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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 21 December 2011

B e f o r e:

MR JUSTICE MITTING

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Between:
THE QUEEN ON THE APPLICATION OF HOMESUN HOLDINGS LIMITED, FRIENDS OF THE EARTH LIMITED AND SOLAR CENTURY HOLDINGS LIMITED

Claimant

v

SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE

Defendant

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Computer-Aided Transcript of the Stenograph Notes of
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Mr S Grodzinski QC (instructed by Asserson Law Offices) appeared on behalf of **HomeSun Holdings Limited**
Mr N Pleming QC and Mr D Sinclair (instructed by ?) appeared on behalf of **Friends of the Earth Limited**
Mr E Robb (instructed by Prospect Law) appeared on behalf of **Solar Century Holdings Limited**
Me P Nicholls and Mr J Cornwell (instructed by treasury Solicitors) appeared on behalf of the **Defendant**

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J U D G M E N T

1. **MR JUSTICE MITTING:** By the Electricity Act 1989, Parliament broke up state controlled monopolies by which electricity was supplied to UK consumers and substituted a regulated market with separate and, in significant respects, competing participants. Electricity used to be generated and transmitted across the National Grid by the Central Electricity Generating Board and supplied to end users by 12 regional boards. After the Act came into force the electricity industry was divided into four components: generation, transmission, distribution and supply. The Act has been amended over the years, principally by the Public Utilities Act 2000.

2. The present structure of the industry allows for competition between generators and suppliers to ends users, down to individual households. Transmission and distribution are, and remain, regulated natural monopolies albeit now privately owned. The market is regulated by the Gas and Electricity Markets Authority and its executive arm, Ofgem ("Ofgem"), but the Secretary of State for Energy and Climate Change also has a role to play. The generation, transmission, distribution and supply of electricity without a licence is an offence under section 4. Ofgem is responsible for granting licences under section 6 and for setting and subsequently modifying their standard terms under sections 8A and 11A.

3. The principal objective of Ofgem and the Secretary of State is to protect the interests of consumers by promoting effective competition (section 3A(1)). The Secretary of State is from time to time required to issue guidance to Ofgem about the contribution by Ofgem to the attainment of social and environmental policies, to which Ofgem must have regard. (Section 3B(1) and (2)).

4. The Energy Act 2008 introduced a politically determined alteration to the regulated market to encourage the installation and use of low-carbon technology in the generation of electricity. Sections 41 to 43 contained enabling provisions to encourage the installation and use of small-scale generators by a variety of low-carbon energy sources and technologies. One of them is solar photovoltaics: using the power of the sun to generate electricity by solar panels, typically installed on the roofs of buildings.

5. This case concerns solar panels with a generating capacity of no more than 4 kilowatt hours, which I will refer to as "small solar systems".

6. Sections 41 to 43 relevantly provide:

> "41. **Power to amend licence conditions etc: feed-in tariffs**
>
> (1) The Secretary of State may modify ...
>
> (b) the standard conditions incorporated in licences under those provisions by virtue of section 8A of that Act~...
>
> (2) The Secretary of State may exercise the power in subsection (1) for the purpose only of—
>
> (a) establishing, or making arrangements for the administration of, a scheme of financial incentives to encourage small-scale low-carbon

generation of electricity~...

(3) Modifications made by virtue of subsection (1) may include—

(a)provision requiring the holder of a supply licence to make a payment to a small-scale low-carbon generator, or to the Authority for onward payment to such a generator, in specified circumstances;

(b)provision specifying how a payment under paragraph (a) is to be calculated;

(c)provision for the level of payment under paragraph (a) to decrease year by year in accordance with a formula published, or to be published, by the Secretary of State;

(d)provision about the circumstances in which no payment, or a reduced payment, may be made to a small-scale low-carbon generator ...

(4) In this section- ...

'small-scale low-carbon generation' means the use, for the generation of electricity, of any plant—

(a) which, in generating electricity, relies wholly or mainly on a source of energy or a technology mentioned in subsection (5), and

(b) the capacity of which to generate electricity does not exceed the specified maximum capacity.

'small-scale low-carbon generator' means an owner of plant used or intended to be used for small-scale low-carbon generation, whether or not the person is also operating or intending to operate the plant ...

(5) The sources of energy and technologies are— ...

(d) photovoltaics ...

(6) The Secretary of State may by order modify the list of sources of energy and technologies for the time being listed in subsection (5) ...

42. **Power to amend licence conditions etc: procedure.**

(1) Before making a modification, the Secretary of State must consult—

(a)the holder of any licence being modified.

(b)the Gas and Electricity Markets Authority, and

(c)such other persons as the Secretary of State considers appropriate.

(2) Subsection (1) may be satisfied by consultation before, as well as by consultation after, the passing of this Act.

(3) Before making modifications, the Secretary of State must lay a draft of the modifications before Parliament."

7. There then follows a provision which mimics the negative resolution procedure set out in the Statutory Instruments Act 1946, which requires 40 days to be allowed to Parliament to disapprove the modification proposed.

"(5) If no such resolution is made within that period, the Secretary of State may make the modifications in the form of the draft.

43. **Feed-in tariffs: supplemental**

(1)A modification under section 41 of part of a standard condition of a licence does not prevent any other part of the condition from continuing to be regarded as a standard condition for the purposes of Part 1 of the Electricity Act 1989.

(2) Where the Secretary of State makes modifications under section 41(1)(b) of the standard conditions of a licence of any type, the Gas and Electricity Markets Authority ('the Authority') must—

(a) make the same modification of those standard conditions for the purposes of their incorporation in licences of that type granted after that time, and

(b) publish the modification.

(3)The Secretary of State may by order—

(a)make provision conferring functions on the Authority or the Secretary of State (or both) in connection with the administration of any scheme established by virtue of section 41 ... "

8. Sections 104 and 106 provide for the making of orders as envisaged in section 43(3)(a) and for what is meant by "modify" when modifications are made otherwise than by order, the procedure set out in section 42:

9. "'modify' includes amend, add to, revoke or repeal."

10. With effect from 1 April 2010 the Secretary of State introduced a scheme to encourage the installation of, amongst other technologies, generators with a maximum capacity of 5 megawatts, including small solar systems. The means were to require licensed electricity suppliers -- amongst whom feature most prominently the so-called "big 6" -- to pay a sum of money per kilowatt hour for electricity generated by small solar systems to their owner, whether or not the owner consumed the electricity or supplied it back to the National Grid. The owner can be, but need not be, the owner of the

building to which the solar panel is fixed. One of the claimants in these proceedings is a so-called "aggregator" which owns a large number of small solar systems, for which it receives the feed-in tariffs but from which it permits the homeowner to draw free electricity.

11. The scheme was established and carried into effect by a combination of the Feed-in Tariffs (Specified Maximum Capacity and Functions) Order 2010 and by amendments to the standard licence conditions issued to electricity suppliers. Both contain complex and extensive definition provisions, which I propose to summarise and incorporate in my description of the scheme.

12. Article 4 requires Ofgem to accredit eligible installations, including small solar systems, on a central feed-in tariff register if it is satisfied that they fulfill the requirements of Article 5, that is to say that their generating capacity is less than 50 kilowatt hours, that they use appropriate technology and that they are submitted for accreditation by a licensed electricity supplier. Ofgem is required to assign a tariff code to the accredited installation by reference to its description in a schedule to the standard licence condition and the feed-in tariff year, which runs from 1 April to 31 March, in which it became eligible for accreditation.

13. That date is described in Schedule A to the standard licence conditions as:

> " ... the later of the date:
>
> (a) ...
>
> (ii) of receipt by [an electricity supplier] of [an owner's] request for ... Registration ...
>
> (b) on which the Eligible Installation is
>
> Commissioned."

14. From then on, and for the next 25 years, the electricity supplier must pay to the owner of a small solar system installed in the years 1 April 2010 to 31 March 2011 and 1 April 2011 to 31 March 2012 either 36.1 or 31.3 pence per kilowatt hour depending on whether it was fitted to a new or existing building. Clause 3.3 of Part 1 of Schedule A to the standard licence conditions required those sums to be adjusted to reflect annual changes in the Retail Prices Index. For the year 1 April 2011 to 31 March 2012 the figures are 37.8 and 43.3 pence per kilowatt hour. Article 13 of the 2010 Order required Ofgem "to publish the FIT payment rate table applicable for that FIT year in accordance with" that clause.

15. Feed-in tariffs for larger installations, 50 kilowatt hours and above, were sharply reduced by a "modification" made by the Secretary of State under sections 41, 42 and 106 on 1 August 2011. A "fast-track" consultation preceded the reduction. A consultation document was issued on 18 March 2011 and allowed for responses up to 6 May. A decision to lay draft modifications before Parliament was made on 9 June.

The modification was made after the 40-day period had elapsed on 21 July and it came into force of 1 August.

16. The Secretary of State also exercised his power by order under section 104 to amend article 13 of the 2010 Order with effect from 1 August 2011 so that it now reads:

> "On or before 1st March immediately before the beginning of each FIT year (except FIT year 1), the Authority must publish ... in accordance with clause 3.3 of Part 1 of Schedule A to Standard Licence Condition 33 [the FIT payment rate table which is to apply for that FIT year subject to the Secretary of State substituting a new FIT payment rate table in Schedule A to standard licence condition 33]."

17. As the explanatory note makes clear, the amendment was made as a minor change to the function of the Authority and did not purport to confer any new power on the Secretary of State. The power to make the modification to the feed-in tariffs was clearly assumed to exist.

18. One further feature of the scheme must be described, summarised by the invented word "degression". In each of the years after 2010/2011 and 2011/2012 an ever lower feed-in tariff applies but once fixed it remains the same for the next 24 years subject only to revision to reflect changes in the Retail Prices Index. The "fast-track" consultation announced the intention of the Secretary of State to conduct a comprehensive review of the feed-in tariff scheme:

> "A consultation on the comprehensive review will be launched this summer with intention that resulting changes to the scheme take effect from 1st April 2012, unless the review itself reveals a need for greater urgency. As with the fast-track review, the Coalition Government will not act retrospectively and any changes to generation tariffs resulting from the comprehensive review will only affect new entrants into the FITs scheme from that date. Installations which are already accredited for FITs at the time the changes come into force will not be affected."

19. The consultation was not in fact started until 31 October with an end date of 31 December -- 2 days' time. It proposed a reduction in the feed-in tariff for small solar systems from 37.8 or 43.3 pence per kilowatt hours to 21 pence per kilowatt hour. The reasons were that the cost of small solar systems had fallen by about 30 per cent from about £13,000 to about £9,000 and the price of electricity had risen. Accordingly, the assumptions as to rate of return, on which the scheme had been based, were now wrong and unduly favourable to small-scale generators. In consequence, there had been a much larger number of installations, and consequently take-up of the subsidy, effected by the scheme than had been anticipated and the rate of take-up was accelerating, as a table annexed to the witness statement of Ms Williams shows. Some 39,000 installations were accredited in the year to 31 March 2011 and 84,000 were accredited in the 7 months to 31 October 2011. Also annexed to her statement was a graph which showed a very sharp increase toward the end of that period.

20. The Secretary of State invited consideration of three proposals: "Do nothing," option 1; "Low tariffs early," option 2; and "Low tariffs April 2012," option 3. Option 2 was the Secretary of State's preferred option, as was explained in paragraphs 44 and 45 of chapter 2 of the consultation document:

> "44. Because of the urgency of the budgetary concerns, and the aim of ensuring that the FIT scheme continues to be available to households and others, we are proposing that, subject to the outcome of the consultation and the Parliamentary scrutiny required by the Energy Act 2008, the new tariffs will come into force from 1 April 2012 but will apply from that date to all new PV installations with an eligibility date of on or after 12 December 2011 (the 'reference date'). Existing generators with an eligibility date before the reference date will not be affected by the proposed change in tariffs.
>
> 45. The effect of this is that, depending on the result of the consultation, installations with an eligibility date that falls between the reference date and 31 March 2012 will receive the current tariff for that period only, and will then move to the new tariff from 1 April 2012. Those installations with an eligibility date on or after 1 April 2012 will start immediately on the new tariff."

21. Thus, the Secretary of State was proposing to reduce the feed-in tariff payable to the owner of small solar systems installed after 12 December by approximately half for all but the first two months of the life of the installation by a "modification" which was to be made and laid before Parliament some time in the new year, probably before 1 April 2012. This proposal inevitably caused dismay in the industry which has grown up to supply and install small solar systems; and amongst community organisations which proposed to install small solar systems in social housing schemes, village halls and schools. Hence, these claims brought by two major industry participants and Friends of the Earth, the latter, in effect, on behalf of a large number of community organisations, and in support of their proposition, that by acting as he proposes, the Secretary of State has jeopardised the long-term viability of the market for low-carbon electricity generation. All of them challenge the consultation and proposal on a number of grounds.

22. On Friday 16 December, I gave permission to apply for judicial review on those grounds, which did not require a detailed examination of the evidence which has been, and might be, deployed by the claimants and which would undoubtedly have been deployed by the Secretary of State only on those which raised clear issues of legal principle.

23. There are five issues:

24. 1. Whether or not judicial review was available to challenge a proposal not yet passed into law. If yes;

25. 2. Whether the enabling sections of the Energy Act 2008 give to the Secretary of State the power to amend the feed-in tariff.

26. 3. Whether his proposal is to effect a modification to the feed-in tariff which is retrospective and/or unauthorised by the enabling sections.

27. 4. Whether his proposal is itself an abuse of power.

28. 5. Whether Article 1 of the First Protocol to the European Convention would be infringed if the proposal is put into effect.

The first issue

29. Mr Nicholls, for the Secretary of State, submits that judicial review either is not or should not be available to challenge a mere proposal. The Secretary of State is entitled to consult on any proposal he likes. Provided he has not made his mind up, he may identify his preferred proposal, or even set out only one on which to consult, and the fact -- which he contends is, in any event, overstated -- that the making of this proposal has had an impact on the market affected by it does not make it amenable to review.

30. I accept all of the propositions on which he founds his submission, which are amply supported by authority. (See for example those cited in Royal Brompton & Harefield NHS Foundation Trust v Joint Committee of Primary Care Trusts [2011] EWHC 3364 (Admin)). But my acceptance is subject to an all-important caveat. The proposal must be to make a lawful decision. In the case of a proposal to enact primary legislation -- subject to an exception for overriding EU law -- it will by definition be lawful. Parliament can do what it pleases by statute. But in the case of a proposal to which effect may only be given, or is intended to be given, by a purely executive decision; or by an executive decision validated by parliamentary resolution, or the absence of a negative resolution under the Statutory Instruments Act 1946, or by a similar process, the lawfulness of the proposal may properly be the subject of a judicial review claim. That is especially so where, as here, the making of the proposal inevitably had an immediate and significant impact on the market to which it related.

31. The impact assessment which accompanied the consultation document sets out the Secretary of State's assessment of the impact of his proposal, if adopted. It would reduce the uptake of small solar systems between 12 December 2011 and 1 April 2012 by 70 per cent. This would only occur if those contemplating the installation of small solar systems decided in large number not to do so before the modification ratified by Parliament was made.

32. The true principal is set out in the judgment of Carnwath LJ in R(Shrewsbury and Atcham Borough Council v Secretary of State for Communities and Local Government [2008] EWCA Civ 148 at paragraphs 32 to 33:

> "32. Judicial review, generally, is concerned with actions or other events which have, or will have, substantive legal consequences: for example, by conferring new legal rights or powers, or by restricting existing legal rights or interests. Typically there is a process of initiation, consultation,

> and review, culminating in the formal action or event ('the substantive event') which creates the new legal right or restriction. For example, the substantive event may be the grant of a planning permission, following a formal process of application, consultation and resolution by the determining authority. Although each step in the process may be subject to specific legal requirements, it is only at the stage of the formal grant of planning permission that a new legal right is created.
>
> 33. Judicial review proceedings may come after the substantive event, with a view to having it set aside or 'quashed'; or in advance, when it is threatened or in preparation, with a view to having it stayed or 'prohibited'. In the latter case, the immediate challenge may be directed at decisions or action which are no more than steps on the way to the substantive event."

33. It is not necessary for me to determine whether the impact of the making of the proposal has been as great as that contented for by the claimants or whether, as Mr Nicholls submits, the greater impact has been produced by long-term proposals. I am satisfied that it has had, in principle and in practice, a significant impact. In principle because it has converted the expectation of a prospective installer of a small solar system from a certainty that he will be paid at the current tariff for 25 years to a situation of uncertainty in which he is likely to receive the current tariff for no more than a few months; and in practice because I accept that it has had a significant impact. Judicial review is available to challenge the proposal on the basis that it is a proposal to take an unlawful decision, in which category I include a decision which is unlawful either substantively or because it will, if taken, be taken in a manner that is not authorised by a statutory procedure.

The second issue

34. This is a point raised for the first time by me. Mr Grodzinski QC, and perhaps Mr Robb for the installers, are neutral. Mr Pleming QC for Friends of the Earth submits that although the wording of the enabling provision is clumsy, it is just effective to give the Secretary of State the power that he proposes to exercise. I propose to proceed on the assumption that the Secretary of State does have power to amend the feed-in tariff but I will briefly explain why I doubt that he does.

35. Section 41(2)(a) sets out the purposes for which the power may be exercised:

> "Establishing, or making arrangements for the administration of, a scheme of financial incentives to encourage small-scale low-carbon generation of electricity."

36. The explanatory note to section 41 at paragraph 156 states:

> "Subsection (1) gives the Secretary of State the power to modify electricity supply and distribution licences (as well as standard conditions incorporated in licences, documents maintained in accordance with the

condition of licences or agreements that give effect to those documents) to introduce a scheme (that will be known as 'feed-in tariffs') to encourage small-scale low-carbon generation of electricity."

37. Paragraph 108 states:

> "Subsection (2)(a) states that the modifications in subsection (1) may be made for establishing feed-in tariffs for small-scale low-carbon electricity generation, or for making arrangements for the administration of such a scheme."

38. The power to make modifications to standard electricity licence conditions is to be exercised in a market which is otherwise regulated by an independent authority, Ofgem, not the Secretary of State. Ofgem has been given the power under section 11A of the Electricity Act 1989 to modify standard conditions including, now, those relating to feed-in tariffs. That power is subject to a veto by the Secretary of State but not to direction by the Secretary of State. Decisions taken in the electricity market are inevitably long-term decisions. They involve substantive capital expenditure even for small-scale installers -- proportionate to their means they will be substantial -- and the payback periods are long.

39. All of these considerations, the wording of the legislation and the explanatory notes against that background suggest that Parliament intended to confer on the Secretary of State power to establish a scheme and to make arrangements for its administration, and in doing both to set initial rates including provision for adjustment in line with changes to the Retail Prices Index but then to leave it to Ofgem to regulate this aspect of the market, as is does others. In other words, it seems to me to be, at the very least, strongly arguable that Parliament intended that once the scheme had been established it was for Ofgem not the Secretary of State to make changes. But, as I have indicated, given the lack of enthusiasm on the part of those to whom this argument might have provided an advantage in these proceedings, I put those doubts aside and proceed on the assumption that the Secretary of State has the power which he claims to be entitled to exercise.

The third issue

40. This is at the heart of the challenge. Mr Grodzinski, Mr Pleming and Mr Robb submit that section 42 sets out a clear and mandatory procedure for effecting modifications to feed-in tariffs which will therefore only take effect once the process is complete: consultation, followed by draft modifications being laid before Parliament, followed by parliamentary approval or the lack of disapproval, followed by the making of the modification. The statutory scheme does not contemplate, let alone permit, a modification which in practice takes effect from a date prior to the making of the modification. By proposing to do so the Secretary of State has both made a proposal to make a decision which would be unlawful and made a decision to announce the proposal to do so -- and so disrupt the market for small solar systems -- which is itself unlawful.

41. Mr Nicholls submits that the proposal is not to make a retrospective decision and that the modification which the Secretary of State proposes to make is authorised by sections 41 to 43, and is lawful.

42. The starting point is that, as of 12 December and today, anyone installing a small solar system is entitled, under existing law, to a feed-in tariff of 37.8 or 43.3 pence per kilowatt hour for the next 25 years. If the Secretary of State's proposed modification is made he will lose that right for all but first three and a half months. The fundamental question is whether the enabling legislation permits that to be done. It is not disputed that there is a strong presumption against retrospective legislation, in particular retrospective secondary legislation, or similar decisions subject to parliamentary scrutiny, which may be overridden by express statutory language or by an obvious parliamentary intent. This is the explanation for the effectiveness of statutory provisions which gave effect in future to consequences based in substantial part on past facts: L'Office Cherifien Des Phosphates v Yamashita-Shinnihon Steamship Co. Ltd [1994] 1 AC 486 per Lord Mustill at 528H to 529A, Antonelli v Secretary of State for Trade and Industry [1998] QB 948 per Beldam LJ 959A to B, and Leeds Group Plc v Leeds City Council [2011] EWCA Civ 1442 per Sullivan LJ at paragraph 12.

43. In this case, the Secretary of State is only entitled to make modifications for two purposes: to establish a scheme of financial incentives to encourage small-scale low-carbon generation of electricity, or to make arrangements for the administration of a scheme for the same purpose. Clearly he is not proposing to do the first. In making arrangements for the administration of the scheme, he must do so for the statutory purpose: to encourage small-scale low-carbon generation of electricity. The arrangements which he makes will of necessity take into account the long-term nature of the industry; the fact that, proportionate to means, significant capital outlay is required; and the payback is to take place over 25 years.

44. Changes made by reference to a date earlier than the date on which they come into effect are not, in my judgment, calculated to further the statutory purpose. On the contrary, as Mr Pleming observes, they will tend to undermine confidence in those contemplating participating in the market for small solar systems. Further, Parliament has expressly provided in section 42 for a mandatory process before changes to the feed-in tariff can be made: "Before making a modification..." The whole tenor of the scheme is prospective. I cannot discern in it a clear parliamentary intention to permit the Secretary of State to make a modification which has a significant adverse impact on those proposing to install small solar systems before the date on which the modification is made and comes into effect.

45. If, therefore, following the proposal of the Secretary of State to make such a modification in the exercise of that statutory power such a modification were to be made, it would, in my judgment, be unlawful. It is therefore a proposal to make an unlawful decision and, as such, is not only amenable to judicial review but can properly be the subject of effective relief.

46. In the light of that conclusion it is unnecessary for me to reach any decision or to express any view on the fourth and fifth grounds, and I do not do so. I invite submissions as to the nature of the relief which I should grant.

47. MR GRODZINSKI: Can I start, my Lord, by expressing gratitude, I am sure not just from those instructing me but from everyone on both side of the court for the speed with which my Lord produced such a careful and comprehensive judgment.

48. The appropriate relief, in our respectful submission, is as follows. One, that there be a declaration that the 12 December reference date is, unlawful and, insofar as necessary, a quashing of that date. Two, a declaration that any new reference date can only lawfully take effect from after the consultation has closed, and after the Secretary of State has lawfully considered the responses to the consultation, and after the draft modification has then been laid before Parliament, and the 40 days provided in section 42 of the Energy Act 2008 has elapsed. That is the relief that we seek.

49. MR PLEMING: We support that.

50. MR JUSTICE MITTING: Mr Robb?

51. MR ROBB: We too support that.

52. MR JUSTICE MITTING: Mr Nicholls?

53. MR NICHOLLS: Our position is that we do not oppose the making of a declaration in accordance with your Lordship's judgment. We would oppose any order to quash the consultation process. If I may, I will wrap that up with the submission which I seek to make.

54. MR GRODZINSKI: We are not asking for that, my Lord.

55. MR NICHOLLS: You did say quashing if necessary.

56. MR GRODZINSKI: I meant quashing the 12 December reference date. I am not submitting that the whole consultation -- we have thought carefully about this and about whether it would be appropriate for us to ask for the consultation to be started all over again. This is not a US v Tobago (?) case where people are deprived of some important material where they do not know what the answer is. I hope I can give that assurance. We are not seeking a rerun of the consultation.

57. MR NICHOLLS: To quash the date would be to impact on the consultation process.

58. MR JUSTICE MITTING: I think what is required fundamentally is a declaration that to implement a modification of the feed-in tariff by reference to the date 12 December would be unlawful.

59. MR NICHOLLS: That follows from your Lordship's judgment, and for our part I cannot oppose the granting of declarations. But, whilst I am on my feet, we do apply for permission to appeal. Your Lordship indicated last week that this was a point

which raised institutional issues and we do say indeed that all of the issues in the case, in particular the retrospectivity question which your Lordship has founded your judgment on, is a point of some importance. It is a point, we submit, not only of legal importance but practical importance because the Secretary of State requires to know where he stands in relation to the ongoing consultation exercise. So what we would invite the court to do, if it is minded to do so, is to grant permission to appeal. We would invite the court to order that it be expedited with a view to it coming on very early next term, and then we hope that the Court of Appeal can look at these issues and come to their own view comfortably in time for decisions to be made. Following on from what Mr Grodsinski has just indicated to you, the consultation processes will proceed in the meantime, your Lordship's declaration will stand, but we hope that if the Court of Appeal considers it and comes to a different view, that the Secretary of State will then be able to act upon the original proposal, if that is what the Court of Appeal says. So in terms of the remedy, we obviously cannot stand in the way of any declaration but we do oppose any quashing of any sort because to lesser or greater degree it will interfere with the consultation process in a way which might be ultimately a (Inaudible) different view.

60. MR JUSTICE MITTING: I am only minded to grant declaratory relief.

61. MR NICHOLLS: I am grateful.

62. MR JUSTICE MITTING: I do not think there is any need for a quashing order or, for that matter, a prohibition order. The Secretary of State, I am confident, will act -- subject to my decision being upset by an appellate court -- in accordance with the law as I have declared it to be.

63. MR NICHOLLS: I am grateful.

64. MR JUSTICE MITTING: Mr Grodsinski, ordinarily, questions of permission to appeal would not be matters for the -- sorry, you want to deal with relief first?

65. MR GRODZINSKI: No, I have nothing to add on relief.

66. MR JUSTICE MITTING: Can I invite you to draw up a declaration, please, between all of you, an agreed declaration, following my judgment.

67. MR GRODZINSKI: Absolutely.

68. MR JUSTICE MITTING: Thank you. Now, the application for permission to appeal would not normally be something on which you had a great deal to say but I appreciate that the industry has brought these proceedings to achieve a degree of certainty and that an appeal is inevitably going to lead to further uncertainty.

69. MR GRODZINSKI: My Lord has our sentiments exactly in mind. We accept, and can do no other, but that this is an important cause but the question is still, regardless of any issues of expedition, whether there is a realistic prospect of success and, in our submission, for the reasons that my Lord has articulated, there is not. This is a black and white case. The only question of substance for my Lord and for the appellate

court, on the basis of my Lord's judgment, leaving aside any question of the respondent's notice, would be the question as to whether there is a vires in the 2008 Act to act in the way that the Secretary of State has purported to do. Given the wealth of authority on that point, despite its constitutional significance, this is not a novel case ultimately at all. It is a simple case about statutory construction and there has been nothing that comes close on the Secretary of State's side to identify any power of the kind that he needs. So we say that there is no realistic prospect of success. If my Lord is against us on that -- and even if my Lord it with us on that -- we would ask you, please, to exercise your powers under the Civil Procedure Rules Part 52, rule 52.4, which reads as follows:

> "(1) Where the appellant seeks permission from the appeal court it must be requested in the appellant's notice. [That is obvious].
>
> (2) The appellant must file the appellant's notice at the appeal court within –
>
> (a) such period as may be directed by the lower court [That is this court] (which may be longer or shorter than the period referred to in sub-paragraph (b)); or
>
> (b) where the court makes no such direction, 21 days after the date of the decision of the lower court that the appellant wishes to appeal."

70. So my Lord has power to require the Secretary of State to submit a notice of appeal in a very short time, and we would invite my Lord to make that direction so as to give rise to the possibility -- and I accept the ambition of what I am about to ask -- given that the longer this appeal lasts, the greater and the longer the uncertainty lasts, and that the Secretary of State should not be able to achieve through a delay in an appeal that which he has failed to achieve by unlawful executive action. We are inviting my Lord to take the exceptional course of indicating that an appeal should come on this week. Now, I accept that that is going to ask a lot of people to work very hard. If that is not possible then we would ask my Lord to certify that this case is fit for vacation business and that an appeal should be heard in the first week of January, ie immediately or as short as possible after the bank holiday, and to direct the Secretary of State to submit his notice of appeal within such a time as would facilitate that timetable because, as I say, this case will only provide the certainly for the industry once it has come to an end and not before. Can I just take instructions for a moment? That is our position on permission to appeal.

71. MR PLEMING: My Lord, I hope my position has been constant on behalf of Friends of the Earth, and that is to make submissions designed to minimise uncertainty, and it is uncertainty that would be created by the appeal process unless the Secretary of State accepts that what he is now pursuing is an appeal to deal with the future activity rather than the decision that has just been declared unlawful by your Lordship. So what we would prefer is an invitation by the court to my learned friend on behalf of the Secretary of State to accept that if he is to appeal this decision, it is on the basis that the 12 December date has gone because otherwise, as indicated by my learned friend Mr

Grodsinski, we would end up in this most undesirable world that, as a result of your Lordship's declaration of unlawfulness, the 12 December date has effectively gone, for it to be resurrected somewhere during January or February could have most unfortunate consequences. So if the Secretary of State wants to test the analysis of section 42 for what he intends to do in his next review of this legislation all well and good but it should be on the basis that the 12 December date goes.

72. My Lord, how is that to be achieved? One is, as I said, by invitation by your Lordship to my learned friend to offer that undertaking as a price of permission before your Lordship or, if that is not an invitation that is accepted, for your Lordship a decline to give permission and for the Court of Appeal to address. Otherwise, we do see some advantage in the timetable suggested by my learned friend Mr Grodsinski. We find it difficult to imagine that the Court of Appeal would sit, effectively, tomorrow.

73. MR JUSTICE MITTING: I think, save in cases involving liberty, it is unlikely that the Court of Appeal would sit.

74. MR PLEMING: That is the reality and it is really to ensure that the uncertainty generated by the 12 December date is not perpetuated or extended. I hope that is a clear submission.

75. MR JUSTICE MITTING: So, you are seeking an undertaking from the Secretary of State, as a condition of grant of permission to appeal, not to lay a modification before Parliament with a date earlier than the decision of the Court of Appeal or order of the Court of Appeal, whichever is the earliest?

76. MR PLEMING: Yes, some number of days after the Court of Appeal has made its decision. The number of days that has come straight from section 42 is 40, so it is 40 days after the Court of Appeal has spoken or, alternatively, if one takes a customary date in the legal framework, it would be 28 days. The most important point to keep emphasising is that what we do not want is to go to the Court of Appeal and then resurrect this date, because that would be must unfortunate.

77. MR GRODZINSKI: My Lord, my learned friend Mr Pleming and I discussed this before the hearing this afternoon. We support fully that invitation. For our part, we would invite my Lord to fix, if the invitation is taken up, upon the number of days as 40, that being precisely the number in section 42(2) and that reflects again the overarching imperative, in our submission, of not allowing the Secretary of State to achieve through the process of appeal that which he has not through the process of unlawful executive action.

78. MR JUSTICE MITTING: This may require some thought but let us see first of all whether the Secretary of State is minded to give an undertaking.

79. MR NICHOLLS: My Lord, I am not in a position to give an undertaking. The purpose of an appeal relates to the decision under challenge, so I do not offer the undertaking which is sought.

80. So far as the submissions made in relation to the timing of the appeal is concerned, your Lordship has, I think, indicated the difficulty of getting the matter before the Court of Appeal this week, not least because of the difficulty of preparing a case such that the Court of Appeal can effectively deal.

81. MR JUSTICE MITTING: There is no chance of doing it.

82. MR NICHOLLS: Term starts on 11 January. What I would invite your Lordship to do is to direct this case as suitable to be heard in the first week of term. Then, in terms of the delay which Mr Grodsinski lays great weight on, I invite your Lordship first of all to look out of the window. It is rather dark and 4.05 pm. As your Lordship indicated several times in the course of your judgment, decisions about investment in the electricity industry are long-term decisions. It is inconceivable that a delay of what would be 3 weeks can make the difference between a decision to invest in 25-year process of seeking returns in relation to the feed-in tariff or not and so, having regard to the nature of the industry, we say there is no realistic prospect of anybody being materially disadvantaged by having to wait 3 weeks before the Court of Appeal can resolve the matter. That, as it seems to us, is the appropriate way to deal with it. It is not a case where there are facts that make it so urgent that it needs to get before the Court of Appeal and it needs to get before the Court of Appeal as soon as possible. As it seems to us, the first week of term is ample sound timetable in which to achieve that. It does provide a certainty and it avoids the concerns which Mr Grodsinski has about matters lingering on, although I am bound to say for the time being your Lordship's declaration prevails and, clearly, the Secretary of State has to be to governed by that. What my proposal does is get the case before the Court of Appeal promptly and in an orderly fashion, giving all parties a proper time to reflect upon your Lordship's judgment. Mr Grodsinski has already indicated that there may be respondent's notices to be pursued. I say that that timetable is entirely fair and sensible, having regard to the nature of the decisions which potential investors and installers would be making.

83. MR JUSTICE MITTING: If I were to refuse permission but to shorten the period within which you should put in a notice of appeal, what is the shortest time in which you could do that?

84. MR NICHOLLS: I would need to give some thought to that because of the time of year but one observation that arises from your Lordship's question is of course that it would be quicker if permission were to be granted because then your Lordship can make an order saying granted permission and dealing with it expeditiously. I do not, as I stand before you, have a particular date to put by which we can put in the notice of appeal.

85. MR JUSTICE MITTING: Mr Grodsinski, my principle aim is that which you and Mr Pleming urged upon me, to do that which is least likely to cause prolonged uncertainty. At the moment, I am far from clear how I can achieve that aim. I doubt, to be blunt, that the prospects of success in an appeal against my decision are that good but it may be that in the wider importance of the case that it is fit for the Court of Appeal under the second head, about which I express no view at the moment. But I am anxious above all to avoid further prolonged long uncertainty.

86. MR GRODZINSKI: Can I give my Lord two reasons why, in our submission, the first week of January rather than the first week of term is appropriate. I accept, in a narrower perspective -- and after all we are the claimant -- HomeSun has a number of employees who are on a statutory redundancy period that comes to an end of 12 January. So, from its perspective, a hearing before then is immensely important otherwise there is a prospect that they will win in the Court of Appeal but because nothing can be done, effectively, until then, they would have to have been let go by then. That is the first point.

87. The second point is that Mr Nicholls says 3 weeks here or there makes little difference, but the problem is that in that 3-week period there is still a possibility faced by those in the solar industry that any installations that they put up in that period will have a tariff set, if this appeal is successful -- although we expect it not to be -- at a commercially unviable rate. So, again, my learned friend looks up at the sky and says it is dark as if the solar generation in this particular winter makes a difference to the 25-year point. My Lord has the point. So, in our respectful submission, in order to avoid delays in the appeal having precisely the effect that the uncertainty already generated has had, we would respectfully invite my Lord -- and, of course, ultimately my Lord cannot tie the Court of Appeal's hands, my Lord can just indicate to the Court of Appeal how urgent my Lord thinks it is.

88. MR JUSTICE MITTING: Quite. I can do a limited number of effective things. One is to make an order refusing or granting permission and, if I refuse, shortening the time for filing of an appellant's notice. If the Court of Appeal considers that this case deserves its attention, then by one means or another it will get to the Court of Appeal. At the moment, I think that I should give effect to my own view that the prospects of success are insufficiently great to justify the grant of permission, but having done that, to do that which I can to ensure that if there is an application for permission to the Court of Appeal, to see it is dealt with as quickly as possibly, and my power is limited to shorting the notice period.

89. MR GRODZINSKI: I suppose my Lord has an informal discretion to indicate, through whatever channels are appropriate -- and it is not for me to suggest what they might be -- to indicate to the Court of Appeal what the urgency is, and that could be recorded either on the face of the order or through informal means.

90. MR JUSTICE MITTING: The precise point in the legal term at which we have arrived and the departure of judges from this building to their homes means that the informal means are not as easily accessible as they sometimes can be.

91. MR GRODZINSKI: I telephoned two Lord Justices' clerks this morning in relation to judgments I had just received in draft and there may be a number of points and both of the voicemail messages said they were off until 11 January. So, I understand.

92. MR JUSTICE MITTING: So, what I can do it limited. I think all I can do is give effect to my own view about merits by refusing permission to appeal, which I do, and then seeing where we go from there.

93. MR GRODZINSKI: Can I then -- my instructing solicitor asks me to ask you -- I think my Lord has already said you would do it -- you would curtail the time for filing the notice of appeal.

94. MR JUSTICE MITTING: Yes, I am willing to do that, but what I want is, given the fact that Christmas is only a few days away, a realistic timetable.

95. MR GRODZINSKI: The notice of appeal does not itself have to do anything more that contain the grounds of appeal.

96. MR JUSTICE MITTING: No.

97. MR GRODZINSKI: I would invite my Lord to direct that the notice of appeal be filed by Friday.

98. MR JUSTICE MITTING: I assume it is your side who has brought in the LiveNote shorthand expert.

99. MR GRODZINSKI: It is.

100. MR JUSTICE MITTING: Therefore, you will have available to you an unapproved transcript by close of business today.

101. MR GRODZINSKI: We will share it. There is no pride of ownership in relation to it.

102. MR JUSTICE MITTING: Quite. You will have to do that to permit your proposed timetable to be realistic.

103. MR GRODZINSKI: Absolutely.

104. MR JUSTICE MITTING: You will have to supply a copy, by later on this afternoon, of the LiveNote draft.

105. MR GRODZINSKI: The Treasury Solicitors are paying for half of it.

106. MR JUSTICE MITTING: They are entitled to it then.

107. MR GRODZINSKI: Undoubtedly so. As soon as we get it from LiveNote. I do not invite my Lord to have to approve it because that will take some time. We will just circulate it.

108. MR JUSTICE MITTING: Quite. Well, you do not need an approved transcript for drafting purposes at this stage.

109. MR GRODZINSKI: Can I ask until Wednesday 4 January for my notice of appeal, not only because it is rather dark outside but because I very much doubt that anyone is going to be making decisions about installing solar panels over Christmas and the New Year, and I can at least say that any uncertainty generated by a prospective appeal is not going to have an impact in that period, and I will submit my notice of appeal

immediately after the Christmas and New Year festivities, with a view to getting on with it as quickly as possible.

110. MR JUSTICE MITTING: Is there any personal reason why the imposition of a Friday deadline on drafting a notice of appeal would be impossible or difficult to achieve?

111. MR NICHOLLS: I am not around after tomorrow. I am not around on Friday at all, so it will curtail my involvement to tomorrow and what burden I can impose on Mr Cornwell's shoulders, I am sure are very unreasonable and heavy ones.

112. MR JUSTICE MITTING: The fact is that, as eventually refined, the scope of my judgment was very narrow and the determinative issue was a single one. From what you tell me, I think you can draft an notice of appeal tomorrow.

113. MR NICHOLLS: I just need to put down a marker about what if do not, in this sense: as your Lordship well appreciates, documents of this importance do not just need to be drafted by me but they need to be approved by the Treasury Solicitor and other departmental officials as well, so there is always a group of people who need to look at these things. I am concerned, just in the nature of things, that if you impose an obligation on Friday and I am not able to meet it, what do I then do? Do I go to the Court of Appeal and invite them to extend the time? Do I do it ex post facto? I am concerned that that approach is creating significant difficulty in circumstances where it cannot logically make a difference because no-one can stand up before the court and say, "You know, 25 December, we were planning to make a decision about solar panels and now we cannot". Everybody is in the same position of having a period of quiet over Christmas, and I do say it cannot make any difference to anyone if I have until the 4th, which is a Wednesday, in the New Year to submit the notice of appeal.

114. MR GRODZINSKI: To make life easier -- I have just canvassed some views -- we would be content for 4 January if it was accompanied by the skeleton argument, as it should be, not just bare grounds of appeal.

115. MR JUSTICE MITTING: How does that offer strike you?

116. MR NICHOLLS: I cannot say more than I will see what I can do. Can I actually just come to the position of the Court of Appeal? How is it of any use to the Court of Appeal if I produce a grounds of appeal at great haste and a skeleton argument under similar constraints rather than presenting them with something in a more considered form which will be more useful to them? So apart from my own inconvenience -- although I know that takes a pretty low priority in any litigation -- simply the position of the Court of Appeal. I have no difficulty if your Lordship wishes to impose a relatively short timeframe after 4 January for a skeleton argument to be submitted but I am just concerned there may be practical problems. Maybe we should say the 6th, which is the Friday, then I can say yes to both notice of appeal and skeleton.

117. MR GRODZINSKI: I feel like I am in the souk in Jerusalem. I feel the problem with this timetable is -- at the risk of echoing my earlier submissions -- it predetermines the

timing of the hearing in the Court of Appeal because it means we are not going to have a hearing until, at the very earliest, the week of the 11th.

118. MR JUSTICE MITTING: There will be a Lord Justice on vacation duty and all I can do is to urge the Secretary of State to accompany the notice of appeal and skeleton argument with a request that the request permission be put before the duty Lord Justice promptly.

119. MR GRODZINSKI: I am grateful and I will say no more than that save for this. For my learned friend to say, "I will see what I can do" is unsatisfactory. We would ask for an undertaking from the Secretary of State that he submits his notice of appeal with a skeleton on the 4th.

120. MR JUSTICE MITTING: Did I hear the 6th?

121. MR GRODZINSKI: I hear from my learned friends the 6th, and I hear from my instructing solicitor the 4th. I am sticking to the 4th.

122. MR JUSTICE MITTING: I am not going to split the different.

123. MR GRODZINSKI: Just on the question of counsel's convenience -- and this is about to touch on the next application that my Lord will be asked to decide, which is costs -- for our part, we have been playing -- I was going to say musical chairs -- we have tried as hard as we can not to let counsel's convenience have anything to do with this case. Mr Drabble (?) and Miss Mountfort (?) were here last week, Mr Pleming and myself were here this week, and I am in the Court of Appeal in the week of the 17th and if that is when -- I hope it is not -- this case is listed, somebody else will have to do the Court of Appeal. Counsel's convenience, with respect, should have nothing to do with it.

124. MR JUSTICE MITTING: Thank you. I had already indicated that I refuse permission to appeal on the basis that I do not believe that there is a realistic prospect of success. I shorten the time for filing an appellant's notice under the Civil Procedure Rules 52.4 to 4.00 pm on Wednesday 4 January and direct that a skeleton argument is filed with the notice of appeal. I request that the Treasury Solicitor accompanies the notice of appeal, if one is served, with a request that the application for permission is put before a single Lord Justice as a matter of urgency.

125. MR ROBB: My Lord, may I make a brief submission. It is really to deal with any uncertainty that may arise from your judgment, as there will not be a chance to correct the transcript that is going to go off to all parties as soon as it is produced. Towards the beginning of your judgment, you indicated that you were referring only to systems up to a maximum of a 40 kilowatt peak. In fact, your Lordship is dealing with systems up to a maximum of 50 kilowatt peak.

126. MR JUSTICE MITTING: I am sorry, I had overlooked that.

127. MR NICHOLLS: Just so there is no lack of clarity. I am told strictly it is 250 but the point is there are many references in the consultation document and elsewhere to the

prospective change of the consultation applying to systems well above the 40 kilowatt peak size. I just wanted your Lordship to make a note of that at this point.

128. MR JUSTICE MITTING: The reasoning that I have set out applies, obviously, to other proposals within the consultation document which suffer from the same flaw but I apologise to you for overlooking the interests of larger generators but all of the arguments focused on small users.

129. MR ROBB: Indeed. The same point applies in any event but I just wanted to make sure you --

130. MR JUSTICE MITTING: Well, clearly it does.

131. Now we get to the most contentious point.

132. MR GRODZINSKI: I will not make the same submission as Lord Brennan once made when I was sitting, effectively, as his pupil, which was, "We came, we won, they pay." I will be slightly more appropriate than that. We do seek our costs of the application for judicial review. I am conscious that my Lord at the last hearing gave a provisional indication about awarding more than one set of costs. There is plainly power to award more than one set of costs, and an example of that is in Mr Pleming's submission, paragraph 18.1.11, and the only entry in it under the heading, "Costs of separately represented claimants" reads:

> "A, R (on the application of) v East Sussex County Council [2005] EWHC 585 (Admin). No indication of the circumstances in which this order was deemed appropriate. It would be in the circumstances appropriate -- fair, just and appropriate -- to depart from the typical starting point and to award the claimants two sets of costs."

133. So that recognises two things. One, that, generally, claimants do not get more than one sets of costs but, two, obviously, the court has a discretion to depart from that where it is fair, just and appropriate. If I could seek to renumerate briefly why we say it is fair, just and appropriate. First of all, the common sense reason why, generally, separately represented claimants should not get more than one set of costs is that they ought to have co-ordinated matters between themselves in advance and thereby avoiding duplication. In this case, that was simply not possible because of the very urgent situation which my Lord has agreed we were facing. We did not, for example, when we issued the claim form, know whether or not Friends of the Earth would or would not issue the claim. Once it became clear that there were three claimants, all steps were taken to avoid duplication so far as possible to do so. So, for example, one bundle was prepared for the permission hearing and one bundle was prepared for this hearing and one skeleton argument was prepared for both hearings, and so there has been, in fact, very little duplication of effort at all.

134. To some degree, there has been duplication because Mr Pleming has had to sit here as I have droned on for a day or so but that was inevitable because to some degree Friends of the Earth's interests are wider and different from those whom I represent.

Nonetheless, it was agreed last week, in light of our respective commitments, between the grant of permission and today's hearing, that I would take the lead in the advocacy, although with considerable help from Mr Sinclair, and we therefore spent, and my clients spent, and will, I am afraid, be liable for, costs both from my instructing solicitors and me who worked part of the weekend: Friday, Sunday, Saturday night and Monday. That is not a complaint on our part, it is just reflecting the reality. What else could be done? So, in those circumstances, for us to be told, "Well, you cannot have all of your costs," of course subject to assessment, would, in our submission, be inappropriate, unjust and unfair.

135. Again, in relation to the evidence, our evidence went to a slightly different -- significantly different set of impacts than the Friends of the Earth. Again, there has been no duplication in the preparation of evidence. So, for those reasons, we would say that HomeSun is entitled to its costs -- taxed if not agreed -- and see no reason why others should be treated differently, although I do understand that separate submissions will be made by Mr Pleming and Mr Robb.

136. MR PLEMING: My Lord, on behalf of Friends of the Earth, we do also ask for our costs of this application, Friends of the Earth acting as a reasonable and responsible environmental organisation; and Friends of the Earth, as already noted and observed by your Lordship, I suspect from the papers, had a broader interest to protect and advance than the other claimants, who understandably approached these proceedings from their own commercial prospectives. We trust that your Lordship will accept that Friends of the Earth, through its legal team, have made a substantial argument, or contribution to the argument. What your Lordship would not know is that, as recognised by my learned friend Mr Grodsinski, Mr Sinclair has been substantially involved in the drafting, and lead has fluctuated with Mr Drabble last week and Mr Grodsinski this week. We have tried, as he said, not to duplicate. It would be inconsistent, we say, with the principles enshrined, and now well known to your Lordship, in the Argus (?) Convention to in any way penalise a responsible and reasonable environmental organisation when bringing its proceedings, and not order the unsuccessful government party -- and I emphasise government -- to pay the reasonable costs.

137. That is our primary position. We are well aware that your Lordship showed some initial disinclination to order three sets of costs, and could we suggest a fallback position, which is very much an alternative. Our first and primary position is that we cover our costs. If your Lordship is disinclined to make that order, accepting that it was reasonable for Friends of the Earth to commence these proceedings and left with little option but to pursue them in light of the summary grounds of resistance filed by the Secretary of State and orders made by your brother judges, we had to bring this case to your Lordship for permission. So, the first part is that Friends of the Earth should recover their costs, subject always to agreement or detailed assessment, up to and including the grant of permission on Friday. Then what to do with Friday to today, if it is not to be our full costs, then reflecting that co-operation that I referred to, an alternative -- my learned friend Mr Grodsinski not signing up to this, and I am not suggesting that he should -- but an alternative would be for your Lordship to order the Secretary of State to pay 50 per cent of the Friends of the Earth's cost from Friday and 50 per cent of my learned friend Mr Grodsinski's client's costs, it having been

understood by conversations between those who instruct me and Solar Century that so long as they get their permission costs then they would not press for separate costs for this hearing. So, our primary position are costs, for the reasons I have given; the alternative is costs up to and including permission, thereafter 50 per cent of our costs.

138. MR ROBB: My Lord, we too ask for our costs up to permission. We do not seek any costs thereafter. Very briefly, in terms of our position up to the permission stage, we were the first to challenge, as your Lordship will have seen from the forms. That was because of the immediacy of the impact on my client company and the seriousness of that impact. Your Lordship will know, because I have said it a couple of times, we do come from a slightly different perspective. Once we understood that HomeSun and Friends of the Earth had joined and had become claimants in their own right, we did everything we could too to expedite things, to get together to produce joint bundles, joint skeletons and everything else. After the permission stage, my submission is that we wanted to keep an eye on things but we do not apply for our costs post that but I do respectfully urge your Lordship to grant our costs to permission.

139. MR NICHOLLS: I accept that the Secretary of State is liable for one set of costs but I invite your Lordship to stop at that point.

140. MR JUSTICE MITTING: Three claims forms with accompanying evidence have been issued and filed. It is a little difficult for an individual claimant to coordinate litigation with other claimants until the claim forms are filed. I agree if there had been a claim association which could have brought a claim on behalf of all members of the association then that would have been a good way of doing it and you might have only been faced with two claimants: the Trade Association and Friends of the Earth. But, as I understand it, there is not a coordinating body here, they are all individuals. Why should you not pay the start-up costs of the litigation to each of the parties but then only one from then on?

141. MR NICHOLLS: So far as Friends of the Earth is concerned, when they issued their claim form they applied to have their case joined with that of Solar Century, so it is difficult to understand why, in term of coordination, they could not just be an interested party in that litigation. But in answer also to my Lord's question, all the claimants have now made it clear that they are arguing the same points. As they said in their first skeleton arguments, the parties share grounds of challenging the legality of the proposal. They had one skeleton argument there and they had one skeleton argument in this case. There is no reason to depart from the general rule, particularly in a case such as this where a number of parties come along to argue the same points, that the Secretary of State should be liable for only one set of costs rather than all the costs, no matter how one divides it up. There is no reason in this case why there needed to be three claims, particularly so far as Friends of the Earth is concerned and, in the event, the addition of the other parties has not altered the arguments that were put before the court. So whilst I accept the liability to pay one set of costs, there are no circumstances in this case which justify a departure from the usual rule.

142. MR JUSTICE MITTING: Thank you. Somebody was inevitably going to be the lead claimant but why could others not have come in as interested parties?

143. MR GRODZINSKI: My Lord, because the timing, as it were, was Solar Century, HomeSun, Friends of the Earth, all within a few days of each other. The grounds argued by Solar Century did not cover all of the grounds that we argued. Now, some of the grounds that we put forward in our claim in the end have not been decided upon in this hearing because of the very tight timetable and because the restriction in the grant of permission made the limitation as to what could have been decided today. So there were points that we took that were not taken in the Solar Century grounds and we felt constrained to take because we felt they had legal merit. Now, whether they have legal merit is of course a matter that my Lord has decided upon. That is the first point.

144. The second point is that the thrust of Mr Nicholls' submissions is that because there was one skeleton for both hearings, somehow we should be penalised for that. On the contrary, one would have though that the greater the degree of cooperation, the more inclined the court should be to recognise that there will be no duplication and to not penalise the parties for that duplication, but to compensate. If my learned friend is right then we ought to have put three different sets of skeleton arguments in and therefore we would have had three sets of our costs.

145. The last submissions I would make is, if my learned friend is right and one set of costs is awarded, I ask rhetorically how is that to be divided up between the three. Is there going to be some pro rata device of totting up the number of hours and then dividing it up? It would be an invidious exercise to say the least, and the fact that this has to be done at all shows quite why it is an unfair thing to order in the first place.

146. MR JUSTICE MITTING: One would rather hope that the admirable cooperation which has been shown so far would extend even to dividing up a single pot of costs.

147. MR GRODZINSKI: No doubt it would, my Lord. But how is that single -- if the single pot of costs are ours -- as I suspect ours will be the greatest because most work was done-- how would it be decided? As my instructing solicitor points out, if there is any real duplication and if the total costs cannot be agreed and it comes before -- I do not know what the right name is now, not the Taxing Master -- the Costs Judge, the Costs Judge can cut down the costs which he thinks are duplicated.

148. MR JUSTICE MITTING: There is a certain amount of duplication of evidence here, although I was informed by all the witness statements that have been filed, in fact, that they could have been shrunk by half and I would have still got the same essence from them. The claims forms, I think, had to be issued for all three parties, and that is reasonable and they should recover costs of preparing and filing the claim forms but beyond that I really do not see why the Government should have to pay more than one set of costs.

149. MR GRODZINSKI: If my Lord has not been persuaded by what we have said so far then we would simply ask, if my Lord is going to award one set of costs, then whosever it is -- and there is going to be no inflation here -- whoever it properly belongs to -- because it would be invidious to pick the smallest bill and then divide it by three.

150. MR JUSTICE MITTING: Can I take what you have said to me, that you anticipate that your costs will be greater than that of any other party?

151. MR GRODZINSKI: I think so, given the number of hours that my team have spent.

152. MR JUSTICE MITTING: You have plainly borne the burden of the main hearing.

153. MR GRODZINSKI: Can I just -- cooperate. I think the short answer is it is difficult to know because Mr Sinclair has prepared the drafting of the skeleton for the permission hearing, I only worked with that draft skeleton for this hearing. That was most of Friday and all of Saturday and Sunday, and I then spent all of Monday preparing for today. I do not know. I have not got a comparative totting up of hours or rates or anything.

154. MR JUSTICE MITTING: I do not want to create difficulties, especially where none would exist unless I make an order that causes difficulties. What I have in mind -- and tell me if this is clearly wrong -- is that the claimants should have the costs, each of them and separately, of preparing and filing their claim forms including the statement of the grounds upon which relief is sought and the summary of the facts but that thereafter there should only be one set of costs, which I propose should be yours, in the expectation that that is likely to reflect the biggest of the three bills reasonable incurred.

155. MR GRODZINSKI: I am grateful, my Lord.

156. MR JUSTICE MITTING: There is implicit in what I have said that an equitable sharing will then occur.

157. MR GRODZINSKI: Yes.

158. MR JUSTICE MITTING: I can give, if you insist upon it, liberty to apply in the event of a falling out.

159. MR GRODZINSKI: If there was liberty to apply, I suspect the co-operation that has existed thus far would all of a sudden evaporate.

160. MR JUSTICE MITTING: I am glad to hear it. The order that I make then is that the Secretary of State will pay each of the claimants their costs of preparing and filing the claim form, including the grounds upon which relief is sought and the summary statement of facts, and the costs of HomeSun thereafter, to be the subject of a detailed assessment if not agreed. In the event that the division between the three successful claimants of the resulting award of costs is not agreed between them, there is liberty to apply, I fear to me, to resolve any difference on paper.

161. MR GRODZINSKI: I am very grateful. In terms of getting an order to my Lord, one of us will draft one this evening and we will agree it between us this evening and send it to the Secretary of State this evening. Is my Lord around tomorrow to endorse it?

162. MR JUSTICE MITTING: No, but I will try and set up a means by which it can be got to me and I can then endorse it and send it back.

163. MR GRODZINSKI: I am grateful.

164. MR JUSTICE MITTING: But things may not work perfectly.

165. MR GRODZINSKI: We may not need to trouble your Lordship. If everything can be agreed in terms of the order then we will not trouble your Lordship.

166. MR JUSTICE MITTING: What do you want me to do about approving the transcript of the judgment?

167. MR GRODZINSKI: I am in the LiveNote staff's hands as to when it is likely to be approved and when it can be emailed.

168. THE LIVENOTE WRITER: 8.30 pm this evening.

169. MR GRODZINSKI: If my Lord gave, through the associate, to the LiveNote writer, whatever email address is applicable.

170. MR JUSTICE MITTING: If only I knew it. It is probably best to send it by fax, I can certainly provide that.

171. MR GRODZINSKI: I am grateful. I will ask the LiveNote person to liaise with your associate.

172. MR JUSTICE MITTING: I will wait outside for those who need to have numbers to come and see me. Thank you all.