

Neutral Citation Number: [2013] EWHC 1013 (Admin)

CO/8473/2012

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

Royal Courts of Justice  
Strand  
London WC2A 2LL

Monday, 25 February 2013

**B e f o r e:**

**JOHN HOWELL QC**  
(Sitting as a Deputy High Court Judge)

**Between:**

**THE QUEEN ON THE APPLICATION OF CRYSTAL WINDOWS & DOORS LTD\_**  
**Claimant**

v

**OFFICE OF FAIR TRADING\_**  
**Defendant**

**RENEWABLE ENERGY ASSURANCE LIMITED**  
**RENEWABLE ENERGY ASSOCIATION**  
**Interested Parties**

Computer-Aided Transcript of the Stenograph Notes of  
WordWave International Limited  
A Merrill Communications Company  
165 Fleet Street London EC4A 2DY  
Tel No: 020 7404 1400 Fax No: 020 7404 1424  
(Official Shorthand Writers to the Court)

**Mr S Murray** (instructed by Prospect Law Limited) appeared on behalf of the **Claimant**

**Ms E Mitrophanous** (instructed by Office of Fair Trading) appeared on behalf of the  
**Defendant**

**Ms M Lester** (instructed by Renewable Energy Assurance Limited) appeared on behalf of  
the **Interested Parties**

J U D G M E N T  
(As Approved by the Court)  
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1. THE DEPUTY JUDGE: This is a renewed application for permission to claim judicial review. The Claimant, Crystal Windows and Doors Limited, was refused permission on the papers by HHJ McKenna, sitting as a Deputy Judge in the Administrative Court.
2. The Claimant manufactures and installs Solar Photovoltaic systems to its customers. They receive payments in respect of the energy which such systems generate by virtue of what are called "feed-in tariffs". But consumers will only receive such payments if their suppliers are members of a scheme of self-regulation sponsored in this case by the Renewable Energy Association. The Claimant is a member of that scheme.
3. The scheme is operated by the Renewable Energy Assurance Limited, to whom I will refer as "the Company". It is a wholly owned subsidiary of the Renewable Energy Association. The scheme comprises by-laws that govern the relationship between its members. They are required to adhere to the by-laws and to a Consumer Protection Code of conduct that has to be approved by the Office of Fair Trading, to whom I will refer as "the OFT".
4. The OFT approve such codes under its Consumer Code Approval Scheme. The OFT's Approval Scheme is an arrangement made by the OFT under section 8 of the Enterprise Act 2002. That section provides:

"(1)The OFT has the function of promoting good practice in the carrying out of activities which may affect the economic interests of consumers in the United Kingdom.

(2)In carrying out that function the OFT may (without prejudice to the generality of subsection (1)) make arrangements for approving consumer codes and may, in accordance with the arrangements, give its approval to or withdraw its approval from any consumer code.

(3)Any such arrangements must specify the criteria to be applied by the OFT in determining whether to give approval to or withdraw approval from a consumer code."
5. The Company's Code was approved by the OFT on 3 November 2011.
6. The Claimant seeks to impugn the OFT's decision on 12 July 2012 to approve amendments to that Code and to carry out a review of the Code.
7. The OFT states that its approval had initially been sought for the changes on 16 March 2012, that it raised one substantive issue about them; and that, when it was informed that the amended code had been adopted by the Company on 18 June 2012, its case manager raised no objection to them, having ascertained that the amended code had addressed the issue which the OFT had raised satisfactorily.
8. The Claimant subsequently raised the question with the OFT whether it had in fact approved the changes and it raised a number of concerns with the OFT about the changes which had been made. The OFT says the Company offered to make any

further amendments which the OFT required and the OFT then decided to approve the amended code on 12 July 2012 on the basis that it would be in the better interests of consumers and members of the scheme to have certainty as to the applicable code.

9. It appears that, subsequently, on 30 January 2013, the OFT had approved a new code, the latest drafts of which were submitted to it on 29 January 2013. I have not considered the extent of the differences between the Code as it had been approved in January this year and that approved in July last year.
10. The changes to the Code with which the Claimant was particularly concerned were those relating to the disciplinary procedures it contained. They were said to have been made to achieve consistency with the scheme by-laws regarding such proceedings. The changes involved deleting those procedures from the Code itself but referring to the relevant sections of the by-laws which dealt with such proceedings instead. One consequence of this change that has particularly concerned the Claimant was that an express requirement in the Code that the disciplinary panel would investigate suspicions that a member had not complied with the scheme quickly and fairly is not replicated in the by-laws. That has caused the Claimant particular concern.
11. The Claimant alleges that the OFT's decision to approve the amended code on 12 July 2012 was unlawful since the Company had purported to make the alterations to its Code on 18 June 2012 before the OFT had in fact approved them. It contends that that was contrary to the statement in the OFT's Consumer Code Approval Scheme that any changes to the Code had to be agreed in writing with the OFT before they were implemented and that the OFT had no power to give retrospective approval to changes already made. The Claimant relies on the fact that, as I have mentioned, under section 8(2) of the Enterprise Act 2002, the OFT must act in accordance with its published arrangements when giving its approval.
12. The Core criteria and Guidance provide that the code sponsor should regularly review and update its provisions in the light of changing circumstances and expectations. They also provide that the code sponsor should provide a written report annually to the OFT including changes to the Code agreed with the OFT and implemented. Under more information about this latter requirement it is stated that:

"Changes to the code which need to be notified to the OFT include any fundamental changes which may affect compliance with any of the core criteria and also any that were made as a result of addressing concerns raised by advisory bodies as part of the consultation exercise. Any changes to the code must be agreed with the OFT before they are implemented."
13. The Claimant contends that the OFT gave retrospective approval to the changes made and it had no power to do so. On behalf of the Claimant, Mr Murray took me to various letters and emails but in none of them did the OFT purport to give retrospective approval. The actual approval, which was given in an email sent on 12 July 2012 to the Company, stated that:

"Having now undertaken a preliminary review of the code amendments we are content with the changes you have made. We are still awaiting feedback from our colleagues in the legal team and will pass on any comments they may make in due course for you to action."

On behalf of the OFT, Ms Mitrophanous has informed me that the OFT did not purport or intend to give retrospective approval. On that basis this issue simply does not arise.

14. The Claimant further alleges that the approval given was unlawful as the OFT had no power to conduct a review of the alterations once made and that it should not have approved the changes without first being satisfied that they were appropriate. There is no power, so the Claimant contends, for the OFT to give preliminary approval, as the OFT at one point had said it had.
15. In fact the OFT has power to withdraw its approval from any consumer code it has approved. There is no reason why it may not conduct a review for that purpose. In practice, of course, if the OFT says that its approval will be withdrawn if the code is not amended as it wishes the likelihood must be that the code will be amended accordingly, if not its approval will be withdrawn. But, whatever the more general position may be, in this case the OFT says the Company had undertaken before the approval was given to make any amendments to its code which the OFT subsequently requested. Even if the OFT had no power itself to amend a code which it had approved, in practice it had an assurance from the Company that it would give effect to what it required after any review. On that basis, it appears to me that the question is then whether there is any arguable case that the OFT acted unreasonably in approving the amendments in all the circumstances on the basis that it would be undertaking a review to which it could reasonably expect the Company to give effect. That involves, in effect, a challenge to the purpose and rationality of the decision.
16. The Claimant contends that the OFT took no account of the potential impact on consumers or members which the altered code would have pending the outcome of the review and that it simply rubber-stamped the alterations without proper consideration when it realised that changes had been implemented without its prior approval. It points to the removal of the requirement that suspicions that members who have not complied with the scheme would be investigated by the panel quickly and fairly in that connection.
17. The notion that the OFT gave no consideration whatever to the proposed amendments, however, is at odds with the sequence of events. The amendments had been previously considered and the OFT's substantive concern at that stage had been resolved before the amendments were adopted. The OFT says that the changes to the Code with respect to disciplinary procedures were considered and were not of concern to it. In considering whether or not the OFT's reason for approving the amendments at that stage was at least arguably unreasonable it is necessary to bear in mind the public interest in having a code which consumers can rely on and it being clear which code they can rely on.
18. In the letter to the Claimant on 19 July 2012 the Claimant was informed by the OFT that they were going to give consideration to the particular points which the Claimant

had raised as part of the review which they proposed to hold and that, as Ms Mitrophanous has informed me, they were also proposing to review more generally the code in the light of the fact that there had been over 1,000 complaints received since the Code had been approved in November 2011.

19. In my judgment, the complaints which the Claimant had raised about the fairness of the procedures to members of the scheme such as the Claimant could not arguably have justified postponing the approval of the amendments if it was otherwise in the public interest to approve them. The OFT's Code requires sponsors to establish a procedure for handling non-compliance by members with their code which include independent disciplinary procedures and reasonable timetables for action. It indicates that the procedures should be fair to the member who is being investigated. The by-laws contain a framework and timetable for investigation by the executive and a framework for proceedings of the disciplinary panel which appear to provide for fair hearings. The removal of the express requirement to investigate a suspicion fairly cannot relieve the non-compliance panel of the obligation which would in any event be implied to act fairly if the prescribed framework was deficient for that purpose. So, in my judgment, that does not of itself provide a reason for not approving the amendments at that stage. Similarly, in my judgment, the disciplinary panel would be unarguably required in any event to consider such complaints as soon as reasonably practicable.
20. The other reason for having a review, namely to look at the whole code overall, appears to me one which would in any event have applied whether or not the amendments were being put forward. Mr Murray has suggested nothing which would suggest that the amendments would have made any matters worse with respect to dealing with the complaints in that respect.
21. In my judgment, therefore, the Claimant has not shown any arguable grounds upon which to seek judicial review.
22. Both the OFT and the Company suggest that in any event the claim has become academic because the review has been concluded, the new code has been published and that, if the Claimant had any complaints about that code, they could be the subject of a further and different judicial review. I do not propose to refuse permission on the ground that the claim is academic. I do not necessarily consider that it would have been. But I do refuse permission on the basis which I have outlined.
23. I am very grateful to all counsel for their assistance.