FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(ENVIRONMENT)

[2021] UKFTT 84 (GRC)

Appeal Number: NV/2020/0002 (V)

Heard using Could Video Platform
24 February 2021

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

ANTHONY MCGRADY

Appellant

and

SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Respondent

Representation

For the Appellant: Miss S. Grain (non-legal representative)
For the Respondent: Mr C. Streeten of Counsel

DECISION AND REASONS

Introduction

1. The hearing took place remotely, using the Cloud Video Platform. Both parties were able to fully participate in the hearing and no technical difficulties arose.

2. The appellant in this matter is Anthony McGrady. There has been some confusion in this regard because the letter from the Department for Business, Energy and Industrial Strategy dated 18 December 2019, which is the letter under appeal in the instant case, is addressed to Miss Sara Grain.

3. Miss Grain is the landlady of a property known as 30 Gilmonby Road, Middlesbrough TS3 0AD ("the Property"), having purchased it in February 2019.

4. Mr McGrady became the tenant of the Property on 25 June 2019. He is no longer the tenant but that is not relevant to the issue I now have to determine.

Preliminary Issue

5. The preliminary issue that requires determination is whether Mr McGrady has a right of appeal to the First-tier Tribunal against the response of the Department of Business, Energy and Industrial Strategy ("BEIS") of 18 December 2019 to a complaint made by Miss Grain about a Green Deal Plan - AD0000254713 ("the Plan"), attached to the property. The complaint by Miss Grain was referred to the Secretary of State for BEIS ("the Secretary of State"), on 30 October 2019.

History of the Proceedings

6. By way of a Notice of Appeal (Form T98) dated 14th January 2020, Mr McGrady sought to appeal to the First-tier Tribunal against the Secretary of State's letter of the 18 December 2019. Miss Grain is named as Mr McGrady's representative on that form. A bundle of documentation running to 264 pages was subsequently provided to the Tribunal and, on 18 May 2020, Judge McKenna (the Chamber President) sat to determine the matter on the papers.

7. However, the President was not satisfied of the Tribunal's jurisdiction and accordingly adjourned the matter to seek further submissions on this issue from the parties. By way of directions of the same date, the President said as follows:-

> "6. As I understand it, the Respondent's letter of 18 December 2019 communicated a decision that the Appellant's complaint was ineligible for consideration as it was made out of time, and in any event, she was not the bill-payer. It does not seem to me to include a decision, on the merits, to impose or not to impose a sanction. It is not therefore immediately apparent to me how such a decision is said to fall within the scope of regulation 87(1) (b) of the Framework Regulations.
>
> 7. I note that the parties' submissions do not address the issue of jurisdiction and I consider it fair and just to give them an opportunity to do so before I

determine this appeal. If I decide that the Tribunal does not have jurisdiction in this matter then I must strike it out under rule 8 (2) of the Tribunal's Procedure Rules. Affording the parties this opportunity to comment further is intended to comply with rule 8 (4) of those Rules.

8. I observe that the Tribunal is a creature of statute and has no inherent jurisdiction. It may only determine appeals in relation to which Parliament has provided a statutory right of appeal. Challenges to decisions which are not covered by a statutory right of appeal should be made to the Administrative Court.

9. **I therefore DIRECT as follows:**

(i) The Respondent is to make further submissions on the Tribunal's jurisdiction to determine this appeal within 28 days of the date appearing below;

(ii) The Appellant may reply within 28 days thereafter;

(iii) The matter is reserved to myself and is to be listed for determination on the first convenient date thereafter."

8. The Secretary of State filed written submissions on, or around, 22 June 2020. The appellant chose not to file a Reply.

9. Although the Chamber President reserved the matter to herself, for reasons which need not be rehearsed she has been unable to further consider this matter. Given the twin features of the delay and prospect that the President will not be able to give due consideration to this matter in the near future, the appeal was put before me. I took the view that it was appropriate to receive oral submissions.

The 'decision' under challenge (the letter of 18 December 2019)

10. As previously alluded to, the letter of 18 December 2019 is addressed to Miss Grain and is drawn in response to Miss Grain's complaint of 30 October 2019. After setting the scene, the Secretary of State's letter says as follows:

"Time frame for bringing a Disclosure and Acknowledgment Complaint

13. The Framework Regulations make provision, under regulation 10, for the issue of a Green Deal Code of Practice (the "**CoP**"). The relevant version of the CoP for the purposes of this complaint is Version 5, which has applied since 1 July 2017 and all references to the CoP in this letter are to that version.

14. The CoP, amongst other things, sets out the time limits for bringing a complaint in respect of a Green Deal Plan. In relation to a complaint concerning a breach of the disclosure and acknowledgement provisions, paragraph 4.11.1 states the following –

"where the recipient becomes the bill payer of a Green Deal property, the complaint is made within 90 days of the recipient being notified by the relevant energy supplier that it is a Green deal property".

15. For completeness, under the Framework Regulations "recipient" means the person to whom the disclosure document is required to be provided and from whom acknowledgement is to be obtained and, the "*bill payer*" is the person who is liable to pay the energy bills for the Property.

16. You, as Buyer, would have become the "deemed" bill payer for the Property once the completion of sale had been carried out and ownership was passed on to you. This applies despite you not receiving any energy bills as the Property would have still been supplied with energy whilst the refurbishments were carried out and this would have incurred usage costs.

17. Importantly, for the complaint time period, the CoP states that the 90 day period begins when the recipient bill payer receives notification from the relevant energy supplier that it is a Green Deal property. You have explained that you did not receive notification of the Plan during the time prior to 25 June 2019 when you would have been the bill payer.

18. As you were not notified of the Plan during the period when you were the bill payer your complaint is not eligible under paragraph 4.11.1. There is no provision on the CoP for a person who is not the current bill payer to make a complaint where the Plan is brought to their attention by a third party after they have ceased to be the bill payer.

19. The Tenant became the bill payer on 25 June 2019 and was informed of the existence of the Plan by his energy supplier on 30 July 2019. The Tenant would then have had 90 days from that date to make a complaint. However, that 90 days expired on 28 October 2019, two days before you made your complaint. Therefore any complaint by the Tenant would now be out of time."

The Green Deal Scheme

11. The Green Deal is a scheme that was implemented to increase the uptake of energy efficiency measures in properties in the United Kingdom. Essentially, the Green Deal was created to provide a framework under which loans could be made to consumers who wanted to install energy efficient and renewable improvements at their property.

12. The scheme operates through companies which are registered as "Green Deal Providers" pursuant to regulation 15 of the Green Deal Framework (Disclosure, Acknowledgment, Redress etc) Regulations 2012 (SI/012/2079) ("the Framework Regulations"). Green Deal Providers offer loans and arrange the installation of relevant measures/products at consumers' properties. These arrangements are known as "Green Deal Plans". The repayments for the loans are collected directly through consumers' energy bills.

13. The relevant primary legislation is found in Chapter 1 of Part 1 of the Energy Act 2011 ("the 2011 Act"). Sections 12-16 of the 2011 Act relate to disclosure of the Green Deal Plan. Section 12 reads:-

> "12. **Disclosure of green deal plan etc in connection with sale or letting out**
>
> (1) This section applies where –
>
> (a) a green deal property, or a lease of such a property, is to be sold, […]
>
> (2) The seller or prospective landlord or licensor must, in relation to the document, or each document, required to be produced or updated as mentioned in section 8(4) –
>
> (a) obtain the document or, if the requirement to produce or update the document has not yet been complied with, produce a document containing the same information in connection with the green deal plan as that document would have contained, and
>
> (b) provide the document free of charge to any prospective buyer, tenant or licensee at the specified time.
>
> (3) An obligation under subsection (2) may be discharged by an agent."

14. The document "*mentioned in section 8(4)*" (referred to in section 12(2) of the 2011 Act) is an Energy Performance Certificate, which provides full details of, *inter alia*, the plan and the repayments required under it.

15. The "*specified time*" referred to in section 12(2)(b) of the 2011 Act is defined in the Green Deal (Disclosure) Regulations 2012 ("the Disclosure Regulations") and is generally a time at or before the buyer, tenant, or licensee views the property. In any event, it is before the sale or contract to let/licence is complete.

16. Under section 14(2) of the 2011 Act, the seller or landlord must also secure that the contract for sale or the tenancy agreement includes an acknowledgment by the buyer or the tenant that the bill payer at the property is liable to make

payments under the Green Deal Plan and that certain terms of that plan are binding on the bill payer. The form of the acknowledgement is prescribed by the Green Deal (Acknowledgment) Regulations 2012 ("the Acknowledgment Regulations").

17. Failure to comply with the above requirements is a breach of regulation 62 of the Framework Regulations. Regulation 62 reads:

> **"62. Breach of the disclosure and acknowledgment provisions**
>
> A breach of the disclosure and acknowledgment provisions occurs where –
>
> (a) the notifier has failed to provide –
>
> (i) the disclosure document relating to the green deal property; or
>
> (ii) if the obligation in section 8(4) has not yet been complied with, a document containing the same information in connection with the green deal plan as the disclosure document would have contained, to the recipient in accordance with, or as applicable, section 12 or chapter 2 of Part 7 of these Regulations; or
>
> (b) the recipient did not give an acknowledgment."

18. Under regulation 66 of the Framework Regulations, the Secretary of State may impose sanctions for breaches of the disclosure and acknowledgment provisions. Regulation 66 reads:-

> **"66. Sanctions for breaches of the disclosure and acknowledgment provisions**
>
> (1) This regulation applies where the Secretary of State is satisfied that there is a breach of the disclosure and acknowledgment provisions.
>
> (2) The Secretary of State –
>
> (a) may impose cancellation on the relevant person; and
>
> (b) may impose compensation on the notifier.
>
> (3) Where a person other than the notifier is wholly or partly responsible for the breach, imposing compensation means that the Secretary of State requires the notifier to pay to the relevant person such amount (as a fixed sum or in instalments) as the Secretary of State may determine, being an amount not exceeding the sum payable under paragraph (a) of the definition of compensation in regulation 51.

(4) In deciding whether to impose the sanction of cancellation under paragraph (2), the Secretary of State must have regard to –

(a) whether a reasonable period of time before the commitment date, the recipient had knowledge of all or some of the information about the green deal plan that is required to be included in the disclosure document; and

(b) in circumstances where the Secretary of State is satisfied that the recipient had such knowledge a reasonable period of time before the commitment date, whether the recipient has suffered or will suffer substantive loss in consequence of the breach of the disclosure and acknowledgment provisions.

(5) In this regulation, "commitment date" means –

(a) where section 12 applied, the date on which the contract for sale or lease or licence agreement was entered into;

(b) where regulation 44, 46 or 50 applied, the date on which the transaction or arrangement was entered into."

19. By regulation 10 of the Framework Regulations "*The Secretary of State must issue a code of practice for green deal certification bodies and green deal participants and make it publicly available free of charge*". Version 5 of the Code of Practice, issued in 2017, is relevant in the instant matter. Pursuant to regulation 24(1)(a) of the Framework Regulations, green deal providers must comply with the Code of Practice.

The right of appeal to the First-tier Tribunal

20. Regulation 87 of the Framework Regulations provides that-

"87(1) Subject to paragraph (5), any person directly affected by a decision of the Secretary of State –

(a) to refuse an application for authorisation under Part 3 to act as a green deal assessor certification body or a green deal installer certification body;
(b) to impose or not to impose a sanction under Part 8,

may appeal to the First-tier Tribunal.

(2) The Tribunal must determine the standard of proof in any case.

(3) The Tribunal may suspend a decision pending determination of the appeal.

(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.

(5) …."

Submissions

21. In his written submissions of 22 June 2020, the Secretary of State contends that the appellant does have a right of appeal to the First-tier Tribunal against the letter of the 18 December 2019, for the following reasons:

"9. The Secretary of State acknowledges that:

a. The Tribunal is a creature of statute and only has jurisdiction to determine an appeal insofar as that power is conferred by statue. Otherwise, the Appellant would have to challenge any decision, action, or failure to act by the Secretary of State by way of judicial review.

b. Regulation 87 is ambiguous regarding the Tribunal's jurisdiction in circumstances where the Secretary of State finds that a complaint made to him is not an eligible complaint for the purposes of Part 8 of the 2012 Regulations.

10. On its true construction, however, Regulation 87 does confer jurisdiction on the Tribunal in cases where a complaint has been made but found ineligible by the Secretary of State.

a. *First,* it should be remembered that the 2012 Regulations are a statutory instrument, rather than primary legislation. As the courts have observed, the quality of draftsmanship in secondary legislation may be less precise and this must be taken into account in carrying out the process of interpretation (see *Gluck v Secretary of State for Housing, Communities, and Local Government* [2020] PTSR 334 per Holgate J at para, 60).

b. *Second*, the words used in regulation 87(1)(b) given their natural and ordinary meaning are capable of encompassing circumstances where the Secretary of State has found a complaint to be ineligible. That can be seen from the facts of this case. The Appellant has requested

that the Secretary of State impose a sanction. The Secretary of State has considered that request. He has, however, decided not to impose a sanction. The reason for that decision is that the complaint is ineligible. Nevertheless, the decision is a decision not to impose a sanction. Notice of that decision is given pursuant to regulation 77. It is of particular note that regulation 87(1)(b) refers to a "decision of the Secretary of State … under Part 8". This militates in favour of a wide construction of regulation 87, which captures all relevant decisions under Part 8, including whether or not the complaint is eligible".

c. *Third*, the structure of Part 8 of the 2012 Regulations support his construction. In particular: (1) regulation 52 says that the Secretary of State "must not impose a sanction under this Part" unless there is an eligible complaint. It does not say he has no jurisdiction to consider a request that he impose a sanction, but prevents a sanction being imposed; (2) Regulation 77 then requires that the Secretary of State give notice of his decision not to impose a sanction. There is no suggestion that that requirement does not apply where the reasons for not imposing a sanction is that the complaint is ineligible; (3) the wording of regulation 87(1)(b) mirrors to some degree regulation 52, encapsulating decisions both to impose a sanction, and not to do so.

d. *Fourth*, this construction accords with the purpose behind regulation 87 and the 2012 Regulations more generally The regulations are designed to protect consumers and regulation 87 directs appeals to the First-tier Tribunal which provides a relatively accessible, straightforward, and cost effective mechanism for resolving disputes. It would not accord with the intention of the legislation to require one subset of cases to be determined by the High Court, especially in circumstances such as the present, where the less adversarial and more inquisitorial process before the First-tier Tribunal is especially well-placed to resolve any issues of fact that may arise in relation to eligibility.

11. For these reasons, the Secretary of State respectfully submits that the Tribunal has jurisdiction in this appeal."

22. At the hearing, Mr Streeten eloquently advanced the Secretary of State's position on broadly the same basis as was contended for in writing, save in relation to relevance of regulation 77 of the Framework Regulations.

23. In particular, it was submitted that the wording of regulation 87, when read in its proper context, supports the proposition that the Tribunal has jurisdiction to consider on appeal a challenge to a finding by the Secretary of State that a complaint is not an eligible complaint. Such a decision is a decision not to impose a sanction – the reason for not imposing the sanction being that there

has been no eligible complaint. This, it was submitted, does not offend a literal interpretation of the regulation, which is capable of bearing the wide meaning contended for by the Secretary of State. It was further asserted that the same conclusion is reached by taking a purposive approach to the interpretation of the provision.

24. Mr Streeten reminded the Tribunal that an alternative approach would have as a consequence the fact that a challenge to such a decision would have to be pursued by way of judicial review. This, it was asserted, would have significant disadvantages, including increased costs. It was also observed that the Administrative Court is not generally a fact-finding jurisdiction, and in such circumstances, it must have been Parliament's intention to provide a right of appeal in relation to all decisions made by the Secretary of State under Part 8 of the Framework Regulations.

25. The appellant did not file a Reply to the written submissions, but at the hearing of 24 February concurred, on the issue of jurisdiction, with the position taken by the Secretary of State.

Discussion

26. The Secretary of State submits that the letter of 18 December 2019 constitutes a decision for the purposes of regulation 87(1). In summary, it is said that the letter is a decision not to impose a sanction under Part 8 of the Framework Regulations.

27. The obvious point to note is that nowhere in the letter of the 18 December 2019 does the Secretary of State purport to undertake a consideration of whether a sanction should be imposed, and neither does the Secretary of State assert in the letter that he has made a decision not to impose a sanction. The closest the letter gets to suggesting that such a decision has been made, is the assertion in the closing paragraphs that Miss Grain is entitled to pursue an appeal under regulation 87 of the Framework Regulations.

28. The absence of any reference in the letter to a decision being made on whether to impose a sanction does nothing to dampen the Secretary of State's enthusiasm for his position because, on his case, the only pre-requisite required before the Tribunal's jurisdiction is engaged under regulation 87(1)(b) is that the Secretary of State has made a decision under Part 8 of the Framework Regulations, the consequence of which is either that a sanction is imposed, or that no sanction is imposed. The Secretary of State seeks to constrain this submission only to a limited extent, by restricting it to circumstances in which a complaint has been made, although this need not have been an eligible complaint.

29. I start by identifying what is not contentious. There can be no dispute that Mr McGrady was affected by the contents of the Secretary of State's letter to Miss Grain of the 18 December 2019. He was at the relevant time the tenant of the Property and the bill payer. It is also undisputable that if the letter of the 18 December 2019 is a decision by the Secretary of State not to impose a sanction, then regulation 87(1)(b) of the Framework Regulations provides Mr McGrady (and Miss Grain) with a right of appeal against that decision to the First-tier Tribunal.

30. The question for determination is whether the letter of 18 December 2019 is a decision of a type that falls within the scope of regulation 87(1) of the Framework Regulations, and in particular regulation 87(1)(b) thereof.

31. I turn first to the terms of regulation 87(1). Breaking it down into its constituent parts, regulation 87(1) provides for a right of appeal to the First-tier Tribunal when the following conditions have been met:

    (i) There must have been a decision by the Secretary of State.
    (ii) The decision referred to in (i) above must have been a decision to: (a) refuse an application for authorisation under Part 3 of the Framework Regulations to act as a green deal assessor certification body or a green deal installer certification body; (b) impose a sanction under Part 8 of the Framework Regulations; or, (c) not to impose a sanction under Part 8 of the Framework Regulations;
    (iii) The person appealing must have been directly affected by a decision of a type identified in (ii) above.

32. The term 'decision' is not defined in the Framework Regulations, but I observe that the Oxford English Dictionary defines 'decision' as being *"A conclusion or resolution reached after consideration"*.

33. In summary , the Secretary of State asserts that the meaning of *"a decision of the Secretary of State not to impose a sanction"* in regulation 87(1)(b) is ambiguous, but that when read in context and when a purposive approach is taken to interpretation, one is compelled to read the provision so as to include within its scope a decision not to treat a complaint as an eligible complaint. Hereinafter, I will refer to this as the wide interpretation.

34. In conclusion, I find that there is an unbridgeable gulf between the Secretary of State taking a decision not to impose a sanction (which is a decision which falls within the scope of regulation 87(1)), and the Secretary of State dealing with a preliminary matter which has as a consequence the fact that a sanction is not imposed; for example, by not treating a complaint as an eligible complaint.

35. In my view, the Secretary of State's preferred construction of regulation 87(1)(b) requires an unnecessary gloss to be put on the words of the regulation. The words, when read literally, are clear and not, as the Secretary of State asserts, ambiguous in their meaning. The prescriptive nature of the wording in regulation 87(1) clearly militates against a conclusion that it was intended that any decision made under Part 8 of the Framework Regulations that has as a consequence that a sanction is not imposed, is appealable.

36. Whilst I appreciate that I am considering secondary legislation and, as the Secretary of State puts it, the quality of draftsmanship in such legislation might be less precise than in a statute, it also has to be appreciated that if regulation 87(1) was intended to have the scope contended for by the Secretary of State, then absolute clarity in this regard could easily have been achieved. It did not require legislative artistry. For example, it could have been drawn in terms which stated that a person affected by a decision of the Secretary of State under Part 8 of the Framework Regulations may appeal to the First-tier Tribunal or, alternatively, a provision could have been drawn which specified that any decision not to treat a complaint as eligible under regulation 52 of the Framework Regulations could be appealed by an affected person.

37. I further reject Mr Streeten's submissions that reading regulation 87(1)(b) in context, and construing it purposively, lead to the conclusion that Parliament intended the provision to be interpreted widely.

38. I take these in points turn. Considering regulation 87 as a whole does not lead to the wide interpretation contended for by the Secretary of State. In particular, I do not accept that reading regulation 87(1) in the context of regulation 87(4) militates towards a wide interpretation of the term *"a decision not to impose a sanction"*. Regulation 87(4) provides for the Tribunal's remit in relation to an appeal which is lawfully before it. Although it refers to the powers of the Tribunal "*in relation to a decision under Part 3 or Part 8*", this can only mean a decision under Part 3 or Part 8 that falls within the scope of regulation 87(1). It does not address the meaning of regulation 87(1).

39. That this is so can be illustrated by reference to regulation 87(1)(a), which provides for a right of appeal in circumstances where there has been a decision by the Secretary of State to refuse an application for authorisation, under Part 3 of the Framework Regulations, to the act as a green deal assessor certification body or green deal installer certification body. However, under Part 3 the Secretary of State is empowered to make decisions not only in relation to authorisation as a green deal assessor certification body (regulation 12) and green deal installer certification bodies (regulation 14), but also in relation to green deal providers (regulation 16). The Secretary is further empowered under Part 3 to make a decision on an application of a green deal provider for withdrawal of its authorisation. It is beyond dispute that regulation 87(1)(a)

does not provide for a right of appeal against the latter two types of decision but, nevertheless, the wording of regulation 87(4) is broad, referring to a "*decision under Part 3 or 8*".

40. Moving on, the Secretary of State further submits that reading regulation 87(1)(b) in the context of Part 8 of the Framework Regulations also militates towards a wide interpretation. Once again, I disagree.

41. Part 8 of the Framework Regulations is headed "*Enforcement*" and is separated into five Chapters. Chapter 1 - "*Interpretation, scope, complaints*", runs from regulation 51 through to regulation 60A; Chapter 2 – "*Breaches and failure to take modifying steps*", runs through to regulation 64; Chapter 3 – "*When sanctions may be imposed*" runs from regulation 65 through to regulation 71; Chapter 4 – "*Notices, procedure and requirements*", incorporates regulations 72 to 81; and, finally, Chapter 5 – "*Enforcement undertakings and guidance*" runs to regulation 85.

42. Regulation 52, found in Chapter 1 of Part 8, circumscribes the Secretary of State's power to impose sanctions. It makes clear that the Secretary of State must not impose a sanction unless there has first been: (a) an eligible complaint made to the Secretary of State in accordance with regulation 59, (b) a complaint made under regulation 60 or 60A, or (c) relevant information (is received by the Secretary of State from a specified or authorised person. An "*eligible complaint*" is defined as a complaint made in accordance with either regulation 55, 56, 57 or 58 (see regulation 51). Insofar as is relevant to the instant matter, an eligible complaint in respect of the breach of disclosure and acknowledgment provisions is defined in regulation 56 as "*a complaint: (a) by the recipient to the green deal provider; and (b) which the provider is required to handle under the code of practice*". Pursuant to regulation 60 of the Framework Regulations, where the authorisation of a green deal provider has been withdrawn (as in this case), a complaint which would otherwise have been made to that provider may be made directly to the Secretary of State.

43. Therefore, at the outset, the Secretary of State is required to decide whether the requirements of regulation 52 have been met. If they have not, then there is no question of the Secretary of State having to choose between imposing or not imposing a sanction, because the regulation precludes the Secretary of State from imposing a sanction.

44. If the requirements of regulation 52 have been met, then a sanction may be imposed subject to the requirements Chapter 3 to Part 8 of the Framework Regulations (see regulation 53). The provisions of Chapter 3 to Part 8 identify scenarios in which a sanction may be imposed, each of which requires the Secretary of State to first be satisfied that there has been a breach of a specified requirement or obligation. If the Secretary of State concludes that there has

been such a breach, then he must decide whether to impose a sanction for that breach. In all but one scenario, the imposition of a specified sanction is discretionary. Prior to imposing a sanction the Secretary of State must provide an "*intention notice*" to any affected person, other than the relevant energy supplier. This notice must include specified information (see regulations 72 and 73 – Chapter 4 to Part 8). If, after considering any representations received, the Secretary of State decides to impose a sanction then he must "*give a sanctions notice in accordance with regulation 78*". If, after giving an intention notice, the Secretary of State decides not to impose a sanction, then the Secretary of State must give notice to that effect to any person to whom the intention notice was required to be given, i.e. to an affected person (regulation 77).

45. In my conclusion, when regulation 87(1)(b) is read in the context of Part 8 there is no support for the wide interpretation of that regulation; indeed, I find the contrary to be the position. Part 8 provides a clear structure or route for the Secretary of State's consideration process upon receipt of information or a complaint. It mandates that a complaint must comply with specified requirements before the Secretary of State is required to make a decision on the substantive issue as to whether to impose a sanction. It is particularly relevant that the regulations mandate that a notice must be sent to an affected party upon the making of decision to impose a sanction (regulation 78) or on the making of a decision not to impose a sanction (regulation 77). There is no requirement for a notice to be sent upon the making of a decision that a complaint is not eligible.

46. Given the facts of the instant case, I need not analyse the Code of Practice in any depth. I observe, however, that the Code of Practice was issued by the Secretary of State pursuant to regulation 10 of the Framework Regulations. It is relevant that Part 4 of the Code of Practice concerns "*Customer Complaints, Dispute Resolution, and Redress in the Green Deal*" and that therein it separately identifies those circumstances in which a Green Deal Provider is required to handle a complaint and those circumstances in which a Green Deal Provider is not required to handle a complaint. Amongst other reasons, a Green Deal Provider is not required to handle a complaint that does not comply with the provisions relating to the timeliness of the complaint. The distinction is important because the Code places stringent obligations on a Green Deal Provider when that provider is required to handle a complaint, including an obligation to investigate and resolve the compliant. Those same obligations do not flow when the provider is not required to handle a complaint.

47. Mr Streeton also leaned heavily on the purposive approach, it being said that the purpose behind the Framework Regulations, and regulation 87 in particular, was "*to protect consumers and regulation 87 directs appeals to the First-tier Tribunal which provides a relatively accessible, straight forward, and cost effective mechanism for resolving disputes*". He submits that given the aforementioned

purpose, it would not accord with the intention of Parliament to require one subset of cases to be determined in the High Court and, thus, Parliament must have intended decisions not to treat a complaint as an eligible complaint, as falling within the scope of regulation 87(1).

48. To consider this submission I must turn to the relevant primary legislation i.e. 2011 Act. It is the 2011 Act which provides the outline for the Green Deal Scheme and the power to lay delegated legislation, including the Framework Regulations and the appeal provisions therein. The 2011 Act is the prime guide to the meaning of the legislation delegated thereunder, including the Framework Regulations.

49. The Preamble to the 2011 Act states, *inter alia*, that it is:

> "An Act to make provision for the arrangement and financing of energy efficiency improvements to be made to properties by owners and occupiers; about the energy efficiency of properties in the private rented sector; about the promotion by energy companies of reductions in carbon emissions and home-heating costs; about information relating to energy consumption, efficiency and tariffs; for increasing the security of energy supplies…"

50. It is clear, therefore, that the purpose of the Green Deal Scheme is to provide incentives to households and business generally to promote the twin aims that energy should increasingly be derived from renewable sources and that the UK's carbon dioxide emissions must be reduced.

51. By section 3 of the 2011 Act, the Secretary of State was required to establish, in regulations, a scheme for authorising persons to act as green deal assessors, green deal providers and green deal installers and for regulating the conduct of these green deal participants. He did so by way of the Framework Regulations. The purpose of the Framework Regulations is clearly to provide a framework for regulating the conduct of green deal participants.

52. Section 35 of the 2011 Act provides for the introduction of appeal provisions and states, amongst other things:

> **"35 Appeals**
> (1) This section applies if provision is included in a scheme or regulations by virtue of any of the following—
> (a) section 3(3)(h) or (i);
> (b) section 6(4);
> (c) section 16.
> (2) The Secretary of State must by regulations provide for a right of appeal to a court or tribunal against any sanction imposed, or other action taken, by the Secretary of State or a specified public body under the provision mentioned in subsection (1).

(3) Regulations under subsection (2) may, in particular, include provision—
(a) as to the jurisdiction of the court or tribunal to which an appeal may be made;
(b) as to the persons who may make an appeal;
(c) as to the grounds on which an appeal may be made;
(d) as to the procedure for making an appeal (including any fee which may be payable);
(e) suspending the effect of a sanction or other action being appealed against, pending determination of the appeal;
(f) as to the powers of the court or tribunal to which an appeal is made;
(g) as to how any sum payable in pursuance of a decision of the court or tribunal is to be recoverable.
(4) The provision referred to in subsection (3)(f) includes provision conferring on the court or tribunal to which an appeal is made power—
(a) to confirm the sanction imposed or action taken;
(b) to withdraw the sanction or action;
(c) to impose a different sanction or take different action;
(d) to remit the decision whether to confirm the sanction or other action, or any matter relating to that decision, to the person who imposed the sanction or took the action;
(e) to award costs or, in Scotland, expenses.

53. It is readily observed that section 35(2) is drawn broadly, and it is of particular note that it does not constrain the venue for any appeal to the First-tier Tribunal. In my conclusion, there is nothing in section 35, or the 2011 Act as whole, which militates in favour of regulation 87(1) of the Framework Regulations being read in the manner contended for by the Secretary of State.

54. Returning to regulation 87(1)(b), in my view the literal or narrow interpretation of regulation 87(1)(b) has the benefit of certainty. This is to be contrasted with the position if the Secretary of State is correct, and the words "*decision of the "Secretary of State not to impose a sanction under Part 8"* include all decisions taken by the Secretary of State which have as a consequence that a sanction is not imposed under Part 8. What, for example, if there is a vexatious complainant who, after the time limit for an eligible complaint has long expired, continues to make complaints? Does each response from the Secretary of State, whatever that response maybe, carry with it a right of appeal to the Tribunal? To take this further, would a right of appeal be available in a scenario in which the Secretary of State does not respond to the receipt of information or a complaint because he deems there not to have been a complaint (as opposed to an eligible complaint)? On the Secretary of State's rationale this, arguably, could be said to be a decision not to respond to a complaint, which has as a consequence that no sanction has been imposed and, accordingly, on a wide interpretation of regulation 87(1)(b) is a decision not to impose a sanction.

55. By rejecting the respondent's submissions, as I do, there is no danger of any person being denied an effective remedy. As the Secretary of State observes in her submissions, there is the possibility of bringing an application for judicial review against a decision of the Secretary of State which is not susceptible to appeal. Whilst I accept that this is likely to involve increased costs and that judicial review is not suited, in most cases, to fact finding, that does not render the remedy ineffective.

56. Drawing all of this together, in my conclusion the decision of the Secretary of State of the 18 December 2019 is not a decision which falls within the scope of regulation 87 of the Framework Regulations and, consequently, the First-tier Tribunal has no jurisdiction to consider the substance of the appellant's appeal.

Decision

57. Accordingly, for the reasons given above I strike out the appellant's appeal for want of jurisdiction, pursuant to rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

Signed:
M O'Connor
Upper Tribunal Judge O'Connor

9 March 2021