *A notice under these Regulations:*
>
> *(a) must be in writing; and*

(b) may be transmitted by electronic means unless the recipient has indicated unwillingness to accept notices in that way.

60. Notification is synonymous with 'give notice', absent clear statutory intention. There is no reasonable basis upon which to consider that these regulations draw such a distinction, not only would it be contrary to the scheme's objects but it would be fanciful to suggest that some of their other notification obligations could be satisfied by telephone. Moreover, Ms Heaney's position is less equivocal than the respondents suggest. The relevance of her assertion that there is "no evidence" of notification being given is first to confirm that she has no undisclosed relevant documents. Second, her complaint has always been accepted on the factual basis that she was required to sign some documents by the agent without being able to read them, and that the agent took at least some of them straight back. She has never in any position to put forward a positive evidential case that *no* documents *ever* gave her the required notification, and that situation has arisen from the mis-selling itself.

61. Regard must also be had to the facts of Ms Heaney's complaint – she has always claimed that she never knew the plan involved borrowing or repayment at all. The facts of her complaint are consistent with those cited in the Citizens Advice Scotland report, were believed by FOS, and then in turn by the Secretary of State. In particular, we note the following conclusions reached in the Sanction Notice at paragraph 18, expressed to be findings made on the balance of probabilities in relation to breaches of the Code of Practice:

    a. *Paragraph 2.7, requires that a Provider must not mislead customers by act or omission. In failing to adequately explain the costs and savings associated with the Plan, HELMS breached the CoP. Ms Heaney states that she was told that she was agreeing to pay £1,000, the remainder of the cost of the measures would be paid for by the government. The Secretary of State notes the finding by the Financial Ombudsman Service that Ms Heaney reasonably thought that the solar panels were not funded by a loan and accordingly is satisfied, on the balance of probabilities, that this provision has been breached.*

    b. *Annex B paragraph 18, requires a discussion of whether the loan instalments are offset by the savings achievable, based on the actual energy usage of the property to which the Plan is attached. The Secretary of State notes the finding by the Financial Ombudsman Service that Ms Heaney was not aware that she was entering into a loan and accordingly is satisfied, on the balance of probabilities that this information was not discussed with Ms Heaney as required under the CoP.*

62. Elsewhere, the Secretary of State reasons why the sales tactics used would have prevented Ms Heaney ascertaining from the documentation that she was taking out a loan. The Secretary of State may not have applied those findings to regulation 30(3), but this does not undermine the findings themselves. We have already set out our own assessment.

63. Notwithstanding the careful attention given to this case by Ms Heaney, the CAB, the Secretary of State, GDFC and the ECC no documents have emerged that give the notification required by regulation 30(3). Importantly, nor does the evidence suggest when such notification *might* have been given. The Tribunal has all the usual jigsaw

pieces of a Green Deal plan: the EPC, GDAR, GDIP and the credit agreement with its explanatory documents. No suggestion has been made that any documents are missing that would usually be encountered, and it would have been straightforward for either respondent to tell the Tribunal that it is missing a particular expected document. Indeed, we have been told that the Secretary of State's experience is that notification would be given verbally.

64. Considering the evidence therefore, we find that the written notification required by regulation 30(3) was not given. This is not simply due to an absence of evidence to the contrary, but is the proper conclusion to draw after having assessed the wider evidential picture.

65. Insofar as it might remain relevant, was notification given orally? The Secretary of State's experience gives weight to it not having been done in writing, but does not establish that the telephone script was followed on every occasion. It certainly falls well short of being evidence that can undermine the fundamental basis upon which the sanction was issued, being that HELMS never discussed with Ms Heaney that she was taking out a loan at all. We therefore take the findings in the Sanction Notice as answering whether the required information was verbally communicated on this occasion. For the avoidance of doubt, we would reach the same finding ourselves on the evidence. Ms Heaney has always claimed to have never been told that she would be required to pay anything apart from an initial £1,000, let alone what she could expect to pay in her first year in respect of each individual improvement. Her account has been believed by the FOS, the Secretary of State and, now, the Tribunal. In this case there is the added feature of the unusual circumstances surrounding the 2013 defective credit agreement and December EPC. There is reason to think that even the usual procedures might have gone awry on this occasion.

66. We presume that the tension between Mr Streeten's present instructions and the Sanctions Notice arose from concerns that the latter might be forced by formal operation of the burden of proof to yield to Ms Heaney's present lack of precise recollection. Such concerns would be misplaced. The Tribunal will also only resort to the burden of proof when unable to resolve an issue of fact by simply evaluating and examining the evidence, including the wider context –Re B [2008] UKHL 35 at [32], [72]; Verlander v Devon Waste Management [2007] EWCA Civ 835 at [18]-[19].

67. The Tribunal finds that HELMS did not comply with the obligation under regulation 30(3) to notify Ms Heaney of the amount of the first year instalments attributable to each improvement. This being a qualifying condition, the plan is not a Green Deal plan. To the extent that other issues in the appeal therefore fall away, we nonetheless consider them in the alternative.

D. Did the plan restrict Ms Heaney from changing supplier?

68. Regulation 34 provides that the plan must not restrict a billpayer from changing gas or electricity supplier. While no actual term of the plan purports to do so, the document "Explanation of your credit agreement" issued to Ms Heaney states that:

The Bill Payer will be free to change the intervals at which electricity bills for the property are to be paid, and to change electricity supplier. However, they will need to choose an electricity supplier that is part of the Green Deal.

69. Ms Heaney observes that many suppliers do not take part in the Green Deal, so her choice of supplier is restricted. We reject that this offends against regulation 34. As confirmed by the arrangements set out by Ms Heaney, it is Ofgem that has chosen to exempt suppliers with fewer than 250,000 customers from mandatory Green Deal participation. Regulation 34 prevents *the plan* from imposing any restriction, and it does not.

E. Is regulation 30(4) breached by the charges for finance?

70. Regulation 30(4) requires that the improvement-specific instalments must not exceed the improvement-specific first year savings, and regulation 30(5) requires that the improvement-specific payment period must not exceed the improvement-specific savings period. Mr Wilcox's submissions at the hearing included that these requirements were breached in the case of finance charges added to the agreement, as well as the insulation improvement. He made a similar submission concerning regulation 30(3). Mr Streeten and Ms Urell objected that these arguments had not previously been raised. We permitted the parties to make written submissions, but restricted to regulation 30(4) and (5).

71. On financing, Mr Wilcox observes that Ms Heaney's energy plan requires repayment of the principal sum advanced, a set-up charge of £63.24, and a daily servicing charge of five pence for a period of 8826 days. His complaint is that the set-up and servicing charges are excluded from the improvement-specific first year instalments when calculating whether they exceed the improvement-specific first year savings, risking the golden rule being bypassed by a low-priced improvement coupled with an expensive finance charge, and the regulations should be read as requiring finance charges to be apportioned between individual improvements. We agree with the respondents that such a risk is ruled out by the golden rule at regulation 30(1) encompassing all instalments to be paid, including charges for finance. It is the improvements that are specified, and if the figures were to include other charges then the regulations would say so.

72. We need not set out Mr Wilcox's points on insulation. This was really an exercise in trying to reverse engineer the improvement-specific first year instalment figures from how the annual payments dropped off over the life of the plan. We accept Ms Urell's criticism of the methodology, but the only real utility of the whole exercise is to further fortify our principal conclusion that the figures were never notified.

Issue 2 – What is the correct way to calculate the "improvement-specific savings period" for micro-renewable technologies such as Solar PV?

73. This issue also relates to regulation 30, and the requirement at (3)(b) to notify the "improvement-specific savings period". This term is defined by regulation 28:

28. Estimating the period over which savings are likely to be made

(1) The Green Deal provider must estimate the period over which the savings on energy bills resulting from the improvements are likely to be made (the "savings period") on the basis specified in paragraphs (2) to (5).

(2) The Green Deal provider must make a reasonable estimate of the period over which each improvement is likely to result in annual savings on energy bills which are equivalent, after taking into account the effect of likely changes in the price of energy, to the improvement-specific first year savings for that improvement.

(3) Subject to paragraph (4), the Green Deal provider must, when making the estimate under paragraph (2), include any period when the efficient functioning of the improvement is likely to depend on repairs for expected wear and tear.

(4) The period included under paragraph (3) does not extend beyond the time that the Green Deal provider estimates that the likely cumulated cost of carrying out repairs for wear and tear will exceed the likely cost of replacing the improvement.

(5) The savings period is the longest of the periods estimated under paragraph (2).

(6) The estimate made under paragraph (2) is, in relation to an improvement, the "improvement-specific savings period".

74. The complaint raised by the ECC is that the plan estimated the improvement-specific first year savings for Solar PV by the income received through FIT, but then set a savings period of 23 years despite FIT payments only being available for 20 years.

75. It was confirmed in oral argument that no issue was taken by Ms Heaney or Mr Wilcox over 23 years being an appropriate figure in terms of the expected lifespan of the Solar PV equipment itself, the objection only arising from the FIT payment period. This was sensible, as we agree that 23 years appears to be reasonable based on the evidence provided. The market standard rate is 25 years, as is the standard lifetime assumption in the Green Deal documentation produced by the Secretary of State. GDFC suggests that 23 years was likely to have been chosen by reference to 25 years minus a deduction for wear and tear and a conservative uplift for increases in the price of energy. We agree.

76. The Secretary of State and GDFC both reject the ECC's argument as requiring a more technical and over-prescriptive approach than justified by the call at regulation 28(2) for a "reasonable estimate", and ask the Tribunal to recognise that a reasonable estimate may encompass a range of figures. They further argue that the ECC's case neglects that Ms Heaney will still be entitled to export energy to the grid after the expiry of the FIT. Moreover, the methodology for generating the estimated first year savings is fixed by regulation 27(3). The provider would not be able to select an alternative amount. GDFC additionally argues that the difference is *de minimis* and should be disregarded; when FIT duration was reduced by the Secretary of State from 25 to 20 years it was estimated that the return on investment would be reduced by only 0.7%.

77. In reply, Mr Wilcox accepted that the provider could not have altered the estimated first year saving and that by virtue of regulation 27(3) this must be calculated according to the SAP. But, he argued, SAP itself assumes benefit from FIT rates rather

than what might be lower post-FIT income. He took us to the SAP-specified price for electricity sold to the grid, which does broadly correspond with the (then) Department for Energy & Climate Change's leaflet on the benefits from Solar PV that arise specifically from FIT.

78. We largely agree with the respondents' arguments on this issue. If any of the figures specified at regulation 30(3) had not been calculated according to the provisions of the Act or the regulations then this would likely be a breach of a qualifying condition. An example might be where estimated first year savings had been calculated by different figures to those that appear in SAP, the use of those figures being mandated by regulation 27(3). The calculation of the improvement-specific savings period at s.4(5) and regulation 28 requires only an estimate however, and we consider that this recognises the wide range of considerations that would come into play. These would, as argued by the respondents, require the provider to use its product and market expertise to produce an estimate of the improvement-specific savings period. Here, the ECC criticises the estimate as failing to make proper provision for the end of the FIT. We agree with the respondents that this was really a judgement call for the provider, who may have considered a number of different considerations. These include the post-FIT income, and the provider might well have rationally decided that after 20 years there would still be some sort of government-subsidised micro-generation income available. The necessity of such speculation illustrates the problem with the ECC's position, which requires the Tribunal to pick apart the figures used with little information as to how they were reached. Nothing in the scheme required the provider to set out its working in this regard, and it cannot be the intention of the regulations that such retrospective analysis would be necessary to determine a qualifying condition.

79. Our decision is therefore that FIT duration is a valid and relevant consideration when calculating the improvement-specific savings period, but that this does not translate into a requirement to cap the period accordingly. A provider might reach a valid estimate that goes beyond the time when FIT payments would be received. Poor standards in reaching such estimates would potentially engage the Secretary of State's sanction powers as a breach of the Code of Practice, rather than rule out the existence of a Green Deal plan altogether. There is insufficient evidence for us to find fault with the estimate made in this case, and others will turn on their own facts.

80. We did not need to address the *de minimis* argument, but should record that future such arguments will be approached with very careful scrutiny. An assertion that a particular error would have made no material difference, on this or any other topic, will usually require very clear evidence. Finally, we do not exclude the possibility that in some cases it could be argued that no 'estimate' was really performed at all – the provider simply not having taken the trouble, or having deliberately selected an incorrect figure in an attempt to satisfy regulation 30(5). In that case the provider will not have estimated the improvement-specific savings period in accordance with regulation 27 and the qualifying condition at regulation 30(3) will have been breached.

Issue 3 – If the agreement into which Ms Heaney has entered is not a Green Deal plan, is the only appropriate sanction one of cancellation?

81. The Secretary of State retains the power to impose a sanction even if a plan is not a Green Deal plan due to breaching a qualifying condition. The power to impose a sanction is provided by regulation 67, and is engaged where the provider breaches one of the 'relevant requirements'. Those relevant requirements include, by way of regulations 26 and 27, ensuring that the Green Deal plan meets the various qualifying conditions. There is therefore no issue as to jurisdiction.

82. The sanction of cancellation is defined by regulation 51:

> *"cancellation" means that the Secretary of State requires the relevant person–*
>
> *(a) to cancel the liability of the bill payer and any subsequent bill payer to make payments under an energy plan from the effective date; and*
>
> *(b) to refund to the bill payer any instalments paid under the plan in respect of a period after that date;*

83. It stands as a self-evidently more severe sanction than the alternative, reduction:

> *"reduction" means that the Secretary of State requires–*
>
> *(a) the relevant person to reduce the liability of the bill payer and any subsequent bill payer to make payments under an energy plan from the effective date; and*
>
> *(b) the relevant person to refund to the bill payer any instalments paid under that plan in respect of a period after that date;*

84. The Preliminary Decision sets out a detailed consideration of the sanctions regime, at [58]-[84]. We take it carefully into account, including the six relevant considerations when determining sanction.

<u>The parties' arguments</u>

85. Given our decision on Issue 1, as well as the arguments made on this issue we must also incorporate some of those put forward under Issues 6-8.

86. While each party recognised the applicability of the six-step approach, all but GDFC argue that cancellation is the only appropriate sanction where an energy plan is found not to be a Green Deal plan.

87. While relying on her overall case as to the way in which the plan was mis-sold, and her financial loss, in her skeleton argument Ms Heaney draws attention to some particular features. First, she has been required to buy her energy from Green Deal suppliers. This has excluded smaller, more competitive, suppliers. In her Amended Reply she estimates that over the lifetime of the plan the resulting cost may be as much as £8,247 and gives her methodology. While we consider this to be a very rough estimate (the volatility of energy prices and the sustainability of smaller suppliers could hardly be more topical), no one can deny that she has faced some level of

additional expense on that basis. While this does not breach a qualifying condition, it does bear some very minor relevance to sanction given the nature of the mis-selling. Second, Ms Heaney observes that if cancellation is not imposed then liability for payments will not transfer upon sale of the property. She will have, in effect, a freestanding credit agreement with GDFC and be liable for instalments as with any other unsecured loan. She considers this wholly unacceptable given the finding by the Secretary of State that when mis-sold the plan she had no idea that she would be liable for any kind of repayments. It is one thing to make her subject to a Green Deal plan she never intended, with all the unique protections and features it includes, but another to land her with a freestanding loan agreement.

88. Addressing the consequences for such circumstances more generally, Mr Wilcox agreed with the Ms Heaney's points above. He listed the consequences of a consumer being left with a non-Green Deal energy plan: instalments could no longer be properly be deducted from energy bills, payment then being required by direct debit or similar; liability would not transfer with the property; and if the consumer's circumstances changed for the worse, then on default they might face legal proceedings, enforcement, and damage to their credit rating. This was so radically different to the Green Deal plan they ought to have received that the only proportionate sanction was cancellation. Mr Wilcox reinforced those arguments by referring to the contractual provisions of Ms Heaney's credit agreement and installation agreement, which entitle the provider and installer to demand payment of the entire cost of installation (subject to cancellation of interest payments and charges) and compensation. Mr Wilcox also made submissions concerning principles of contract law, including misrepresentation and *non est factum*. Both Mr Wilcox and Ms Heaney reiterate their argument that when the Secretary of State made the Sanction Decision he erred in assessing proportionality by reference to the consequences for GDFC rather than by reference to the breach, and that the Tribunal should not do likewise.

89. The Secretary of State adopts the same position as Ms Heaney and the ECC, arguing that the consequences of being subject to a non-Green Deal energy plan are so serious for Ms Heaney that cancellation is the only proportionate outcome. Mr Streeten did, however, disassociate the Secretary of State from Mr Wilcox's contractual arguments.

90. On behalf of GDFC, Ms Urell first observes that the legislative scheme plainly encompasses reduction as a potential sanction for breach of a qualifying condition. The regulations could have easily provided that cancellation would automatically follow a breach of a qualifying condition, but they did not. The Secretary of State, and the Tribunal, were still required to consider the issues identified in the Preliminary Decision.

91. Ms Urell next challenged the significance of the consequences argued by the other parties, describing them as 'more illusory than real'. First, making payment direct to GDFC by direct debit was hardly any more difficult than setting up a similar payment to an energy supplier. Second, transfer of liability upon sale was already subject to the purchaser being notified and giving consent. Ms Heaney would have always faced a situation where she could only sell her house if she either paid off the whole plan or found a purchaser willing to take on the payments. Her position now would be no different, on agreeing a sale she could either retain liability herself or arrange for the

energy plan to be transferred to the purchaser by novation. Third, the potential for legal proceedings on non-payment was still possible on a Green Deal plan if Ms Heaney failed to pay her electricity bills. Failure to pay energy bills might have even worse consequences than failing to pay GDFC, the supplier having the power to install a (more expensive) pre-payment meter or even disconnect the supply.

92. Ms Urell's oral submissions developed GDFC's case on what Ms Heaney's position would be in the event that cancellation were not imposed. She accepted that Ms Heaney would, in effect, be left with a freestanding credit agreement that was no longer connected to the energy supplied to her property. But consumer credit is heavily regulated, she argued, and lenders held to a high standard of behaviour. GDFC is regulated and authorised by the Financial Conduct Authority and would be required to act in accordance with its rules and according to the provisions of consumer credit legislation. This includes the principle of forbearance, a lender exercising proper restraint where a debtor struggles to meet their obligations and taking legal action as a last resort. Ms Urell argued that Ms Heaney would not, in reality, be any worse off as directly liable to pay a responsible lender such as GDFC than if she were subject to a Green Deal.

93. Finally, GDFC argues that the windfall benefit to Ms Heaney from cancellation would be disproportionate. Assuming that cancellation takes effect at the date of complaint to the Secretary of State, she would still benefit from years of savings without having to pay the corresponding instalments. Ms Urell pointed to the large and well-known rises in energy prices since the various calculations were performed by the Secretary of State, meaning that the savings will now be even greater as Ms Heaney uses electricity she has generated herself using the Solar PV. We also take into account Ms Urell's arguments as to Issues 6-8, arguing that there should be no remedy at all where the improver has not suffered any discernible financial loss.

<u>Consideration</u>

94. We reject the contractual arguments raised by the ECC as to misrepresentation and *non est factum*. They have not been raised as issues in the appeal by Ms Heaney, and the considerable latitude extended to the ECC on the scope of its submissions and evidence on Green Deal plans does not extend to arguing specific contractual remedies. While issues of contract law might be relevant factors in some cases, we have no specific jurisdiction to grant relief for breach of contract. We also consider these arguments to be a collateral attack on the rejection by Judge Macmillan of its case as to the requirement for mutual intention to enter into a Green Deal plan. As a matter of case management, we decline to permit these issues to be raised.

95. Turning to the other issues, we agree with GDFC that cancellation is not an automatic consequence of a breach of a qualifying condition. That would bypass the considerations mandated by the regulations, such as the requirement at regulation 79 that any sanction must be proportionate to the breach in relation to which it is imposed, and the requirement at regulation 67(3) that the bill payer has suffered or is likely to suffer substantive loss. The same conclusion was reached by Judge Macmillan in the Preliminary Decision at [83] when formulating the six relevant factors to determining sanction. Their relevance must be assessed in every case, and we do not

rule out the possibility that even where a qualifying condition is breached their application may, on occasion, result in the imposition of a lesser sanction than cancellation. But for the reasons that follow, such cases are likely to be rare.

96. As to the six considerations, on *(i)* a breach of a qualifying condition is plainly a breach of a relevant requirement by virtue of regulation 26 and 27. Consideration *(ii)* will be met in all cases concerning HELMS due to its systemic mis-selling but in any event the breach of a qualifying condition is a sufficiently serious matter so as to justify some sort of sanction. It is a fundamental statutory requirement of a Green Deal plan, going beyond simple compliance with the Code of Practice and technical specifications applicable to providers.

97. We move to *(iii)*, *(iv)*, *(v)* and *(vi)*. The first consideration is the seriousness of the breach overall. We consider that this goes further than simply assessing how the qualifying condition came to be breached. It is in the nature of a qualifying condition that it operates in a binary way. Incidents of non-compliance may be very technical and inadvertent, or they may arise from gross negligence or actual fraud. While the former is to be treated as mitigating seriousness, and the latter as aggravating it, the starting point must be that even the least culpable breach of a qualifying condition has consequences that are already very serious. The scheme's qualifying conditions are its primary legislative requirements, and compliance both provides the Green Deal's plan unique characteristics (such as the golden rule) and evidences them to a consumer who might wish to enter into the plan (such as the present failure to comply with regulation 30(3)). Non-compliance at inception thereby not only undermines the purpose of the statutory scheme in a particular case and in general, but may also adversely affect subsequent future bill payers upon the sale or renting of the property. They receive less information upon which to base their decision than the initial improver, and are entitled to assume that at inception the relevant regulatory requirements were met.

98. We accept the argument that continuation of the energy plan alters its entire nature, and that this has serious adverse consequences for a borrower. While paying tribute to the detail and skill of Ms Urell's submissions, we have no hesitation in finding that Ms Heaney will suffer substantive loss as a result of her energy plan not being a Green Deal plan:

    a. First, Ms Heaney would be liable to pay instalments direct to GDFC. This involves more than just the fuss of arranging a direct debit. It requires two bills to be paid rather than one, and for some will present additional difficulties in budgeting. What of someone on a pre-pay meter, or who has problems with debt, or with obtaining and running a bank account, or insolvency? Neither Ms Heaney nor the Tribunal can be certain of what her future holds. She will have lost an important protective feature of the Green Deal plan.

    b. Second, default could lead to enforcement. This can be distinguished from a debt owed to an energy supplier who could only ever bring an action for arrears. Non-payment of the credit agreement could lead to action for the entire outstanding balance. Ms Heaney's credit agreement goes even further, permitting the lender to serve notice of termination (and therefore be

immediately entitled to the outstanding balance) simply upon the energy plan ceasing to be a Green Deal plan. Statutory regulation and the forbearance required by lenders before taking enforcement action might provide some very modest mitigation of the threat of litigation, but someone facing a decree for the entire sum will draw scant comfort from it having been the lender's last resort. It might have been open to GDFC in this appeal to provide some form of enforceable undertaking never to visit such consequences upon Ms Heaney, but it has not done so. It will be for the Tribunal on a future occasion to judge the weight carried by such an offer, which might in any case be commercially or legally impracticable.

c. Third, novation does not provide a suitable substitute for the Green Deal plan's transfer of liability to a subsequent purchaser. Such a purchaser is vanishingly unlikely to ever accept novation of a consumer credit agreement as a pre-condition of buying a house. They would face all the potential adverse consequences identified above, as well as the need to find another purchaser willing to take on the agreement should they later wish to move themselves. It would be even worse for a tenant, who would continue to be liable even if they were evicted. In England and Wales, a typical assured shorthold tenant would enjoy no long term security of tenure but indefinite liability to pay instalments. We find that novation would be so deeply unattractive to any purchaser or tenant, when compared against the official government-backed Green Deal scheme and its protections and regulation, as to be a wholly unreal possibility.

d. Furthermore, an important feature of a Green Deal plan is that no consent is required from the payee, e.g. GDFC, before liability transfers. Under a Green Deal plan Ms Heaney could move out of the property and rent it out to someone else. If the disclosure and consent provisions are met then no matter how parlous the new tenant's financial position, under a Green Deal plan GDFC can do nothing to stop her. Novation would require GDFC's consent, and Ms Urell confirmed that she had no instructions on the circumstances in which it would be given. Without a binding commitment to the contrary, we consider it inevitable that GDFC would wish to satisfy itself of a new party's creditworthiness. We also reject Ms Urell's argument that this point is academic because Ms Heaney does not actually wish to sell or rent out her house. Again, we do not know what Ms Heaney's future holds – these are plans which are entered into for over 20 years. It is the removal of the ability to take such steps that stands as the loss. Ms Urell's response to this point was that, if necessary, future contingencies could be met by increasing the level of reduction. We cannot see how this could sensibly be measured, certainly if it were to take account of the non-pecuniary loss suffered by someone who – solely as a result of the provider's default – finds themselves trapped for decades in a house that they cannot sell.

e. While not specifically put, we suppose it could also have been argued that Ms Heaney could factor satisfaction of the outstanding balance into the sale price of her home, or rent charged to a tenant. But this would likewise stand as an unacceptable restriction and loss of bargaining position, adversely affecting how Ms Heaney can conduct her future affairs and living situation. It is one

thing for a potential purchaser to know that they face an extra £1.99 per day solely for the duration of their own ownership, and quite another to expect them to immediately pay off the whole cost of the improvements. An extra £30 or so to the headline rent would likewise adversely affect the marketing of the property to tenants, notwithstanding that some might realise it provided better value for money overall.

f. A potential further point concerns the relationship between energy plans and credit reference agencies. We have placed no reliance on this at all in reaching our decision, as no relevant evidence has been adduced. We briefly raise the point in case it is developed in future appeals. It is unclear whether, and how, Green Deal plans are recorded by credit reference agencies. The representatives' understanding was that they were not, but we see that some of the loan documentation suggests that they are. The non-Green Deal energy agreement would certainly be recorded, the amount of borrowing and the repayment history being taken into account when further credit is sought. Ms Urell was right in her observation that the consequences of this can be positive, for example a good repayment history increasing a credit score, but that takes nothing away from Ms Heaney facing the *potential* for adverse consequences upon non-payment or default. When considering the total existing debt, a potential lender may also (we have no evidence on the point) treat Green Deal debt as a less significant factor than a simple unsecured loan or finance agreement. This feature would also provide a further disincentive for a purchaser of the property to agree to novation of the credit agreement.

99. For the above reasons, and in agreement with Ms Heaney, the ECC and the Secretary of State, we reject that Ms Heaney has suffered no loss by reason of her energy plan not being a Green Deal plan. The nature of the plan has fundamentally altered, causing severe harm. That conclusion can be reached solely on the basis of the breach of the qualifying condition, even without regard to the other adverse factors identified by the Secretary of State when deciding on sanction.

100. Still on that side of the scales, we weigh the importance of the maintenance of public confidence in regulatory compliance. Its relevance to proportionality was confirmed by the Preliminary Decision at [79], as was deterrence. We respectfully adopt Judge Macmillan's reasoning at [82]. Ms Urell argued that those aspects of the public interest are diminished in cases such as this, where HELMS no longer exists, the Green Deal scheme is closed, and GDFC is not even a provider. We disagree. While the Green Deal scheme may now be closed, there is still a public interest in future schemes enjoying public confidence. A failure to provide effective regulation and enforcement of compliance with one scheme's requirements might well reduce public participation in subsequent schemes. Likewise, effective sanctions against a provider for non-compliance will act as a deterrent to other providers on future schemes. We accordingly reject Ms Urell's argument that deterrence has no part to play because HELMS has ceased operating. These matters therefore carry great weight in favour of imposing the sanctions provided by Parliament where appropriate. They are wholly incompatible with GDFC's continued argument that sanctions ought to be purely compensatory.

101. The features that support the seriousness of the appropriate sanction having been identified, it is equally important to carefully identify the weight carried by those on the other side of the scales. Despite the finding in the Preliminary Decision that the impact of sanction upon the provider or relevant person will only be relevant in exceptional circumstances, GDFC's submissions have continued to reiterate that would be unfair to face the consequences of mis-selling and non-compliance with which it had not been involved. In her later submissions under Issues 6-8, Ms Urell sought to argue that the Preliminary Decision's analysis of proportionality at paragraph 82 only concerned whether the legislation was proportionate, and that the relevance of the effect of the sanction on GDFS was still at large. We disagree. Both respondents argued before Judge Macmillan that the assessment of an individual sanction's proportionality demanded recognition of its effect on the subject, praying in aid Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1"). Judge Macmillan rejected this, her detailed reasons including reliance on Whitter v HMRC [2018] UKSC 31, where Lord Carnwath held as follows:

> *79. … In my judgment, Mr Chacko is right to say that A1P1 has to be considered at the stage of exercise of the discretion conferred by section 66 (1), if only for the simple reason that cancellation of a certificate indubitably involves an interference with the two possessions identified by Ferris J in Vicky. It by no means follows, however, that the proportionality review at this stage always needs to go beyond the proportionality of the CIS regime as a whole. On the contrary, in all save the most exceptional cases it will in my judgment be a complete answer that the discretion as I have construed it forms an integral part of a Convention-compliant statutory regime. And in the circumstances of the present case, I see no more scope for a successful argument based on A1P1, as a ground of challenge to the cancellation of the Company's registration, than I do for a challenge based on the common law principle of proportionality. In particular, the adverse effect on the Company's business is in my view an entirely predictable consequence of the Company's non-compliance, for which it has only itself to blame.*

102. Judge Macmillan held at paragraphs 82(xii) that the statutory scheme was Convention-compliant, and at (vii) and (viii) that the discretion it confers must be exercised in accordance with its objects and scope. Within the context of the Green Deal scheme, that was the regulation of the installation of energy efficiency improvements and ensuring regulatory compliance by Green Deal assessors, providers and installers. The financial circumstances of the 'relevant person' was extraneous to the exercise of that discretion. The Green Deal scheme was held to be a 'tightly constructed statutory scheme' such as that considered in Whitter.

103. We therefore treat the correct approach as already having been resolved by Judge Macmillan at [82] and decline to reopen the issue. Nor can we see any exceptional circumstances in this appeal, the only one put forward by GDFC being that it is not the original perpetrator of the mis-selling. We reject this, the financial consequences for GDFC arise from the bargain it struck with HELMS and carries no material weight in our assessment.

104. While the level of financial loss to GDFC is not relevant in itself, it can also be viewed as a figure that Ms Heaney will no longer have to pay. That is potentially relevant. We turn to the extent of what has been described in these proceedings as a

windfall benefit. We have not been provided with any calculation, and must do our best using the figures provided in the evidence and as part of the Secretary of State's explanation of how the sanction of reduction was calculated. Payments started on 27 November 2014, and the repayment periods were:

a. Condensing boiler – 12 years;

b. External wall insulation – 25 years;

c. Solar PV – 23 years;

d. Floor insulation 25 years.

105. Assuming that cancellation would be effective from 19 March 2019, the date on which the complaint was first made to the Secretary of State, cancellation would result in Ms Heaney having the benefit of the above improvements for the full periods stated, while only having paid instalments for 4 years, 3 months and 20 days. The daily repayment figure in the pre-contract credit information is specified at £1.99 per day, according to which Ms Heaney would have paid £3,130.27 up to the date of cancellation. This is £12,530.16 less than the actual anticipated cost of the plan across its lifetime, calculated in the Sanction Notice as £15,660.43 inclusive of capital, interest and fees. We should make absolutely clear that our conclusions do not depend on those figures being precise, but instead stand as a very broad estimate of the benefit argued by GDFC as providing a windfall to Ms Heaney. We therefore approach cancellation as providing an effective 80% reduction in the amount Ms Heaney must pay for her improvements, while she retains 100% of the savings. These savings were calculated by the Secretary of State as £16,417 across the length of the plan, and later on in this decision we find that reliance can be placed on his methodology in the present context. If cancellation is imposed, Ms Heaney will have had improvements installed at a fifth of the intended price, and achieved in excess of a 500% return on her investment.

106. It was held in the Preliminary Decision that identification of a windfall benefit:

> *80. … must also be relevant [to] sanction, since this will inevitably go to the level and impact of any harm suffered. However, a windfall benefit ought not to operate as an effective bar to a sanction of cancellation, since it can only be one of several potentially relevant factors. In some cases, for example, that the bill payer may have suffered harm of a different nature which may be assessed as outweighing the windfall benefit, or it may be that the seriousness of the breach(es) justify the imposition of a severe sanction, windfall benefit notwithstanding.*

107. While the benefit to the bill payer arising from a sanction falls to be considered in every case, we consider that it will carry less significance in most cases concerning a breach of a qualifying condition. As held by Judge Macmillan, it directly forms part of the calculation of loss. That may be an essential ingredient when calculating a reduction, but the loss in this case has already been established by the consequences of the energy plan no longer being a Green Deal plan. They both stand as "harm of a different nature" and establish the seriousness of breach.

108. Our consideration above answers the issues posed by the Preliminary Decision. On *(iii)* we find that the seriousness of the breach is not answered by the severity of a compliance notice, financial penalty or withdrawal. On *(iv)* and *(v)*, we have reached findings on the level of the harm suffered, and its impact. Substantive loss has been suffered. On *(vi)*, weighing the factors we have identified, we conclude that reduction would offer a wholly inadequate response both in response to the seriousness of the breach, the public interest engaged, and towards remedying the substantive loss and harm suffered by Ms Heaney. Cancellation is the proportionate sanction, even when taking into account the benefits that would accrue to her.

109. We have reached the above conclusions without regard to the wider findings of mis-selling by the Secretary of State.

Issue 4 – If there is a Green Deal plan, was HELMS in breach of its obligations under the Framework Regulations or the Code of Practice?

110. We approach this issue on the alternative basis that there is a Green Deal plan, without regard to our previous finding as to the breach of regulation 30(3).

111. The four breaches of the Code of Practice found by the Secretary of State are set out at paragraph 22. GDFC's opposition to those findings is the same as its opposition to the factual conclusions underlying them, and we reject it on the same basis.

112. Ms Heaney argues five other breaches, set out at Appendix Two of her Amended Reply. In brief summary, these are:

a. A failure to conduct a post-installation EPC in contravention of s.1(5)(b) and s.8(4)(a) of the Act and Annex B, paragraph 84 of the Code of Practice;

b. The production of the December EPC on the mistaken basis that improvements had been installed, in contravention of Annex A, paragraph 7 of the Code of Practice;

c. Failure to inform Ms Heaney in writing as to how and when the instalments payable would be collected from her prepayment meter and the implications if the meter is not regularly topped up, in contravention of Annex B, paragraph 57 of the Code of Practice;

d. Failure to comply with the rule that where the total price of the measures to be installed exceeds £10,000 in total, the provider must ensure that the improver has received at least three quotes from different providers for installation of the proposed improvements, unless the improver gives written confirmation that they are unable or have chosen not to obtain them, in contravention of Annex B, paragraph 30 of the Code of Practice;

e. The guarantee / warranty provided did not comply with the requirement at paragraph 111 of the Code of Practice to allow the relevant compensation caps to increase above a floor of £25,000 as adjusted for inflation.

113. Based on the documentation before the Tribunal, the above breaches may indeed be well-founded (with the exception of (b), given our finding that the December EPC bears no relevance to the energy plan eventually sold to Ms Heaney). Simply leafing through the Code of Practice, so too may other breaches be identifiable. Indeed, during the hearing Mr Streeten and Ms Urell acknowledged that the failure to notify the change of Solar PV configuration (see paragraph 42 above) may have breached the Code of Practice. Nonetheless, no additional breaches were placed before the Secretary of State when he made his decision. While additional sections of the Code of Practice were cited in the complaint, they are met by the four provisions identified by the Secretary of State. To borrow the analogy used by Mr Streeten, there is no need to overload the indictment.

114. The Preliminary Decision confirmed that the Secretary of State is under no investigative duty save as may relate to wider patterns of non-compliance. The additional breaches above have only been raised in these proceedings at a very late stage, and we decline to take them into account as a matter of case management. In any event we agree with the respondents that, when compared with the breaches upon which the Secretary of State's decision was based, they have insufficient gravity to have a material bearing on sanction.

115. By way of summary, we therefore find that the Secretary of State was right to find that HELMS breached the following provisions of the Code of Practice:

> <u>2.7</u> – *A Green Deal Participant or Certification Body must act honestly and fairly and must not do anything which might bring the Green Deal scheme into disrepute. They must not mislead customers whether by act or omission.*
>
> <u>Annex B, paragraph 18</u> – *Where an offer of a Green Deal Plan is made in respect of a domestic property, the Green Deal Provider must discuss with the improver and bill payer, in light of the household's actual energy use estimated in the Green Deal Advice Report, whether –*
>
> > *(a) instalments payable under the Green Deal Plan unlikely to be fully offset by savings on energy bills for the property resulting from installation of the improvements*
> >
> > …
>
> <u>Annex B, paragraph 47A</u> – *Regulation 30 of the Framework Regulations requires a Green Deal Provider to notify the improve her, before a plan is entered into, of the savings estimates, savings., first year instalments and payment period for each improvement. A Green Deal Provider must set this information out in a clear and concise way.*
>
> <u>Annex B, paragraph 54</u> – *The Green Deal Provider must notify the improver and the bill payer that the instalments payable under the Green Deal Plan will be added to the electricity bill for the property and discuss with them the impact the Green Deal improvements could have on the energy bills for the property. This information may be provided to the bill payer in writing but, where this is done, the Green Deal Provider must: (a) advise the bill payer how to ask the Green Deal Provider for further information and explanation; and (b) provide the bill payer with an opportunity to ask questions about the Green Deal Plan.*

Issue 5 – What is the effective date of the sanction in Ms Heaney's case?

116. The parties are now agreed that this is 19 March 2019, the date of the complaint. This is consistent with the definition of 'effective date' at regulation 51 of the Framework Regulations.

Issue 6 – Applying the principles established by the determination of the preliminary issues, was the Secretary of State's decision on the particular facts of this case to impose a reduction correct?

Issue 7 – If the answer to Issue 6 is positive, was the methodology used by the Secretary of State to calculate the level of the reduction (as set out in the Sanction Notice) correct?

Issue 8 – If the answer to either Issue 6 or Issue 7 is negative, what is the appropriate sanction / level of reduction in this case?

117. These issues are necessarily approached on the hypothetical basis that the findings of breach are limited to those in the Secretary of State's decision, rather than breach of a qualifying condition. The parties all thought it appropriate to address the three issues together, and we have already touched on many of their arguments in relation to Issue 3.

Ms Heaney's submissions

118. Ms Heaney, supported by the ECC, obviously supports the Secretary of State's decision to impose a sanction, but argues that cancellation or a greater level of reduction would have been more appropriate. Her case can be divided into three challenges to the Secretary of State's decision. First, she argues that the Secretary of State wrongly attempted to impose a sanction that was proportionate between Ms Heaney and GDFC, instead of the proportionality of the sanction as against the severity of the breach and harm suffered. It should be noted that the Preliminary Decision has already ruled in Ms Heaney's favour on this point. Second, she argues that the Secretary of State's methodology was flawed in respect of his calculation of savings. Mr Wilcox added more detail on this, arguing that the Secretary of State is wrong to use pricing data from the time the complaint was considered rather than at the date of breach. Third, she argues that the Secretary of State's methodology does not even accomplish its stated goal. It purports to put Ms Heaney in the position she would have been in had the breaches not occurred, but fails to recognise that in her case the breaches included falsely representing the improvements as being paid for under a government grant rather than by a five figure loan repayable with interest. On a 30% reduction she will still pay thousands of pounds for improvements that she would never have installed had the mis-selling not occurred. Fourth, the Secretary of State's methodology only looks at the saving figures without taking account of the other forms of harm Ms Heaney suffered. Further mention in this respect was made of the assignment of FIT payment to a third party, meaning that Ms Heaney did not benefit. In summary, Ms Heaney argued that only cancellation provided a proportionate remedy for someone who was – to all intents and purposes – tricked into taking out a loan.

119. Many of ECC's arguments on sanction have already been addressed. Mr Wilcox did take some technical issues with the use of Energy Savings Trust and Treasury figures. We do not need to set these out in detail, for the reasons we give below.

GDFC's submissions

120. GDFC argues that no sanction ought to have been imposed. Its written submissions unequivocally argue that loss (or harm) for the purpose of assessing sanction can only be pecuniary in nature. Ms Urell drew back from such absolutism, acknowledging that other types of harm may exist in some cases. She did maintain that on the present facts there was no other identifiable harm upon which a reduction could possibly be based. She cautioned against over-reliance on the guidance, which unlike the regulations seemed to conflate the fact of a breach with the fact of loss. In support she cited Association of British Travel Agents Ltd v Civil Aviation Authority [2006] EWCA Civ 1356 and R. (L) v Commissioner of Police of the Metropolis [2007] EWCA Civ 168 at [36], and observed that the Preliminary Decision had already found the guidance to be wrong in one respect.

121. Ms Urell next raised an issue with two paragraphs of the Preliminary Decision. At paragraph 13 the increase in Ms Heaney's electricity bills is presented as common ground, and at paragraph 66 Ms Urell is recorded as acknowledging that a shortfall funding arrangement could be a relevant factor for consideration. This was a misunderstanding. Higher bills had never been conceded by GDFC, and she had argued that shortfall funding arrangements were *not* relevant. As a general matter, such misunderstandings are best raised with the judge concerned at the earliest opportunity. They can either be corrected under the slip rule or incorporated into a revised set of reasons. We do recognise, however, that this is not always practicable. In this case we happily record those corrections, and do not treat those matters as being conceded for the purposes of our decision. On those topics, Ms Urell's present case is that no proper analysis has been done as to whether Ms Heaney's bills had actually increased in real terms, and that the FIT assignment was a separate arrangement with a third party that was irrelevant to the present exercise.

122. As to Ms Heaney's other complaints, Ms Urell argued that no evidence had been adduced of her claimed financial difficulties such as reliance on credit cards and having to seek loans from family members. Nor had some of her initial complaints, such as adverse consequences for her mortgage and home insurance, been substantiated – the Secretary of State had determined that Ms Heaney was better off for having entered into the plan. The Preliminary Decision had held that substantive loss was measured by harm, and none could be established in the present appeal. There was no proportionate basis upon which Ms Heaney should receive yet further financial benefit. Other appeals would turn on their own facts.

123. On pricing methodology, Ms Urell argued that while GDFC did not dispute the choice of data used by the Secretary of State, it would still describe it as generous to complainants. The Energy Savings Trust model assumes static pricing whereas prices tend to rise over time, as vividly shown this year. The Secretary of State had taken the lower end of expected savings in respect of Solar PV. GDFC nonetheless supported the 'matching' approach overall, but Ms Urell argued that it was turned on its head

by simply then imposing a blanket reduction of 30% when the sums came out in the bill payer's favour. Logic stated that in those circumstances there should be no penalty at all.

The Secretary of State's submissions

124. Mr Streeten defended the Secretary of State's methodology and argued that each of the six considerations set out in the Preliminary Decision were reflected in the Sanction Notice. The breaches had been identified, both in this individual case and by HELMS on other occasions. The overall breaches had been assessed as very severe, with findings that Ms Heaney had suffered financial difficulty and distress. The Secretary of State had nonetheless taken a panoptic view, concluding that while the breaches were undoubtedly severe, their nature and impact were not at the highest level of severity. Ms Heaney had intended to enter into some sort of plan, had benefited from having the measures installed, and was continuing to benefit from them. It was consistent with the outcome of other cases for reduction to be imposed rather than sanction. This, Mr Streeten argued, demonstrated that seriousness had been fully considered and then calibrated against the context.

125. Nothing in the Preliminary Decision, Mr Streeten argued, justified the detailed calculations proposed by Mr Wilcox. It instead required the assessment of severity to be followed by measuring the harm suffered by the bill payer and its impact, first to decide whether 'substantive loss' had been suffered and second to determine proportionality. That stepped proportionality exercise was carefully undertaken in the Sanction Notice, to decide that while cancellation or reduction could be justified, the more proportionate outcome was reduction. The Preliminary Decision supported the relevance assigned to the benefit Ms Heaney had received, and would continue to receive, from the improvements.

126. Paragraph 39 of the Sanction Notice reads:

> *39. The Secretary of State has also considered the impact of the sanction on GDFC Assets and notes the need to ensure that GDFC Assets is not disproportionately penalised for HELMS' mis-selling.*

Mr Streeten acknowledged the tension between this paragraph and the ruling in the Preliminary Decision that the impact of the sanction on GDFC Assets would only be relevant in exceptional circumstances. Proper consideration of the overall Sanction Notice, however, showed that this factor was unlikely to have been material in the decision to impose reduction over cancellation.

127. On pricing savings, Mr Streeten submitted that Mr Wilcox's position was based on the false premise that the overall object was to precisely undo the consequences of the mis-selling. It was, on the contrary, a broad exercise to determine the scale of the harm suffered in terms of financial impact and provide redress. Considering up to date prices was unobjectionable, and produced a more reliable assessment of the harm suffered than if only prices at the date of breach were considered. The tools and data used were the results of an evaluative judgement by the Secretary of State which balances the need to avoid devoting disproportionate time to each case with the need to ensure adequate redress is provided to consumers. The same was true for the

application of the 30% figure. It provided a principled and consistent approach, being sufficiently large as to reliably meet the golden rule and address the harm suffered as well as the public interest factors engaged. It nonetheless remained proportionate to the overall circumstances. Importantly, its ease of application met the Secretary of State's obligation to apply suitable public resources to running the scheme. Mr Streeten argued that this would be heavily undermined by the "overly hypercritical analysis of household bills and demands" required on Mr Wilcox's case, when those figures would vary greatly between cases and be subject to future dramatic change over the life of the plan.

Consideration

128. The Sanctions Guidance reads as follows:

2.8 Substantive Loss

In some cases, the Secretary of State will need to consider, before imposing a sanction, whether the bill payer has suffered substantive loss. The Secretary of State is likely to consider that a customer has suffered substantive loss where the customer has suffered harm, and is likely to take into account both:

i. the level of harm suffered by the customer; and

ii. the impact of that harm on the customer.

Harm may be:

- *significant (for example financial loss);*
- *moderate (for example, the bill payer was inconvenienced in a minor way); or*
- *minor (for example the bill payer did not notice the breach).*

In assessing the impact of the harm, the Secretary of State will consider any subsequent effects on the customer, for example the ability of a customer to meet other financial obligations. The fact that the complainant did not at first notice the breach does not necessarily mean that the harm suffered was not significant, once discovered.

129. This is wrong, says GDFC, arguing that loss will almost always mean pecuniary loss. We agree with Ms Urell that the Sanctions Guidance is no aid to statutory interpretation. We instead consider its value to be that such documents are "…designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained" – Tesco Stores Ltd v Dundee City Council (Scotland) [2012] UKSC 13. Its relevance in these proceedings, applying the principles already identified at paragraph 29 above, is that the Tribunal affords proper weight to those benefits and to the guidance having been drafted by the Secretary of State.

130. Insofar as is necessary, given the Preliminary Decision, we reject GDFC's argument. If the Framework Regulations had intended to constrain the concept of loss in that way, this would have been specified. In a different context the Framework

Regulations provide a separate remedy of 'compensation', which does have a fixed means of calculation. Breaches of the Code of Practice may have no effect, or a very minor effect, on bill payers. Yet if they are repeated then the Secretary of State may wish to impose, for example, a compliance notice. The purpose of requiring 'substantive loss' is to exclude such cases from the more serious sanctions of reduction and cancellation. We agree with the way in which the issue is dealt with in the Sanctions Guidance, subject to the Preliminary Decision.

131. We also reject GDFC's case that shortfall funding arrangements will never be relevant to proportionality. While not an agreement directly forming part of the Green Deal plan, the provider's role in introducing the improver to it, the clarity and accuracy of the explanation as to how the plan is financed overall, any undisclosed financial incentive, its effect on savings all fall to be considered as matters that may mitigate or aggravate a wider set of circumstances. It has, indirectly at least, formed part of the FOS assessment and Sanctions Notice in this case and we can see nothing in the statutory scheme to rule this out.

132. On Ms Heaney's personal circumstances, we again consider GDFC's complaints of evidential insufficiency to require an over-forensic approach on the part of the Secretary of State. The level of evidence and scrutiny to apply in individual cases is a matter for him, provided that the system works to fulfil its purpose overall. That point echoes Mr Streeten's submissions on the appropriate way in which to calculate savings. We agree with him that, contrary to Mr Wilcox's position, the way in which the Secretary of State calculates savings strikes an appropriate balance between convenience and ensuring that harm is sufficiently measured for the purposes of sanction. The precise loss is not, or at least should not be, determinative of the reduction figure. We likewise see no objection to using up to date pricing information.

133. We also agree that in many cases a fixed percentage reduction will be appropriate, for the reasons put forward by Mr Streeten. Contrary to GDFC's submissions, even where there will be no financial gain over the life of the plan the Secretary of State is still entitled to impose a reduction to give effect to the public interest and deterrence factors already identified. This also addresses other types of harm that will have been suffered by the bill payer. Failure to recognise these factors has the potential to legitimise incidents of mis-selling wherever the consumer ends up better off overall. on GDFC's case, it wrongly focuses on just the end net result. The same can be said of many investments, a high return in several years time will not necessarily be worth missing other comforts and opportunities in the meantime to pay instalments. A person is entitled not to have that choice forced upon them. If the consequences of remedying that include additional benefit accruing to the victim of the mis-selling, then this is not inherently objectionable. As found in the Preliminary Decision, 'windfall' is relevant insofar as it may show that a sanction has addressed harm the bill payer may have suffered.

134. Our approval of a percentage reduction is subject to some caveats. First, it is not found in the Sanctions Guidance. We are not told of the circumstances in which it is applied. The Secretary of State's case could be read as imposing a 30% reduction in every case where that figure is not achieved by reducing instalments to achieve the golden rule. While predictable and consistent, this risks failing to recognise the least

and the most severe breaches. It would also fail to properly address the harm suffered by someone whose loan was reduced by, say, 28% following the matching exercise. It is difficult to see how the extra 2% reduction could provide proper redress for the other types of harm and fulfil the public interest engaged. While any change to guidance is a matter for the Secretary of State, some form of indicative guidance on appropriate reduction figures would have strengthened his case in this appeal.

135. Second, there is the Secretary of State's decision to determine a proportionate reduction not only by reference to the impact on GDFC, but by reference to GDFC not being guilty of the initial mis-selling. For the reasons already given in this decision and the Preliminary Decision, we see no lawful basis for either. We are unable to accept Mr Streeten's reassurance as to its materiality, given its prominence in the Secretary of State's reasoning.

Conclusion

136. On the continuing hypothetical basis, of course, that Ms Heaney's energy plan remains a Green Deal plan, we take all the circumstances into account to decide on sanction.

137. We have given very careful thought as to whether cancellation would have been the only appropriate sanction. The Preliminary Decision held that intention to enter into a Green New deal was not a qualifying condition. But that legal point does not address the obvious harm suffered by a person who, like Ms Heaney, was subjected to high pressure sales tactics that tricked her into taking out a loan for improvements many times greater than the £1,000 she thought was the total price. The Secretary of State was certainly right to describe the breach as very severe. The harm suffered by Ms Heaney, financial and otherwise, has already been described.

138. There are only two countervailing factors. First is that the improvements are not going anywhere and Ms Heaney will continue to save energy from them – the 'windfall'. Following the Preliminary Decision, we place little weight on this. Second is the weight to be attached to the Secretary of State's view on sanction. But the Secretary of State's decision in this case is vitiated by the reliance placed on both the effect of the sanction on GDFC in the absence of exceptional circumstances, and on the 'windfall' benefit that would accrue to Ms Heaney. The decision's assessment of proportionality cannot withstand Judge Macmillan's ruling on those preliminary issues. But for that, we would have confirmed the Secretary of State's decision.

139. On disposal, we would have remitted the appeal to the Secretary of State to reconsider the correct sanction in light of this decision. This would have been with great reluctance given the lengthy delays already suffered by Ms Heaney, but in the absence of more detailed indicative sanctions guidance we consider it appropriate for the initial decision to be taken by the Secretary of State. We would have nonetheless expected the new decision to be speedily taken, and expedited any appeal to this Tribunal so that it could be dealt with in the shortest possible timeframe.

Signed	Date:
Judge Neville	16 November 2022

- ANNEX -

- PRELIMINARY DECISION DATED 29.12.21 -

First-tier Tribunal
General Regulatory Chamber
(Environment)

Appeal Reference: NV/2020/0030

Heard by CVP on 24 June 2021

Before

JUDGE MOIRA MACMILLAN

Between

MS CAROL HEANEY

Appellant

and

THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

First Respondent

and

GDFC ASSETS LIMITED

Second Respondent

and

ENERGY CONSUMERS COMMISSIONER

Intervener

Representation: Ms Carol Heaney represented herself
Mr Charles Streeten – First Respondent
Ms Kate Urell – Second Respondent
Mr Alistair Wilcox – Intervener

DECISION ON PRELIMINARY ISSUE

A) Background

1) This case is one of several appeals currently before the Tribunal against a sanction imposed by the Secretary of State following a finding that a green deal plan has been mis-sold to an energy consumer.

2) The Secretary of State and GDFC Assets Ltd Respondents to each of these appeals. The East Ayrshire Citizen's Advice Bureau is providing support to some of the appellants, including to Ms Heaney who is otherwise representing herself.

3) The Energy Consumers Commission ('the ECC') was made an intervener in this appeal in Case Management Directions dated 24 May 2021. This was following an application by Ms Heaney to rely on Mr Wilcox of the ECC as an expert witness. This application was refused on the grounds that Mr Wilcox's statement dealt largely with matters of law. Ms Heaney thereafter applied for Mr Wilcox's statement to be adapted so as to allow the ECC to become an *amicus curiae.* On 24 May 2021 I decided to make the ECC an intervener, which is the Tribunal's usual practice in relation to 3rd parties who have an interest in the outcome of an appeal, rather than a direct interest in the appeal itself.

4) The Parties have asked the Tribunal to determine a number of preliminary legal issues, all of which arise to some extent in the other green deal appeals waiting to be heard. For reasons of case progression these preliminary issues have been dealt with under rule 5(3)(b) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, rather than under rule 18. As a consequence, this Ruling only binds the Parties to this appeal.

5) Following an earlier Case Management Hearing, a Preliminary Issues Hearing was held on 24 June 2021. Subsequent Directions allowed the Parties to serve additional material until 19 July 2021. Mr Wilcox provided further submissions. Ms Urell and Mr Streeten sent further authorities to the Tribunal but these were unaccompanied by any further submissions.

6) Since then other professional commitments have resulted in undue delay to this Ruling being issued for which I can only apologise. I am grateful to the Parties for their submissions, all of have considered, and for their assistance both prior to and during the Preliminary Issues Hearing.

7) I have afforded appropriate weight to the Secretary of States views in accordance with the principle identified by the Court of Appeal in *R (Hope and Glory Public House Ltd v City of Westminster Magistrates' Court [2011] EWCA Civ 31*, approved by the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] 1 WLR 4799*. This means that I have paid "careful attention" to the reasons given by the Secretary of State as the original decision-maker, bearing in mind that Parliament has entrusted him with making such decisions.

B) Legal Framework

7) Pursuant to s. 1(2) of the Energy Act 2011 ('the Act'), an 'energy plan' is "*an arrangement made by the occupier or owner of a property for a person to make energy efficiency improvements to the property*". This appeal concerns a type of energy plan known as a 'green deal plan', the requirements of which are set out in Part 1, Chapter 1 of the Act.

8) For current purposes, relevant features of the Green Deal Scheme are as follows:

i. s. 1(3) of the Act distinguishes a green deal plan from other energy plans in the following terms:

(3) An energy plan is a green deal plan if—
(a) the energy efficiency improvements are to be paid for wholly or partly in instalments, and
(b) all of the requirements listed in paragraphs (a) to (e) of subsection (4) are met in relation to the plan at the time when it is made.

ii. ss. 2(4) - 2(6) describe the type of energy efficiency improvements that may be the subject of a green deal plan. These include:

a) measures improving the efficient use of, or reducing the consumption of: electricity; gas conveyed through pipes; or any other specified source of energy;

b) measures for increasing the amount of electricity generated, or heat produced, through microgeneration, (which in this context means using technologies such as solar panels, and is subject to a limit on maximum capacity[1]), or through low-emissions sources or technologies; and

c) measures installed for the purpose of supplying energy generated by or produced in association with specified electricity generating processes.[2]

iii. The occupier or owner who makes the arrangement for a green deal plan is the "improver" and the person who makes the improvements is a "green deal provider" (s. 2(2)).

iv. A significant feature of a green deal plan is that a green deal provider offers a loan towards the cost of the energy efficiency improvements ('Green Deal Finance') and arranges for the installation of relevant equipment at the improver's property.

[1] See s. 2(4) Energy Act 2011 and s. 26 Climate Change and Sustainable Energy Act 2006.
[2] See s. 64(1) Electricity Act 1989.

v. The loan is repaid by the bill payer by way of a charge being added to energy bills, or by small deductions being taken from pre-payment meters. The "bill payer" is the person who, at any specific time, is liable to pay the energy bills for the property.[3]

vi. The "golden rule" of a green deal plan is that the first year repayment instalments must not exceed the estimated first year savings.[4]

vii. Some energy efficiency improvements, such as the installation of solar panels, result in the generation of renewable energy by the consumer. This may result in the consumer receiving a payment from the energy provider, known as the Feed-in Tariff ('the FIT'). The two potential elements of a FIT are:

a) a payment received by the consumer because renewable energy has been generated (which manifests as a lower tariff per unit of energy), and

b) a payment received because extra units of electricity have been generated and not used by the bill payer, and these extra units have been sold back to the energy provider.

viii. s.3 requires the Secretary of State to issue Framework Regulations, establishing a scheme under which the conduct of green deal participants (assessors, providers and installers) is regulated. These are the Green Deal Framework (Disclosure, Acknowledgement, Redress etc) Regulations 2012 ('the Regulations').

ix. Conduct of registered green deal participants is also regulated through a Code of Practice, compliance with which is a condition of continued registration (s.3(3)(d) & (e); Regulation 10).

x. The Regulations allow the Secretary of State to impose various sanctions where a party to a green deal plan has breached 'a relevant requirement'. Regulation 67 provides such a power where a green deal provider is found either to have committed a severe breach of a relevant requirement, or to have committed a series of breaches. The available sanctions are set out in regulation 67(2) & (3):

"(2) The Secretary of State may impose on the green deal provider one or more of—

(a) a compliance notice;
(b) a financial penalty;
(c) withdrawal.

(3) Where the Secretary of State is satisfied that the bill payer has suffered or is likely to suffer substantive loss, the Secretary of State may, in addition to any

[3] ss. 1(6)(a) and 2(3) Energy Act 2011
[4] Regulation 30 The Green Deal Framework (Disclosure, Acknowledgement, Redress etc) Regulations 2012

sanction imposed under paragraph (2), impose cancellation or reduction on the relevant person."

xi. A breach of a "relevant requirement" by a green deal provider is defined in regulation 63 as a breach of the requirements of regulations 24 to 26 or 42B, or a failure to comply with a sanction other than a withdrawal.

xii. Regulation 78 sets out the rules that apply to sanction notices. Regulation 79 contains the guidance as to how the appropriate sanction is to be arrived at:

"Any sanction imposed under this chapter must be proportionate to the breach in relation to which it is imposed."

xiii. Regulation 87 provides any person, directly affected by a decision of the Secretary of State to impose or not to impose a sanction, with a right of appeal to this Tribunal. The Tribunal's powers are set out in regulation 87(4):

The Tribunal may—

(a) in relation to a decision under Part 3 or 8—
(i) withdraw, confirm or vary the decision;
(ii) remit the decision to the Secretary of State;

(b) in relation to a decision whether to impose a sanction under Part 8, impose a different sanction or take different action.

C) Factual background

9) Ms Heaney was sold a Green Deal Plan by Home Energy and Lifestyle Management Limited ('HELMS') in 2014. Improvements under the plan included the installation of: solar panels; a gas boiler; external wall insulation; and under-floor insulation. The improvements were paid for by two means:

i) Ms Heaney entered into a Green Deal Finance arrangement with HELMS. Thereafter HELMS assigned the benefit of Ms Heaney's loan repayments to another company - The Green Deal Finance Company ('GDFC') - in return for a lump sum. GDFC Assets Ltd is a subsidiary of GDFC and is the company to which the loan repayments are now due.

ii) Ms Heaney also entered into an arrangement, known as a FIT transfer option, with PV Solar Investments Ltd ('PVSI'). In essence she agreed to transfer her FIT to PVSI in return for PVSI paying the balance of the cost of installation of her solar panels.

10) The sanction decision under appeal relates solely to Ms Heaney's agreement with HELMS. GDFC Assets Ltd, as the current payee under this credit agreement, is a 'relevant person' for the purposes of the sanction decision, pursuant to regulations 51 and 67(3).

This means that the Secretary of State may impose a sanction of cancellation or reduction upon this company.

11) The Secretary of State has no power under the Regulations to make a sanction decision in respect of Ms Heaney's agreement with PVSI, and this aspect of her energy efficiency arrangement is not before the Tribunal.

12) Ms Heaney's position is that she was mis-sold the green deal plan by HELMS, because she was unaware that by entering into the agreement she was taking out a loan. The Secretary of State has accepted that Ms Heaney's plan was mis-sold and has found in addition that she would not have made the energy efficiency improvements to her home had she not been misled by HELMS about the arrangement she was entering into. GDFC does not dispute these findings, but on the basis that it is not in a position to do so due to the difficulty it faces in obtaining relevant evidence.

13) It is not disputed between the Parties that, although Ms Heaney was told she would see a reduction in her energy bills under her green deal plan, in reality her energy bills have increased as a consequence of the dual arrangements she entered in to.

14) The regulation 67 sanction decision made in respect of Ms Heaney's complaint was one of reduction. That decision was reached following a determination by the Secretary of State that Ms Heaney had received some benefit under her green deal plan. The Secretary of State's explanation of the sanction decision is that it intended to put Ms Heaney in the position she would have been in, had the correct estimated savings figures been used when her plan was drawn up.

15) Ms Heaney's substantive grounds of appeal will be considered at a later hearing. This Ruling determines on a preliminary basis the questions that follow.

D) What is a green deal plan?

16) The Parties describe this issue as being largely uncontroversial. They agree that a green deal plan is defined in the legislation as an energy plan that meets the requirements of s.1(3) &(4)(a)-(e), which must be read with ss. 4 & 5, and with the requirements of regulations 30 – 36 when read with regulation 29.

17) ss. 1(4)(c) & (d) introduce a legal requirement that the conditions specified in ss. 4 & 5 (respectively) are met.

   i) s. 4 specifies 8 conditions relating to the assessment of the property being improved, and allows for additional conditions to be specified in the Regulations. For example, the 3rd condition, set out at s.4(4), is that "*the green deal provider has given an estimate, on the basis specified in the framework regulations, of the savings likely to be made on the energy bills for the property if the improvements are carried out.*"

ii) s. 5 specifies 3 additional conditions relating to the terms of a green deal plan, and again allows for additional conditions to be specified in the Regulation. For example, the 2nd condition includes, at s. 5(3)(c), a prohibition on the inclusion in a green deal plan of *"a term providing for money to be advanced to the improver (except in accordance with the framework regulations or provision made under them)."*

iii) In addition to the requirements of s.1(3) &(4)(a)-(e), regulation 29 states that *"[a]n energy plan is not a green deal plan unless the conditions in regulations 30 to 36 are met."*

(a) Regulation 30 sets out the 'golden rule' by reference to the conditions in s. 4;
(b) Regulation 31 stipulates that the green deal plan must not provide for a payment period that ends after the savings period is expected to end;
(c) Regulation 32 requires a fixed interest rate to be charged for the whole of the payment period;
(d) Regulation 33 limits the circumstances in which the amount of the improvement-specific instalments may increase during the payment period.
(e) Regulation 34 prohibits a green deal plan from restricting a bill payer's ability to change gas or electricity supplier;
(f) Regulation 35 requires the green deal provider to agree to guarantee the functioning of the improvements and to repair damage caused to the property by the improvements; and
(g) Regulation 36 requires the improver to provide written consent from the current or a subsequent bill payer, if that person is not the improver, to paying instalments under the plan.

<u>Submissions</u>

18) Ms Heaney submits that, if any one of these requirements are "in breach", then the agreement will be an energy plan rather than a green deal plan. The other Parties put the point slightly differently, submitting that all relevant statutory requirements must be complied with in order for an energy plan to be a green deal plan.

19) Mr Wilcox goes further, submitting that requirements of s.1(3) &(4)(a)-(e), read with ss. 4 & 5, and regulations 30 – 36, read with regulation 29, must also be read with s. 2 and with regulation 26. In relation to the latter, in his view there is a requirement that the parties to an energy plan must intend to enter into a green deal plan. Regulation 26 provides as follows:

26.— Ensuring energy plans are green deal plans and that instalments can be collected on energy bills

(1) Where a green deal provider is to enter into an energy plan which the parties to it intend to be a green deal plan, the provider must ensure that the following are complied with—

(a) the requirements in section 1(4)(a), (b) and (e); and

(b) the conditions set out in section 4(2) to (9) and 5(2) to (4) and regulations 27, 28 and 30 to 36.

(2) Before the first instalment under a green deal plan is collected by the relevant energy supplier, the green deal provider in respect of that plan must ensure that—
(a) the improvements have been installed in accordance with section 7; and
(b) the conditions in section 8(2) and (4) have been met.

20) Regulation 27 sets out the basis upon which a green deal provider must estimate likely energy bill savings and regulation 28 the basis upon which it must estimate the likely savings period.

21) Mr Wilcox's position is that the classification of an energy plan as green deal plan requires proper scrutiny of the documents relied upon as evidence that necessary conditions have been met. He cites, as the starting point, the need for scrutiny of the Energy Performance Certificate ('EPC') which must be valid when the energy plan is agreed, and which he submits may become invalidated within a relatively short period of time. He contends that there should also be scrutiny of the equipment installed, since a change of installation may result in modelled savings not being achieved, thereby breaching the regulation 30 'golden rule'.

22) Mr Wilcox is critical of the Secretary of State for having failed to scrutinise relevant documents and equipment when deciding whether to impose a sanction. He submits that the Secretary of State has proceeded in each case on an assumption that the energy plan before him can be classified as a green deal plan.

23) Finally, Mr Wilcox contends that any of the qualifying conditions relating to the assessment process must also be read with regulation 7(b). As a whole, regulation 7 provides as follows:

*"**7. Definitions of qualifying assessment under section 3(9)***

For the purposes of section 3(9) and these Regulations, an energy efficiency assessment of a property is a qualifying assessment where it is carried out—
(a) by a green deal assessor in accordance with the assessor services specification; and
(b) in accordance with any provisions of the code of practice which apply to qualifying assessments."

24) Mr Streeten, on behalf of the Secretary of State, agrees that a failure to comply with any of the requirements of s.1(3) &(4)(a)-(e), ss. 4 & 5, or regulations 30 – 36, would prevent an energy plan from being classified as a green deal plan. His position is that all legislative requirements must be met, submitting that a green deal plan is analogous with an agreement under s. 106 of the Town and Country Planning Act 1990, since both create obligations that are binding on successors. In the case of a green deal plan, this is because

the obligation to pay the instalments under the plan becomes binding upon successive bill payers[5].

25) Mr Streeten relies on *Southampton City Council v Hallyard Ltd [2008] EWHC 916* in which Morgan J held that that all formal requirements of s. 106 must be met in order to create planning obligations within that statutory scheme:

> *"77. The ninth question is the consequence of the formal requirements of s.106 not having been complied with. Subsection (9) states that a planning obligation may not be entered into except by an instrument which states what the obligor's interest is in the relevant land. I have held that the Custom House agreement does not state what Cindan's interest is in the St Mary's site. It therefore seems to follow that the obligations placed on Cindan are not planning obligations and the City Council does not have the benefit of s.106 applying to them. The only way as I see it that one could avoid that result, would be to say that the requirements of subs.(9) are not mandatory but are directory only. The language of subs.(9) is not a promising start for a submission of that kind, and indeed, that submission was not advanced.*
>
> *78. In these circumstances, my conclusion is that the obligations imposed on Cindan by the Custom House agreement are not planning obligations within s.106 . It follows that s.106(3) , which makes a planning obligation enforceable against persons deriving title from the obligor, cannot be relied upon by the City Council. Spelling that out, the City Council cannot rely on s.106(3) to say that Cindan's obligations are binding on Hallyard or on AIB."*

26) Although Mr Streeten's position is that all legislative requirements for a green deal plan must be met, he notes that the language of the 'golden rule' in regulation 30 refers to estimated, rather than actual, savings. He submits that a wrong prediction of first year savings would not necessarily be a bar to an energy plan being classified as a green deal plan, although it a substantial error leading to an inaccurate estimate might be a relevant consideration.

27) In relation to the EPC, Mr Streeten does not accept that these documents only remain valid until superseded, and submits that there is no legislative support for such a proposition.

28) Ms Urell, on behalf of GDFC Assets Ltd, agrees with the Secretary of State in terms of the legislative conditions for a green deal plan, but does not agree that a breach of any of these requirements automatically invalidates a plan as a green deal plan. She submits that the issue of whether an identified defect in the green deal process results in a qualifying condition not being met must be a question of fact and degree that is best determined on the facts of each case.

29) Ms Urell describes the requirements of the Act as 'cascading' into the Regulations and Code of Practice, and urges caution when determining which must be complied when

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[5] See s. 1(7)

identifying the qualifying conditions for a green deal plan. She notes that the Code of Practice, in particular, has a minutiae of restrictive provisions, not all of which equate to qualifying conditions.

30) Ms Urell disagrees with Mr Wilcox that regulation 26 should be read so that, if the parties do not intend to enter into a green deal plan, then no such plan exists. She submits that a breach of regulation 26 is a breach of a relevant requirement, pursuant to regulation 63, rather than a breach of a qualifying condition. Ms Urell also questions the extent to which the recommended improvements need to have been reflected in the paperwork and equipment installed, in order for an energy plan to be classified as a green deal plan. She submits that this is likely to be a technical matter best determined on a case by case basis.

Ruling

Legislative requirements

31) Having considered these submissions and the relevant legislative provisions I conclude as follows:

i) For an energy plan to be classified a green deal plan it must meet the requirements set out in s.1(3) & (4)(a)-(e) of the Act, which must be read with ss. 4 & 5, and with regulations 30 – 36 read with regulation 29. For reasons of clarity I will refer to these requirements collectively as 'legislative requirements' and individually as 'qualifying conditions'.

ii) Accordingly, there are a number of qualifying conditions that an energy plan must meet.

(a) It must relate to qualifying energy efficiency improvements that are made to a property, which are to be paid for wholly or in part by instalments (s.1(3)(a)).

(b) It must also, at the time it is made, meet all of the requirements of s.1(4)(a) – (e). The view that all requirements must be met is supported both by the unambiguous language of s. 1(3)(b), and by the analogous decision of Morgan J in *Southampton City Council*.

(c) The language of ss. 1(4)(c) & (d) makes clear that the energy plan must also meet all the conditions set out in ss. 4 & 5.

(d) Further, since s. 1(4)(c) refers to a requirement that the "*conditions mentioned in section 4 as to assessment of the property and other matters*" (emphasis added) are met then, pursuant to s. 4(1)(b), this requirement also extends to *"such other conditions… as are specified in the framework regulations."*

(e) Regulation 29 specifies additional ('other') conditions as being those set out in regulations 30 – 36.

iii) I further conclude that an energy plan must also meet the requirements of regulations 27 & 28 in order to be classified as a green deal plan. This is because:

(a) s. 4(4) stipulates a condition whereby the estimate of likely savings under a green deal plan must be made on the basis specified in the Regulations. Regulation 27 specifies the applicable basis, and a footnote to regulation 27(1) confirms that "[t]*his is the estimate that is required to be made under section 4(4) of the Act."*

(b) Similarly, s. 4(5) stipulates a condition whereby the estimate of the savings period must be made on the basis set out in the Regulations, and regulation 28 specifies the applicable basis. A footnote to regulation 28(1) confirms that *"[t]his is the estimate that is required to be made under section 4(5) of the Act."*

(c) Further, the Explanatory Memorandum to the Regulations states (emphasis added):

"Regulations 27 and 28 set out requirements regarding the estimates which must be made, under section 4(4) and 4(5) of the Act, by the green deal provider if an energy plan is to be a green deal plan, being estimates of the likely energy bill savings after energy efficiency improvements are installed under a plan and estimates of the period over which those savings are likely to be made."

(d) Finally, paragraph 29 of Annex B of the 4th Edition of the Code of Practice contains the following in relation to regulation 28:

"The Framework Regulations set out conditions restricting the amount of the instalments that can be charged under a Green Deal Plan (see in particular regulations 28 and 30 and regulation 33). These conditions must always be complied with by Green Deal Providers, and failure to do so will mean that an arrangement does not qualify as a Green Deal Plan."

iv) I note Ms Urell's concerns regarding the cascading nature of the legislative requirements in this context, and the risk of an inadvertent expansion of qualifying conditions. However, in the context of noncompliance with regulations 27 & 28, the 'cascading' intention of the legislation is clear. A green deal provider who has failed to give an estimate on the basis specified in regulation 27 (or, alternatively, in regulation 28) will necessarily have failed to comply with the qualifying condition set out in s. 4(4) (or, alternatively, s. 4(5)). As a consequence, they will not have fulfilled the requirements of s. 1(4)(c) (or, alternatively, of s. 1(4)(d)) and, pursuant to s.1(3)(b), the energy plan will not be a green deal plan.

v) The question of whether a relevant estimate has complied with the requirements of regulations 27 and 28 is one that must be determined as a matter of fact on a case by case basis, having careful regard to the language of the regulations. It was suggested by the Secretary of State in submissions relating to the 'golden rule'

that, notwithstanding the fact that a green deal provider is only required to provide an 'estimate' of first year savings, the identification of a substantial issue which led to an inaccurate estimate might be a relevant consideration when determining compliance. In my view such questions are best determined in a factual, rather than a theoretical, context.

S. 2, regulation 7(b) and regulation 26

vi) I am not persuaded by Mr Wilcox's argument that s.1(3) & (4)(a)-(e) must also be read with s. 2, regulation 26 or regulation 7(b), for the following reasons:

(a) s.2 provides an explanation of some of the terms used in the green deal legislation. Some of these terms appear in the legislative requirements. However, although s. 2 assists in the interpretation of some qualifying conditions, it does not substantially add to them. Although a minor point, I am satisfied that the legislative requirements (ie those that flow from ss. 1(3) & (4)(a) – (e)) need not be described as being 'read with' s.2 other than as a definition clause.

(b) Having considered the language of regulation 26, I conclude that its main purpose is to ensure that the green deal provider, rather than the improver, is responsible for ensuring that an energy plan meets the legislative requirements for classification a green deal plan, where that is the intended outcome.[6] There is no obvious intention to create an additional qualifying condition relating to the intent of the parties, although this may be a legal requirement for other reasons outside the Tribunal's jurisdiction. Indeed, given the complexity of the legislative requirements, a qualifying condition relating to the intent of the improver would raise difficult issues in terms of what they understood a green deal plan to be.

(c) The suggestion that the requirements of regulation 26 should be read as additional qualifying conditions confuses the 'legislative requirements' (that flow from ss. 1(3) & (4)(a) - (e)) with the 'relevant requirements' (identified in regulation 63), a breach of which may lead to a sanction being imposed.

(d) There cannot be a breach of a 'relevant requirement' of a green deal plan unless there is first an energy plan that can be classified as a green deal plan. It follows that the reference in regulation 63(d) to a breach of a relevant requirement in regulation 26 cannot apply to a breach of a requirement listed in 26(1), since this would be a breach of a qualifying condition. As previously stated, an energy plan which breaches a qualifying condition cannot be classified as a green deal plan.

(e) In a similar vein, a breach of regulation 7(b) is also a breach of a relevant requirement. This is because 7(b) requires an energy efficiency assessment to

[6] and that, subsequently, the energy supplier will be in a position to collect the first instalment – regulation 26(2).

be carried out in accordance with the relevant parts of the Code of Practice. A failure to comply with the Code of Practice is a breach of regulation 24(1) and therefore a breach of a relevant requirement, pursuant to regulation 63(d). As previously stated, this is a different matter to a breach of the legislative requirements that flow from ss. 1(3) & (4)(a) – (e).

(f) For this reason, and given the reference in regulation 7 to the purpose of s. 3(9), which is not part of the legislative requirements, I conclude that there is no legal basis upon which to conclude that ss. 1(3) & (4)(a) – (e) should be read with regulation 7.

Conclusion

32) An energy plan that fails to meet the legislative requirements of a green deal plan will, by necessity, remain an energy plan rather than a green deal plan. The applicable legal framework thereafter would fall to be determined, and would be a matter in relation to which this Tribunal would have no jurisdiction.

33) The extent to which the Regulations or the Code of Practice will continue to apply to an energy plan that is not a green deal plan is an issue requiring further submissions in the context of a substantive case. However, the following passage from the 2013 Guidance on Green Deal Sanctions and Appeals ('the Guidance') is noted:

"Where the Green Deal Provider has failed to ensure that the statutory conditions for the establishment of a Green Deal Plan have been satisfied, the Green Deal Provider is in breach of regulation 26 of the Framework Regulations, which is a relevant requirement, and the Secretary of State is able to cancel the plan. The plan is, technically, an Energy Plan – because the conditions required to establish a Green Deal Plan were not met"

34) Where there is a dispute as to whether an energy plan should be classified as a green deal plan, this should be determined by establishing whether each of the qualifying conditions for a green deal plan have been met. Such a determination is likely to be a largely factual, and can only be made on a case by case basis.

E) Does the existence of a Feed in Tariff ('FIT') transfer arrangement breach s. 5(3)(c) of the Act?

35) The relevant parts of the second qualifying condition in s. 5 read as follows:

"(*1) For the purposes of section 1(4)(d), the conditions as to the terms of the plan and other matters are—*

(a) the conditions set out in subsections (2) to (4), and

(b) such other conditions as are specified in the framework regulation.

(2) …

(3)….that the plan does not include any of the following terms—

(a) …

(b) …
(c) a term providing for money to be advanced to the improver (except in accordance with the framework regulations or provision made under them)."

36) The s. 5(3)(c) prohibition is addressed in regulation 39:

39. Permitted cash advances
A term of a green deal plan which provides for money to be advanced by the green deal provider to the improver is not contrary to section 5(3)(c) if the total amount advanced is no more than the lower of—
(a) £150; or
(b) 5 per cent of the estimated total of the green deal instalments.

37) It is common ground that the Green Deal Finance advanced by the green deal provider to the improver will not necessarily meet the full cost of the energy efficiency improvements. If the improver is not in a position to pay any shortfall, there is no prohibition in the legislation against borrowing the money from a 3rd party.

38) Ms Heaney met the shortfall by entering into a separate arrangement with PVSI, which she describes as 'the sister company' of HELMS. PVSI paid the balance of the cost of the solar panels directly to HELMS and, in return, Ms Heaney transferred to PVSI the benefit of any FIT she would receive once she had entered into the green deal plan. Ultimately this arrangement reduced the extent to which Ms Heaney benefited, in real terms, from the energy efficiency improvements being made.

<u>Submissions</u>

39) Ms Heaney submits that the FIT transfer arrangement she entered in to both advanced to PVSI some of the benefit she would otherwise have derived under the plan and reduced her ability to realise the modelled first year savings. She has not directly addressed the question of whether this arrangement breached the qualifying condition in s.5(3)(c).

40) Both Mr Streeten and Ms Urell contend that a FIT transfer option arrangement is not a term of a green deal plan, but is instead a separate, private contractual arrangement between the improver and a 3rd party. They agree that such an arrangement is an assignment of rights of future income rather than a loan, and that it is governed by consumer credit legislation rather than by the Act.

41) Mr Streeten's developed position is that the natural meaning of s. 5(3) is clear: it is concerned with the restricting the terms of a green deal plan in relation to the advancement of money to the improver. He contends that, as such, it is unnecessary to apply a broader, purposive approach to interpreting the legislation. However, should the Tribunal decide to do so, nothing in the legislation suggests an intention to prevent improvers from taking advantage of the option of transferring the benefit of the FIT. Mr Streeten further submits that, while the existence of a FIT transfer contract is not a breach of s. 5(3)(c), the involvement of a green deal provider in making such an arrangement may be relevant to the issue of compliance with obligations under the Code of Practice.

42) Ms Urell's developed position is that, since a FIT transfer contract is an arrangement whereby money is transferred to the green deal provider rather than the improver, it must be outside the ambit of s. 5(3)(c). She accepts that, hypothetically, the shortfall funding arranged under a FIT transfer contract could be transferred initially to the improver. However, in her view a purposive reading of s. 5(3)(c), when read with regulation 39, supports a view that the intention is to prevent the transfer of money from the green deal provider to the improver, rather than to prevent a transfer of money from any other person. She submits as a consequence that, even if the money for a FIT transfer contract were paid initially to the improver, the s. 5(3)(c) prohibition would not apply as it is an arrangement made with a 3rd party.

43) Mr Wilcox's submissions are twofold:

i) Although under a FIT transfer contract the shortfall sum passes from a 3rd party to the green deal provider, it operates as though the money is passed to the improver who then settles the balance using these funds. He submits that, in any event, the term 'to the improver' in s. 5(3)(c) should be read purposively as 'to or for the benefit of the improver'.

ii) Further, in his view a FIT transfer arrangement operates as an unreasonable inducement upon the improver to enter into a green deal plan, where such an arrangement is relied upon by a green deal provider as part of the sales pitch. Mr Wilcox submits that the overarching purpose of s.5(3)(c) is to prevent such unreasonable inducements from being offered.

44) Although Mr Wilcox provided written representations as to whether a FIT transfer contract is a linked contract for the purposes of s. 19 Consumer Credit Act 1974, these submissions are no longer being pursued.

Ruling

45) Having again considered the Parties' submissions and the relevant statutory provisions, I conclude as follow:

i) The language of s. 5(3)(c) is clear and unambiguous. It introduces a qualifying condition prohibiting the inclusion, as a term in a green deal plan, a provision that money is to be advanced to the improver, save as might otherwise be permitted under the Regulations or Code of Practice.

ii) The natural reading of this provision is that the prohibition extends to the transfer of money by any person. I am satisfied that there is no legislative support for a conclusion that the prohibition is intended only to apply to a transfer of money from a green deal provider.

iii) Since the green deal provider 'holds the pen' on the terms of a green deal plan, the green deal provider is able to control whether a term relating to the transfer

of money is included in the plan at all. This view is supported by regulation 26(1)(b) which, as already stated, makes the green deal provider responsible for ensuring that the plan complies with all qualifying conditions, including the condition in s. 5(3)(c).

iv) Regulation 39 provides the only permitted exception to the s. 5(3)(c) prohibition. It allows for a term relating to the advance of money to an improver to be included in a green deal plan, where the money is advanced by a green deal provider and is subject to a cap of the lower of £150 or 5% of the total instalment costs.

v) I am satisfied that, other than this permitted exception and the general prohibition in s. 5(3)(c), nothing in the legislative scheme to prohibits an improver from receiving an advance of money from, or entering into an arrangement with, a 3rd party. The prohibition is against making such an arrangement a term of the green deal plan.

vi) This is consistent with a presumed policy intention of allowing broad access to the Green Deal Scheme. Since the Green Deal Finance arrangement may not meet the full cost of the improvements, at least some improvers will require additional funding to pay the shortfall. This is the position most of those currently appealing sanction decisions found themselves in. Had the legislation prohibited the improver from arranging shortfall funding with a 3rd party, the pool of people able to benefit from the Green Deal Scheme would be limited to improvers making modest energy efficiency improvements or those with sufficient means to pay any shortfall themselves.

vii) However, on the face of the legislation, if shortfall funding arrangement with a 3rd party were a term of a green deal plan and if, under the arrangement, the money were advanced to the improver, even if only initially, it breach the s. 5(3)(c) qualifying condition.

viii) I have gone on to consider whether s. 5(3)(c) should be read purposively, either as suggested by Ms Urell, so that the prohibition only extends to the transfer of money from a green deal provider, or as suggested by Mr Wilcox, so that it is read as 'money advanced to or for the benefit of the improver'

ix) I have considered the principles derived from *R (Quintavalle) v Secretary of State for Health [2003] UKHL 13, [2003] AC 687,* recently endorsed by the Supreme Court in *R (Fylde Coast Farms Ltd) v Fylde BC [2021] UKSC 18, [2021] 1 WLR 2794* in which, at paragraph 6, Lord Briggs and Lord Sales JJSC provide the following guidance:

"Even where particular words used in a statute appear at first sight to have an apparently clear and unambiguous meaning, it is always necessary to resolve differences of interpretation by setting the particular provision in its context as part of the relevant statutory framework, by having due regard to the historical context in which the relevant enactment came to be made and, to the extent that its purpose can be identified (which may require examination of admissible travaux

preparatoires), to arrive at an interpretation which serves, rather than frustrates, that purpose."

x) The wider context in which s. 5(3)(c) should be understood – as one of several qualifying conditions – is set out above. The specific context is best considered collectively with the other s. 5(3) prohibitions. Taken together they prohibit:

(a) A term that makes a person liable to make payments under a green deal plan, for any period of time other than when they are the bill payer for the property;
(b) A term that requires the bill payer to make an early repayment of the amount outstanding under the plan, other than as may be provided for in the legislation; and

(c) A term providing for money to be advanced to the improver.

xi) No assistance on legislative intention is found in the Explanatory Memorandum. I conclude therefore that the collective purpose of s. 5(3) is, in essence, to prevent onerous, inappropriate financial terms from being included in a green deal plan. Read in context, therefore, the prohibition in s. 5(3)(c) is against money being advanced inappropriately to the improver. This would include, but is slightly broader than, Mr Wilcox's suggested interpretation of a prohibition on 'unreasonable inducements' if that is understood to mean money advanced to the improver as a 'sweetener', over and above any benefit to be derived from the installation of the improvements. Alternative arrangements prohibited by s.5(3)(c) might include an initial bonus payment, or a term whereby the improver regularly receives money from the bill payer.

xii) There is some support for this interpretation if the wider purpose of the Green Deal Scheme is considered. This appears to be twofold:

(a) It seeks to reduce domestic energy consumption and to promote the use of more sustainable sources of energy, thereby benefiting the environment; and

(b) It seeks to reduce energy bills, thereby benefiting the improver and/or the bill payer.

xiii) A natural inference from the qualifying condition in s. 1(3)(a) (that the improvements must be paid for at least in part by instalments) is that the intended beneficiaries include improvers who would not otherwise be in a position to fund the installation of energy efficiency improvements in their home. There is no suggestion that an ancillary purpose of the Scheme is to provide improvers with additional financial reward in return for participation.

xiv) However, I find no support from a purposive reading of the legislation for Mr Wilcox's suggestion that this qualifying condition should be read as relating to money advanced 'to or for the benefit of' the improver. The difficulty with his

proposition is that the Scheme as a whole is intended to operate for benefit the improver. I am satisfied that reading s. 5(3)(c) as prohibition on any term allowing 'the transfer of money for the benefit of the improver' might have unintended consequences, although the extent to which it is appropriate to include a term relating to shortfall funding is a matter in relation to which the Tribunal would benefit from further submissions. This is an issue that may well be revisited during a substantive hearing.

xv) Similarly, I find no support for Ms Urell's contention that the s. 5(3)(c) prohibition should be read as only applying to money advanced by a green deal provider. A purposive reading of the legislation as a whole demonstrates an intention to regulate the conduct of all green deal participants. It is not unfeasible that a participant other than a green deal provider might be motivated to advance money to the improver as an inducement to enter a plan. Further, Ms Urell's proposal would permit a term whereby the improver receives money under the plan from the energy supplier or from the bill payer. Either would, in my view, amount to an inappropriate payment read in the context of s. 5(3).

Conclusion

46) S. 5(3)(c) prohibits as a term a provision whereby money is advanced to the improver by any person, save as permitted under regulation 39.

47) A FIT transfer contract does not breach this prohibition since the transfer of money under such an arrangement is not to the improver.

48) However, any term which provides for money to be advanced to the improver, other than as permitted by regulation 39, is likely to breach this prohibition, which is a qualifying condition.

F) What is the relevance of the existence of a warranty/guarantee?

49) S. 5(5)(b) provides that the Regulations may create a further qualifying condition, requiring as a term in the green deal plan a guarantee of the improvements which also specifies who will benefit from this guarantee.

50) Regulation 3 creates such a condition:

> ***"35.— Guarantees to be given by green deal providers***
> *(1) The green deal provider must agree in the energy plan to guarantee the functioning of the improvements and to repair damage to the property which is caused by the improvements (the "guarantee").*
>
> *(2) The guarantee must include the requirements set out in Schedule 3 (guarantees)."*

51) Schedule 3 sets out a number of requirements, including requirements to rectify defects in the functioning of the improvements and to improve specified damage caused by the

improvements or their installation, subject to various time limits and with a minimum level of liability cover of £20,000.

52) Additional requirements as to the nature of the guarantees that must be provided are set out in Annex B of the Code of Practice.

Submissions

53) Ms Heaney notes the statutory provisions and submits that, since the guarantee requirements are a qualifying condition, an energy plan that does not contain such a guarantee in respect of every improvement made would not be a green deal plan.

54) Mr Streeten shares this view. He submits that an energy plan containing terms that fail to meet the guarantee requirements of Schedule 3 will be an energy plan rather than a green deal plan, whereas a plan that breaches the guarantee requirements set out in the Code of Practice will breach a relevant requirement and may liable to a sanction imposed by the Secretary of State. In his view the identification of an appropriate sanction may take into account whether the improver or bill payer has had to expend monies as a consequence of the guarantee failure, and/or whether the failure of the improvements to operate properly results in a failure to generate estimate savings. Mr Wilcox is of the same opinion.

55) Ms Urell shares Mr Streeten's view of the statutory requirements, and agrees that a breach of Schedule 3 requirements will amount to a breach of a qualifying condition, whereas a breach of the Code of Practice will not. However, she disagrees that any expense to which the improver/bill payer has been put as a consequence of the latter breach is necessarily a factor to be considered when determining whether to impose a sanction. She submits that GDFC Assets Ltd should not have to pay for 'a customer's failure to read the paperwork'.

Conclusion

56) This issue appears to be largely uncontroversial. I agree with the parties' views in relation to the impact of a breach of the guarantee requirements set out in Schedule 3 of the regulation, which are a qualifying condition by virtue of s. 5(5)(b) and regulation 35.

57) I further agree that a breach of the guarantee requirements of Annexe B of the Code of Practice would not prevent an energy plan from being classified as a green deal plan, although it would be a breach of a 'relevant requirement' pursuant to regulation 24(1)(a). However, although the existence of such a breach may trigger a decision to impose a sanction, I am satisfied any more detailed analysist of this requirement is best determined on a case specific basis.

G) If in the context of a Green Deal Plan the Provider has breached its obligations, what is the correct approach to determining the appropriate sanction?

H) What is the correct approach to determining whether a sanction is proportionate to the breach?

I) What factors are or may be relevant to determining the appropriate level of reduction?

58) As already identified, regulation 63 sets out the 'relevant requirements' with which a green deal provider is obliged to comply. Regulations 67 & 79 provide as follows:

"67.— Sanctions for breaches of the relevant requirements by green deal providers
(1) This regulation applies where the Secretary of State is satisfied that there is a breach of the relevant requirements by a green deal provider and—
(a) the breach is severe; or
(b) there have been other breaches of the relevant requirements by the green deal provider in respect of the property or other properties.

(2) The Secretary of State may impose on the green deal provider one or more of—
(a) a compliance notice;
(b) a financial penalty;
(c) withdrawal.

(3) Where the Secretary of State is satisfied that the bill payer has suffered or is likely to suffer substantive loss, the Secretary of State may, in addition to any sanction imposed under paragraph (2), impose cancellation or reduction on the relevant person.

79. Proportionality requirement
Any sanction imposed under this chapter must be proportionate to the breach in relation to which it is imposed.

59) Further guidance on the level of financial penalties is found in regulation 75:

75.— Financial penalties
(1) This regulation applies where a financial penalty may be imposed.

(2) In determining the amount of a financial penalty, the Secretary of State must have regard to the annual turnover and the number of employees of the person on whom the Secretary of State intends to impose the penalty.

(3) For each breach, the maximum financial penalty is £50,000.

60) The Respondents submit that a sanction decision must be considered from the perspective of it being an interference with the sanctioned party's right to the peaceful enjoyment of property, which is a right guaranteed by Article 1 of Protocol 1 of the European Convention of Human Rights (A1P1). This provides as follows:

"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."

Submissions

61) Ms Heaney's position is that the Secretary of State should identify the appropriate sanction by considering all breaches together, which requires him to consider all of the material presented to him and, where necessary, exercise powers to obtain additional material wherever situated. Thereafter, he must follow the Guidance, which requires him to take "*a stepped approach, imposing a less severe sanction for a less serious breach, and a more severe sanction for a more serious breach, or… where there have been repeated breaches*".

62) In terms of the regulation 79 proportionality requirement, in Ms Heaney's view this requires the sanction to be calibrated solely by reference to the severity of the breach in relation to which it is being imposed. She does not accept that there is a generalised 'proportionality' requirement.

63) In terms of relevant factors for consideration, Ms Heaney submits that the effect of a sanction upon the party upon whom it is imposed is irrelevant. She notes that the only relevant factor specified in the Guidance is a requirement that Secretary of State "*consider*(s) *the subsequent effects* [of a breach] *on the customer, for example the ability of a customer to meet other financial obligations*."

64) Mr Streeten disagrees. His position is that appropriate approach to determining a sanction is that which the Secretary of State took in Ms Heaney's case:

   i) The Secretary of State determined that, as a consequence of HELMS's breach of the Code of Practice (a relevant requirement), Ms Heaney had suffered substantive loss, and the impact of this harm was substantial.

   ii) He found that Ms Heaney would receive a 'windfall benefit' from the improvements if a sanction of cancellation were imposed; therefore

   iii) He imposed a sanction of reduction, calculated to put Ms Heaney back as closely as possible to the financial position she would have been in under the terms of her green deal plan had the Code of Practice not been breached.

65) Mr Streeten rejects any suggestion that the appropriate sanction must be determined by considering only the severity of the breach. He submits as follows:

i) The appropriate starting place is the obligation to comply with the Code of Practice, followed thereafter by a 5 step process. The Secretary of State must:

   (a) Identify representative breaches of the Code of Practice;
   (b) Consider the severity of the breach(es) (regulation 67(1)(a)), following the stepped approach set out in the Guidance.
   (c) Consider context, which will include the overall number of breaches (regulation 67(1)(b));
   (d) Consider whether there has been substantive loss (regulation 67(3)); then
   (e) Consider proportionality (regulation 79).

ii) Any proportionality assessment must be heavily fact-dependant, requiring consideration of all relevant circumstances. In the context of a green deal plan this will include consideration of whether the improver might receive a 'windfall' benefit as a consequence of the sanction decision, as well as the impact of the sanction will be upon the party being sanctioned.

iii) The latter consideration arises because the imposition of a sanction is an interference with GDFC Asset Ltd's A1P1 rights. Pursuant to s. 3 of the Human Rights Act 1996 ('HRA'), regulation 79 must be read and given effect in a way that is compatible with Convention rights, and/or pursuant to s. 6 HRA, a sanction cannot be imposed that interferes disproportionately with GDFC Asset Ltd's A1P1 rights. Mr Streeten relies on Lord Dyson MR's analysis of Convention case law in *Breyer Group Plc and others v Dept Energy and Climate Change* *[2015] EWCA Civ 408* a paragraphs 28 – 39 & 47 – 49 to submit that Ms Heaney's credit agreement with HELMS, in relation to which GDFC Assets Ltd is now the payee, is an existing enforceable contract. As such it is part of the 'marketable goodwill' of the business and is a possession for the purposes of A1P1.

iv) In his view GDFC Asset Ltd's A1P1 rights subsist even if the Tribunal finds that the contractual agreement between HELMS and Ms Heaney was flawed. Mr Streeten relies on Sir Andrew Morritt V-C's conclusions in *Wilson v First County Trust Ltd* *[2001] EWCA Civ 633,* reached in the context of considering the rights afforded to pawnbrokers under the Consumer Credit Act 1974. This is considered further below.

v) Mr Streeten also relies on Henderson LJ's observations in *JP Whitter (Waterwell Engineers) Limited v HMRC* *[2016] EWCA Civ 1160* [paras 68 – 71] relating to the common law principle of proportionality. He submit that regulation 79 requires application of an 'ends and means' test, the 'ends' being the purpose for which the Secretary of State may decide to impose a sanction. In Mr Streeten's view it can be reasonably inferred from the Scheme as a whole that the purpose is in part to support the public interest in securing compliance with the regulatory regime. He submits that the other mandatory considerations are:

   (a) In accordance with A1P1 obligations, the impact of the sanction upon the person upon whom it is imposed;

(b) The severity of the breach, or series of breaches;
(c) Whether the improver has suffered a substantive loss; and
(d) By extension, whether the improver has received any benefit or saving from the measures that were installed under the plan.

iv) In terms of identifying the appropriate sanction, Mr Steeten's view is that the Secretary of State is required to conduct a reasonable enquiry, so as to identify a sufficient number of breaches to be satisfied as to the severity of the breach(es) and the issue of substantive loss. He does not accept that all potential breaches must be investigated or identified. This is in part because the number of complaints received by the Secretary of State makes anything other than a proportionate investigation unfeasible. He submits that the regime anticipates the provision of assistance from all parties to ensure that all relevant matters are considered when the sanction decision is made.

v) Mr Streeten accepts that cancellation will be an appropriate sanction in response to the most serious breaches, but does not agree that it will always be appropriate in cases where the improver would not have entered into a green deal plan had they not been misled. He contends that the improver must have understood that they were entering into a plan in relation to which some form of payment would be due, and that therefore the fact that they were misled about the terms and conditions ought only to be one of many considerations.

64) Ms Urell largely agrees with Mr Streeten, and adopts his A1P1 argument and his suggested 5 stage approach. She points out that that there are a range of sanctions available under the Regulations that can be used by the Secretary of State to punish a green deal provider, some of which are mandatory. By contrast, the power to impose a sanction for a breach of a relevant requirement is discretionary and engages different considerations.

65) Ms Urell describes the regulation 79 proportionality assessment as being akin to a fairness jurisdiction, and the test therefore as being proportionality *inter partes*. She submits that all relevant circumstances must be taken into account as a matter of common law. As such, any suggestion that the appropriate sanction should be determined without reference to any benefit obtained by the improver is 'just wrong', and this must include a realistic assessment of the cost of the improvements. In her view it would not be proportionate for the Tribunal to do more than is necessary in order to do justice between the parties.

66) Given this, Ms Urell does not agree that either public interest in regulatory compliance or deterrence ought to be relevant considerations. She points out that HELMS has been sanctioned many times, is now a company in liquidation and there is no longer a message to be sent. She accepts that the impact of the breach on the improver's ability to meet financial obligations must be a relevant factor, as recognised by the Guidance, but in her view any such consideration must be supported by appropriate evidence. Although an increase in bills as a result of a green deal plan might be a relevant factor, any wider implications that might arise in relation to mortgages and buildings

insurance ought not to be relevant, since these will have been specifically addressed under the terms of the plan. However, a shortfall funding arrangement could be a relevant factor for consideration.

67) Ms Urell agrees with Mr Streeten that the sanction of cancellation ought to be reserved for the most severe breaches and suggests that this may be an appropriate outcome where the amount to be repaid under the plan equals or exceeds the received benefits. She also agrees that not all breaches in relation to each complaint need be considered by the Secretary of State, since to do so would cause delay and may not add to the assessment of the overall detriment to the improver.

68) Mr Wilcox, by contrast, largely agrees with Ms Heaney. He submits as follows:

i) Regulation 79 requires the sanction imposed to be proportionate to the breach, which means that the Secretary of State must only consider the nature of the breach, rather than any ancillary issues such as the resources of the person being sanctioned. Otherwise, in Mr Wilcox's view, the requirement in regulation 75(2) to consider the financial position of a green deal provider before imposing a financial penalty would be redundant.

ii) Had Parliament intended a broader range of factors to be considered as part of the proportionality assessment, including the impact of the sanction on the relevant person, then this would be explicit on the face of the legislation. Mr Wilcox relies in support on the approach taken by Henderson J in *Whitter*. In that case, which concerned HMRC's ability to make a negative determination under the Finance Act 2004, the court decided that a range of procedural safeguards provided significant protections. These safeguards comprised (1) a discretions as to whether to make a negative determination; (2) a requirement to give advance notice of a negative determination; and (3) a right of appeal. Henderson J concluded that, had Parliament intended HMRC to also consider the impact of the negative determination upon the taxpayer's financial position, this would be apparent on the face of the legislation (see paragraph 60).

iii) Given the similarities between the procedural safeguards considered in *Whitter* and those in the green deal enforcement provisions, and given a similar absence of a specific requirement to consider the impact of a sanction on the relevant person, Mr Wilcox submits that the conclusions reached by Henderson J should be followed. He notes that these conclusions were endorsed by Lord Carnwath when the matter was considered by the Supreme Court in *JP Whitter Ltd v Revenue and Customs Commissioners* *[2018] UKSC 31,* paragraph 22.

iv) In relation to the common law principle of proportionality, Mr Wilcox's position is that the regulatory requirements of the green deal scheme are clear, and compliance is entirely within the control of the green deal providers. Therefore, providing the Tribunal is satisfied that the ends and means of the enforcement powers are proportionate, the Secretary of State's exercise of powers under regulation 67 need not be subjected to a wider assessment of proportionality.

v) In relation to identifying an appropriate sanction, and relevant factors, Mr Wilcox submits that Guidance requires the Secretary of State to take a stepped approach – stating that he will impose a less severe sanction for a less serious breach, and a more severe sanction for a more serious breach, or where there have been repeated breaches. Mr Wilcox accepts that the imposition of a severe financial penalty for one breach might be disproportionate, and expects more severe sanctions to be reserved for more severe, multiple breaches.

vi) He considers the Secretary of State to have an obligation to review and consider every known breach that might merit a sanction, and to also consider whether the green deal provider being sanctioned is responsible for a pattern of breaches affecting several customers. The latter must be a requirement because the Secretary of State has an obligation to ensure that there is compliance with regulatory requirements over time. Given this, he must also ensure that all relevant documents are before him when making a sanction decision. Mr Wilcox notes that the Secretary of State has referred to missing documents in some of the appeal cases and suggests that he should have exercised his powers to obtain them.

vii) Although he agrees that the bar for cancellation should be high, Mr Wilcox does not agree that it should be viewed as the most appropriate sanction for the most severe breaches. He points out that the imposition of a financial penalty could result in a higher financial loss for a green deal provider. He further submits that nothing in the legislation suggests that the approach taken the sanction of cancellation should be different if the 'relevant person' is not the person responsible for the breach(es).

viii) Finally, Mr Wilcox takes issue with the approach taken by the Secretary of State to calculating the sanction of reduction, in particular the application of a blanket percentage reduction which, he submits, recalculates the benefit of the measures under the plan, and is akin to a finding that the 'golden rule' requirements of regulation 30 have not been met.

Ruling

69) I have considered these submissions, as well as the language of the legislation and the Secretary of State's explanation of the enforcement regime as presented in the Guidance.

The correct approach to determining the appropriate sanction

70) Regulation 79 requires the sanction imposed to be proportionate to the breach. A sanction may only be imposed where the breach is severe, or where is it one of a series of breaches (regulation 67(1)).

71) The Guidance note in relation to regulation 79 is, in full:

"Under regulation 79 of the Framework Regulations, the Secretary of State is required to ensure that any sanction is proportionate to the breach in respect of which it is imposed. Accordingly, where there is a choice of sanctions for a particular breach, the Secretary of State will take a "stepped" approach, imposing a less severe sanction for a less serious breach, and a more severe sanction for a more serious breach, or a case where there have been repeated breaches."

72) Regulation 67 provides for two categories of sanction: the first comprises compliance notices, financial penalties and withdrawal, which may only be imposed on a green deal provider (67(2)). The second category comprises additional sanctions of cancellation or reduction, which may be imposed on a relevant person where the bill payer has suffered or may suffer a substantive loss (67(3)).

73) I note in passing that the Guidance incorrectly describes the circumstances in which cancellation may be imposed. Paragraph 4.8 states (emphasis added):

"The Secretary of State may impose cancellation if the breach is severe or if there have been other breaches of the relevant requirements by the Green Deal Provider or Installer in respect of the property or other properties, <u>or</u> if the bill payer has suffered substantive loss. Cancellation may be imposed in addition to any other appropriate sanctions."

74) However, a regulation 67(3) states that cancellation may <u>only</u> be imposed in this context where the bill payer has suffered, or is likely to suffer, substantive loss.

75) The Guidance provides the following explanation of a substantive loss:

"2.8 Substantive Loss
In some cases, the Secretary of State will need to consider, before imposing a sanction, whether the bill payer has suffered substantive loss. The Secretary of State is likely to consider that a customer has suffered substantive loss where the customer has suffered harm, and is likely to take into account both:
i. the level of harm suffered by the customer; and
ii. the impact of that harm on the customer.

Harm may be:
- *significant (for example financial loss);*
- *moderate (for example, the bill payer was inconvenienced in a minor way); or*
- *minor (for example the bill payer did not notice the breach).*

In assessing the impact of the harm, the Secretary of State will consider any subsequent effects on the customer, for example the ability of a customer to meet other financial obligations. The fact that the complainant did not at first notice the breach does not necessarily mean that the harm suffered was not significant, once discovered."

76) Taking all of this into consideration, I conclude that there are 6 steps to be followed when determining the appropriate sanction. These are as follows:

i) Identify whether there has been a breach of a relevant requirement.

ii) Decide whether the breach is sufficiently severe to warrant a sanction being imposed, or whether there has been a series of breaches by the green deal provider either at the same property or at different properties;

iii) Assess the seriousness of the breach(es) overall, and decide whether the sanctions of a compliance notice, financial penalty or withdrawal are appropriate, by deciding whether the severity of these sanctions are proportionate to the seriousness of the breach.

iv) Decide whether the bill payer has, or is likely to suffer substantive loss by considering whether they have suffered harm.

v) Assess both the level of the harm suffered and the impact of the harm.

vi) Decide whether the sanctions of cancellation or reduction are proportionate, by reference to both the severity of the breach and the harm caused to the bill payer.

The correct approach to determining whether a sanction is proportionate to the breach

77) I conclude that a pattern of breaches by one green deal provider is likely to be a relevant consideration both in relation to the assessment of the seriousness of a breach and in relation to the identification of a proportionate sanction. To some extent, therefore, a series of breaches by a green deal provider may be described as operating as an aggravating feature. To conclude otherwise would conflict with both regulation 67(1)(b) and with the Guidance in two respects:

i) It would undermine the enforcement objective, identified in relation to financial penalties, of maintaining the credibility of the Scheme;

"In considering whether to impose a financial penalty the Secretary of State will pay particular attention to whether:

- *the Green Deal Provider has benefitted or intended to benefit from a breach, financially or otherwise;*
- *the behaviour of the Green Deal Provider undermines the credibility or reputation of the Green Deal scheme; and*
- *the breach or breaches lead to significant harm or impact on affected persons."*

ii) It would limit the interpretation of the 'stepped approach', whereby a more serious sanction may be imposed in "a case in which there has been repeated

breaches" so that it reads instead as "a case in which there have been a number of different breaches". This is because it is manifestly unlikely that there will have been a repeated breach of the same relevant requirement at a single property.

78) It follows that the Secretary of State must bear responsibility for ensuring that related breaches by a green deal provider are taken into account when identifying an appropriate sanction, since the other parties are either unlikely to unable to bring this issue to his attention. However, I agree with Mr Streeten that it is otherwise reasonable for the Secretary of State to expect the parties to make all relevant information available to him at the time of the sanction decision. The investigatory role of the Secretary of State is limited, and in accordance general principles the use of coercive powers to obtain information should be preserved as a method of last resort. I see no objection to the Secretary of State proceeding on the basis of representative breaches, provided he is satisfied that these support a proper assessment of severity overall the purpose of identifying the appropriate sanction. Given Mr Streeten's submission that the Scheme presumes that the Secretary of State will receive assistance from the parties to a complaint, it follows that he will consider any additional matters brought to his attention prior to the sanction decision in appropriate detail.

79) I am satisfied from the Guidance and from a reading of the Scheme as a whole that one of the purposes of a sanction decision is the maintenance of public confidence in regulatory compliance, and that this may therefore be a relevant factor to the identification of a proportionate sanction. Further, given the directions in the Guidance to pay attention to the behaviour of the green deal provider, deterrence may also be a relevant consideration.

80) I conclude that the identification of a windfall benefit must also be relevant sanction, since this will inevitably go to the level and impact of any harm suffered. However, a windfall benefit ought not to operate as an effective bar to a sanction of cancellation, since it can only be one of several potentially relevant factors. In some cases, for example, that the bill payer may have suffered harm of a different nature which may be assessed as outweighing the windfall benefit, or it may be that the seriousness of the breach(es) justify the imposition of a severe sanction, windfall benefit notwithstanding.

81) I also conclude that considerations such as a negative impact upon the bill payer's mortgage position or their ability to obtain relevant insurance ought not to be excluded as considerations *per se*. However, the Secretary of State must be satisfied that any detrimental circumstances relied upon are 'subsequent effects' of the breach(es) in relation to which a sanction is being imposed.

82) I am not persuaded by Ms Urell's submissions that the test for proportionality in this context requires a determination of fairness *inter partes.* I am satisfied that the impact of the sanction upon the green deal provider and/or the relevant person will only be relevant considerations in exceptional circumstances, notwithstanding subsisting A1P1 rights.

i) Mt starting position is that the Court of Appeal decided in _*Breyer v DECC*_ (a case relating to the rates payable under a FIT arrangement) that an existing, enforceable contract forms part of the marketable goodwill of a business and is a possession for the purposes of A1P1. This was confirmed by Lord Dyson MR at paragraphs 48 & 49:

"48. There is no challenge to the judge's conclusion that category (iii) cases (leases signed by both parties) were prima facie an element of the marketable goodwill of Homesun's business and were therefore A1P1 possessions. At [2015] 2 All ER 44, para 79, the judge concluded that category (i) cases (possible future concluded leases) were not possessions: "they were much too speculative to represent an element of the marketable goodwill in the business"….

49. As I have said, the distinction between goodwill and loss of future income is not always easy to apply. But in my view, the judge was right to see a clear line separating (i) possible future contracts and (ii) existing enforceable contracts. Contracts which have been secured may be said to be part of the goodwill of a business because they are the product of its past work. Contracts which a business hopes to secure in the future are no more than that. For this reason, I would uphold the judge's classification."

ii) I am satisfied that the credit agreement Ms Heaney entered into with HELMS, in relation to which GDFC Assets Ltd is now the payee, is an existing enforceable contract and therefore a 'possession' such that A1P1 rights are engaged.

iii) The fact that the terms of Ms Heaney's agreement may not have complied with regulatory requirements of the green deal scheme does not deprive GDFC Asset Ltd of its A1P1 rights. This was considered by the Court of Appeal in _*Wilson v First County Trust Ltd*_:

> *"26. … It was said, in effect, in relation to article 1 of the First Protocol, that, where there was no document signed by the debtor – or where the document signed by the debtor did not contain all the prescribed terms of the agreement – neither the agreement, nor the delivery of the pawn, conferred any enforceable rights on the creditor. So, in the present case, the creditor had no relevant "possessions" to the peaceful enjoyment of which it was entitled, or of which it was deprived by section 127(3) of the 1974 Act. In effect, the creditor – by failing to ensure that he obtained a document signed by the debtor which contained all the prescribed terms – must (in the light of the provisions in sections 65(1) and 127(3) of the 1974 Act) be taken to have made a voluntary disposition, or gift, of the loan monies to the debtor. The creditor had chosen to part with the monies in circumstances in which it was never entitled to have them repaid; so there is nothing to engage the rights guaranteed by article 1 of the First Protocol…*

27 There is, if we may say so, such an obvious unreality in treating the pawnbroker as if it were a voluntary disponor that we do not find it a matter of any surprise that the argument advanced on behalf of the Secretary of State cannot be supported. It cannot be supported because, as we have said, a proper analysis of the 1974 Act does not lead to the conclusion that a creditor under a regulated agreement who fails to obtain a document signed by the debtor which contains all the prescribed terms is without rights. The true analysis is that the agreement, and the delivery of the pawn, do confer rights on the creditor; but those rights are subject to restrictions on enforcement.

iv) However, a person's right to the peaceful enjoyment of their property is not absolute. They may be deprived of their possessions by the state where, to paraphrase the language of the Convention, it is in the public interest to do so or where a legitimate aim is being pursued, and where any action taken complies with conditions provided for in law.

v) I find that, although a relevant person's A1P1 rights will be engaged in the context of a sanction of reduction or cancellation, the issue of whether the deprivation is proportionate must be considered from the perspective of the legislation as a whole, rather than through the lens of the exercise of the Secretary of State's discretion in each individual case. In reaching this conclusion I have adopted a number of relevant principles identified by Henderson J in *Whitter v HMRC*, which was approved by Lord Carnwath when the same matter was considered by the Supreme Court.

vi) The first relevant principle is that that any statutory discretion has to be exercised consistently with the object and scope of the statutory scheme. Henderson J observed (at paragraph 60)

"As a matter of first impression, I cannot find any indication in this tightly constructed statutory scheme that Parliament intended HMRC to have the power, and still less a duty, to take into account matters extraneous to the CIS regime, when deciding whether or not to exercise the power of cancellation in section 66(1). By "matters extraneous to the CIS regime" I mean in particular, in the present context, matters which do not relate, directly or indirectly, to the requirements for registration for gross payment, and to the objective of securing compliance with those requirements. My preliminary view, therefore, is that consideration of the financial impact on the taxpayer of cancellation would fall well outside the intended scope of the power.

61. The position might arguably be different if no real content could be given to the discretion which the power affords to HMRC unless wider considerations could be taken into account…

…

65. …I also find it helpful to refer to the observations of Lewison J in Hilton at [22] to [23]. Although made in the context of a proportionality argument, and section 3 of HRA 1998, the observations are equally applicable to the question of construction which I am now considering. Lewison J said:

"22. … If the legislation were to incorporate a general test of proportionality that would place a heavy burden on tax inspectors to conduct a prospective review or forecast of the potential effect of refusal of a certificate on individual businesses. Moreover, it is not said that it will always be disproportionate to refuse a certificate if the result would be that the taxpayer would be put out of business. So there would require to be a judgment by the inspector not only whether a refusal would have that effect, but also whether that effect is proportionate to the failures.

23. There may be social, economic and administrative arguments for and against the imposition of such a burden or there may be other solutions to perceived injustices in the statutory scheme, but they are matters for debate and legislation not for interpretation by a court."”

vii) Henderson J's view was upheld by the Supreme Court in the following terms:

“21. Attractively though the appeal has been argued, I have no doubt that the Court of Appeal reached the right conclusion, substantially for the reasons they gave. Apart from the Convention, the company's submission comes down to a short point: that is, given the existence of a discretion in section 66, it must in the absence of any specific restriction be treated as an unfettered discretion. That to my mind overlooks the basic principle that any statutory discretion must be exercised consistently with the objects and scope of the statutory scheme.

22. Like Henderson LJ, I cannot read the power as extending to matters “which do not relate, directly or indirectly, to the requirements for registration for gross payment, and to the objective of securing compliance with those requirements”: para 60.

viii) In the context of the Green Deal Scheme, the object and scope of the legislation is the regulation of the installation of energy efficiency improvements and ensuring regulatory compliance by green deal assessors, providers and installers. That is the purpose for which the Secretary of State's enforcement powers are provided and I am satisfied that the financial circumstances of a relevant person are extraneous to the exercise of this discretion. Given my considerations above, I conclude that the legislative scheme and Guidance provides sufficient ‘content’ to the Secretary of State's powers: in broad terms he is directed to exercise his discretion by considering the seriousness of the breach and any harm it may have caused. Although a tax regime necessarily gives rise to some unique considerations, I am satisfied that the green deal legislation is a similarly ‘tightly constructed statutory

scheme' that provides no legislative basis for reading in a generalised proportionality requirement.

ix) The second relevant principle identified by Henderson J, at paragraphs 68 – 71, is the potential existence of a common law principle of proportionality where this forms part of the legislative background. However, he concluded that the legislative regime before him was clearly proportionate in terms of the balance between struck between ends and means, noting in addition the existence of procedural safeguards:

> *"71…. there are many contexts in which the common law will require proportionality between ends and means to be observed by a public authority in the exercise of its functions, although whether such a requirement exists as an independent ground of review of administrative action, or only as an aspect of review for unreasonableness, remains a controversial question upon which the Supreme Court has yet to pronounce definitively. Even if that assumption be made, however, I do not think that it assists the Company in the present case. The CIS legislation as a whole is clearly proportionate in the balance which it strikes between ends and means, and in the procedural safeguards for the taxpayer which are built into it. In relation to the power of revocation in section 66(1) itself, the existence of a discretion is one of those safeguards, and it seems to me that any common law requirement of proportionality is comfortably satisfied if the matters which HMRC are entitled to take into account are broadly confined to matters relevant under the statutory scheme to the grant of registration for gross payment, but with a wider margin of discretion than the often highly prescriptive terms of the legislation would otherwise permit.*
>
> *72. The impact of cancellation of registration on the sub-contractor's business is in my judgment an extraneous factor, and the mere fact that the financial consequences for the sub-contractor's business will be severe cannot, without more, make that factor one which it is relevant for HMRC to consider. …"*

x) I am similarly satisfied that the 'ends and means' of the green deal scheme are balanced and proportionate, supported by the provision of additional procedural safeguards as identified by Mr Wilcox. Any proportionality-based appeal against the imposition of a sanction in this context would be against severity of the sanction when assessed against the seriousness of the breach. There is, again, no basis upon which to conclude that the 'ends and means' of the green deal regime requires consideration of the impact of the sanction decision upon the green deal provider/relevant person for the purpose of this proportionality assessment.

xi) The third relevant principle identified by Henderson J is that, in the context of an assessment of proportionality for the purposes of A1P1 rights, other than in the most exceptional cases, the assessment should be confined to the statutory

regime as a whole rather than the exercise of a statutory function by a public body (paragraphs 79-80):

"79…In my judgment, Mr Chacko is right to say that A1P1 has to be considered at the stage of exercise of the discretion conferred by section 66 (1), if only for the simple reason that cancellation of a certificate indubitably involves an interference with the two possessions identified by Ferris J in Vicky. It by no means follows, however, that the proportionality review at this stage always needs to go beyond the proportionality of the CIS regime as a whole. On the contrary, in all save the most exceptional cases it will in my judgment be a complete answer that the discretion as I have construed it forms an integral part of a Convention-compliant statutory regime."

xii) I therefore conclude that, as a matter of domestic and international law, the relevant question is whether any interference with A1P1 rights by the scheme as a whole is in the public interest or is in pursuit of a legitimate aim and accords with conditions provided for in law. For reasons already given I am satisfied that the green deal enforcement provisions meet this requirement.

What factors are or may be relevant to determining the appropriate level of reduction?

83) It has been suggested by Ms Heaney and Mr Wilcox that, in cases of mis-selling, the objective of the sanction ought to be to put the improver back into the position they would have been, had they not entered into a green deal plan. However, for reasons already given, I conclude that the Regulations require the sanction to be proportionate to the seriousness of the breach. That test is capable of leading to a range of different outcomes. However, nothing in the legislative scheme supports an approach whereby a green deal plan should be effectively cancelled, irrespective of whether this would be a proportionate sanction.

84) There is also a more general dispute between the Parties as to whether a single, generic figure can be relied upon, such as the application of a 30% reduction, in circumstances where case-specific data is unavailable. Having considered the submissions of the parties, I conclude that it would not be helpful to deal with this issue on a hypothetical basis, since a range of factors suggest that such a determination is best made on a case by case basis.

J) If the effective date of the sanction is the date of the complaint to the Secretary of State ('SoS'), can the SoS remedy a wrongful act that occurred before the effective date?

86) The '*effective date*' is defined in regulation 51 as follows:

"(a) except where paragraph (b) or (c) applies, the date of the breach;

(b) where the person who was the payee on the date the sanction was imposed was not the payee on the date of the breach, the receipt date;

(c) where the sanction is in respect of a failure to take a consumer credit modifying step, such date as the Secretary of State considers appropriate;"

87) The *'receipt date'* is also defined by the same regulation:

receipt date" means the earlier of—
(a) the date on which a complainant makes—

(i) an eligible complaint; or
(ii) a complaint in accordance with regulation 60; or

(b) the date on which the Secretary of State exercises a power conferred by this Part following the receipt of information under regulation 52(1)(c);

88) Regulation 51 further defines cancellation, reduction and compensation as being sanctions that may be imposed by the Secretary of State from the effective date. This means that, in cases where the green deal provider is no longer the payee under the green deal plan, the Secretary of State may only impose sanctions that take effect from the date of complaint.

89) Ms Heaney accepts that regulation 51 prevents the Secretary of State from remedying any wrongful act that arose between the date of the breach and the date of complaint, but submits that any loss suffered may be taken into account as a sanction decision is designed to prevent ongoing financial misconduct or harm. Her position is that a finding that an energy plan ought not to be classified as a green deal plan would leave the improver the option of seeking a remedy from the date of breach from the Financial Ombudsman Service.

90) Mr Street broadly agrees in relation to the impact of the effect date and the sanction decision. He describes a sanction decision as being a combination of a penalty and redress, and submits that the Secretary of State is able to reflect in the sanction any loss suffered before the effective date. His position is that nothing in the Regulations prohibits consideration of conduct before the effective date and that the Secretary of State is obliged to take such conduct into consideration where it forms part of the bill payer's substantive loss.

91) More generally, Mr Streeten submits that the Tribunal has no jurisdiction to consider any matters, such as the availability of remedies for energy plans that are not green deal plans, and it limited to those matters specified in regulation 87.

92) Ms Urell broadly agrees with Mr Streeten. She agrees that the jurisdiction of the Tribunal is limited and does not extend beyond matters specified in regulation 87. She submits that the purpose of a sanction is not to refund payments made before the effective date, although she accepts that the Regulations impose no limit on the level of reduction that may be imposed. However, in her view, the sanction must still be proportionate, and any level of reduction imposed must not go beyond the principle amount loaned to the improver.

93) Mr Wilcox takes a different position. He submits that calculating the level of reduction so as to include loss before the effective date risks making reduction a more serious sanction than cancellation, and also risks taking an approach that is unduly favourable to the consumer.

Ruling

94) The Parties agree that, by virtue of regulation 51, in cases where the identity of the payee has changed, the Secretary of State is bound to treat the date of complaint as being the effective date in relation to any sanction imposed.

95) Although there is no legislative reference to whether the appropriate sanction may be calibrated by reference to conduct and/or consequences suffered between the breach and the effective date, as a matter of common sense any such conduct or consequence may be relevant factors when considering steps (iii) -(vi) of the 6 step process identified above in relation to identifying an appropriate sanction. The steps in relation to which conduct before the effective date may be relevant seem to be:

i) The assessment of the seriousness of the breaches (step (iii));
ii) The assessment of whether substantial loss and harm has been inflicted (step (iv));
iii) The assessment of the level and impact of any harm (step (v)); and
iv) The assessment of a proportionate sanction.

Next steps

96) The next step in Ms Heaney's case will be the substantive hearing of her appeal.

Directions

97) Parties must, by **5pm on 12 January 2022**, send the Tribunal:

i) Any proposals for a revised hearing bundle in light of this Ruling;
ii) Any further Directions considered necessary, which must be agreed to the extent possible; and
iii) Any dates during the period 14 February 2022 – 14 April 2022 when they would unavailable to attend a remote substantive hearing.

98) A copy of the Ruling will be sent to the Appellants in any other cases in which similar issues arise.

Signed:

Dated:

Judge Moira Macmillan

29 December 2021