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Case Nos: HQ12X03560
HQ12X04456
HQ12X04457
HQ13X03998

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 July 2014

Before :

THE HONOURABLE MR. JUSTICE COULSON

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Between :

BREYER GROUP PLC & OTHERS	**Claimants**
- and -	
DEPARTMENT OF ENERGY AND CLIMATE CHANGE	**Defendant**
FREE POWER FOR SCHOOLS LP	**Claimant**
- and -	
DEPARTMENT OF ENERGY AND CLIMATE CHANGE	**Defendant**
HOMESUN HOLDINGS LIMITED & ANOTHER	**Claimants**
- and -	
DEPARTMENT OF ENERGY AND CLIMATE CHANGE	**Defendant**
TOUCH SOLAR LIMITED	**Claimant**
- and -	
DEPARTMENT OF ENERGY AND CLIMATE CHANGE	**Defendant**

- -
- -

Mr Michael Fordham QC and Mr Simon Murray
(instructed by **Prospect Law**) for **Breyer & Others**
Mr Sam Grodzinski QC

(instructed by **Asserson Law Offices**) for **HomeSun Holdings**
Mr Patrick Lawrence QC and Can Yeginsu
(instructed by **Bhailok Fielding Solicitors**)
for **Free Power for Schools** and **Touch Solar**
Mr Michael Beloff QC and **Mr James Cornwell**
(instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 19, 20 and 21 May 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR. JUSTICE COULSON

The Hon. Mr Justice Coulson :

1. INTRODUCTION

1. This large and (in some respects) novel claim arises out of the defendant's proposal, announced in a Written Ministerial Statement on Monday 31 October 2011 and a consultation document published on the same day, to bring forward the cut-off date by which certain Feed-in-Tariffs ("FIT") at a particular rate would be paid to generators (or their nominated recipients) involved in small-scale solar panel installations. The FIT scheme was designed to encourage small-scale low carbon generation installations. However, by October 2011, the defendant thought that the initial rates for solar photovoltaic installations were too generous to generators. So the defendant proposed to bring forward, from 1 April 2012 to 12 December 2011, the date by which the installations had to be commissioned/registered in order to qualify for the highest FIT rate.

2. On the Assumed Facts the making of this proposal had a significant effect on the solar photovoltaic ("solar PV") industry. Hundreds, if not thousands, of installations which would otherwise have been completed by the April 2012 cut-off date were abandoned, when those involved realised that they could not complete them by the new date of 12 December 2011. Some of those directly affected by this proposed change issued judicial review proceedings. In ***Friends of the Earth v Department of Energy and Climate Change*** Mitting J gave judgment in favour of the claimants on 21 December 2011 ([2011] EWHC 3575 (Admin)). On 25 January 2012, the Court of Appeal ([2012] EWCA Civ. 28; [2012] ENV L.R. 25) also concluded that the proposal was unlawful because there was no power under the relevant statute to make delegated legislation retrospective. The proposal would have taken away existing entitlements without statutory authority.

3. The defendant changed its proposals. It laid before Parliament a Licence Modification to take effect on 3 March 2012 which had the effect of reducing the rate of FIT payable from up to 43.3p per kWh to up to 21p per kWh as from 1 April 2012, for solar PV installations with eligibility dates on or after 3 March 2012. No issue arises as to the lawfulness of those changes. They are irrelevant to the claimants' case, because they maintain that the damage was done to them by the simple making of the original proposal on 31 October 2011.

4. The claimants contend that, by the time that the courts ruled that what was proposed was unlawful, the installations which would otherwise have been completed by April 2012 had been abandoned because of the clear statements (on 31 October and thereafter) that the cut-off date was being moved forward to 12 December 2011. Accordingly, in these proceedings, the claimants seek damages against the defendant pursuant to Article 1 of the First Protocol ("A1P1") on the basis that the proposal was an unjustified interference with their peaceful enjoyment of their possessions.

5. By the orders of Master Leslie and then Andrews J, various preliminary issues were identified to be tried between the parties on the basis of Agreed or Assumed Facts[1].

[1] The Statement of Facts and Issues is attached as Appendix 1. The document is made up of an Introduction (paragraphs 1-2); Part A, the Agreed Facts (paragraphs 3-39); Part B, the Assumed Facts (paragraphs 40-54);

There are issues about whether or not the claimants have 'possessions' within the meaning of A1P1; whether or not the announcement by the defendant of its proposal on 31 October 2011 could amount in law or in fact to an interference; whether or not, if the proposal constituted an interference, it was justified; and whether or not proper satisfaction would lead to a financial remedy. I propose to deal with those issues in that order, having first set out in more detail, the component elements of the FIT scheme and the relevant chronology. I am very grateful to all counsel who appeared at the hearing of the preliminary issues for the clarity and focus of their submissions.

2. THE FIT SCHEME

2.1 General

6. The FIT scheme was introduced in April 2010 to encourage the low-carbon generation of electricity by specified types of technology. One particular type of generation technology was solar PV. The encouragement came in the form of FIT payments by the electricity supply companies to the small-scale producers of low-carbon electricity. This case is principally concerned with the 'generation tariff', which is a payment for the amount of electricity produced by the small-scale low-carbon generator, even if that electricity is used by the person who generated it. The second element, the export tariff, is concerned with payments for electricity exported into the National Grid. Other than acknowledging that different type of FIT, it is not relevant to this case.

7. Pursuant to Section 41 of the Energy Act 2008 ("the 2008 Act"), the defendant could modify the conditions of licenses granted by the Office of Gas and Electricity Markets ("OFGEM") under the Electricity Act 1989, so as to provide for financial incentives for small-scale low-carbon generators of electricity. It was pursuant to this power that the FIT scheme was created. The Explanatory Notes to the 2008 Act said that its stated aim was to encourage "the necessary upfront capital investment" through the "certainty of the payback."

8. In July 2009, the Government published a consultation paper on renewable electricity financial incentives. That consultation expressly recognised the need to encourage private investors to fund the necessary installations. At paragraphs 3.56 and 3.57 of the consultation paper, relating to the proposed FIT scheme, it said:

> "3.56
>
> …Some organisations have seen easy access to up-front, low-cost capital as essential to the uptake of the technologies; others are of the view that tariffs themselves will be sufficient to drive the financial market to develop products in this area and provide the necessary capital, and would be discouraged by government intervention in this area.
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> 3.57

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and Part C, The Issues (paragraphs 55-58). In Part B, Assumed Facts 40-48 are in the defendant's favour; Assumed Facts 49-54 are in the claimants' favour.

> Therefore, we propose that central Government will not be looking to provide up-front capital schemes to finance FIT installations in the majority of cases…"

At paragraphs 3.96-3.102, the paper stressed that regular reviews would be necessary and that it was important to "strike the right balance between flexibility and investment security."

9. In their response to the subsequent consultation in a document dated February 2010, the Government set out their legislative proposals. In the Executive Summary at page 6, in relation to the FIT scheme, the response said:

> "Once an installation has been allocated a generation tariff, that tariff remains fixed (though will alter with inflation as above) for the life of that installation or the life of the tariff, whichever is the shorter."

Other parts of the paper stressed that FIT rates applicable for later installations would be lower "both to reflect and to encourage and drive cost reductions from the relevant sectors", but paragraph 21 went on to say:

> "But any individual installation, once starting to receive a tariff at a certain level, will continue to receive the same generation tariff level throughout its entire support period under the FIT scheme."

Paragraph 24 stressed that, in order to deal with uncertainty for investors, it was expected that the system "will provide long-term certainty for export payments".

10. Paragraph 62 and 63 of the response paper dealt with the proposed FIT rates. Paragraph 62 stated that the tariffs "should encourage investment in small-scale low-carbon generation that will contribute towards meeting our challenging renewable and carbon targets, and do so in a way that ensures value for money for the scheme as a whole, bearing in mind that the costs of support are shared by all electricity consumers". Paragraph 63 said that the tariff levels had been set to provide an expected rate of return of approximately 5-8% (or 7-10% because the FIT rates were linked to inflation), taking into account amongst other things, "the likely effect those risks would have on investors' willingness to invest". Paragraph 71 onwards was concerned with degression, that is to say the reduction in the fixed rates for installations completed in later years. Paragraph 72 stressed that the generation tariff was the one that would apply to generation from that installation for the life of the tariff, subject only to indexation, and stated that the applicable rates would be degressed only for new installations from that point forward. Paragraph 74 explained the relevance of the April 2012 cut-off date. It read:

> "Several responses to the consultation argued that early degression would provide a disincentive for new businesses setting up. We have therefore decided that for these technologies subject to degression, its introduction will be delayed until April 2012, providing generators with tariffs at initial levels for two years. We believe this delayed start to

> degression will provide technology supply chain industries an indication of the costs reductions that will need to be achieved so that the tariffs can still deliver sufficient return to encourage investment from potential generators."

11. Section 6 of the response paper referred to the importance of reviews. Whilst it said that an objective of the FIT scheme was to provide long-term certainty for investors, it added that it was important that the scheme was reviewed and adapted as circumstances changed, including technology costs and supply chains and other policy developments. Paragraph 163 said that, if necessary, early reviews would be set up to consider any significant changes to the fundamentals affecting the operation of the scheme. All aspects of the FIT schemes would be subject to review, including the tariff levels. The reviews would focus on whether the tariffs delivered the target returns. Paragraph 166 said that, in order to ensure that existing investors could proceed with certainty, any changes to future levels of support would apply only to investments following the review. It emphasised that "generation tariffs [from] the installation existing at the time of the review will be maintained."

2.2 The Feed-In Tariffs (Specified Maximum Capacity and Functions Order) 2010

12. This Order (S.I. No. 678) came into effect on 1 April 2010. It made provision for the FIT scheme as proposed in the previous year's consultation and response papers. The key elements of the FIT scheme were:

    (a) The FIT payments would be made by the electricity supply companies, who were referred to in the order as "mandatory FIT licensees". The cost of the FIT scheme would be passed on to all electricity consumers, so the scheme was effectively a subsidy paid by those consumers for low-carbon electricity generation.

    (b) The FIT payments would be made to FIT generators or nominated recipients. The former were defined as the owners of an eligible installation. The latter were those appointed by a FIT generator to receive FIT payments in respect of an accredited FIT installation owned by that FIT generator and recorded as such on the central FIT register. This second category was designed to embrace installers, surveyors, brokers and investors who had arranged, put in or paid for the solar PV system for, say, a school at no up-front cost, but in exchange for receipt of all or part of the FIT otherwise payable. In this way, the nominated recipient would not necessarily be the occupier of the property on whose roof the solar PV equipment had been installed, and the 2008 Act and the S.I. were both based as on the deliberate encouragement by the defendant of a wide range of third party funding models.

    (c) The references in the S.I. to accreditation and registration are important. In order to trigger the FIT payments, there had to be an eligible installation (which meant plant capable of producing small-scale low-carbon generation from – in this case – solar PV) which the Authority (OFGEM) had determined as suitable for participation in the scheme and entered onto the central FIT register. Accreditation was dealt with in Part 3 of the April 2010 Order, and the central FIT register was dealt with in Part 5.

2.3 The Relevant Rates of Payment

13. The relevant rates of payment were set out at Annex 2 of the draft Licence Modifications introduced by the April 2010 S.I., and permitted by the 2008 Act. They were in table form. They identified the rate that was payable for an installation completed within a particular FIT year. The years ran from 1 April to 31 March. Thus, for FIT Year 1 (1 April 2010 - 31 March 2011) and FIT Year 2 (1 April 2011 - 31 March 2012) the stated rate for solar PV installations with a capacity of 4kw or less was 41.3p per kWh. As foreshadowed in the consultation and the response to the consultation, thereafter the rates were lower as a result of the degression process. The rates for FIT Years 1 and 2 were the highest rates for any installations in the FIT scheme.

14. As already noted, in order to qualify for these maximum rates, the installation had to be completed by the end of FIT Year 2, or 31 March 2012. Completion was achieved as follows:

    (a) Paragraph 4 of the April 2010 S.I. provided that the authority had to accredit an eligible installation if it had been commissioned and registered. Once that happened, notice of accreditation was given which included the confirmation date, "the tariff code for the installation, and the unique identifier for the installation".

    (b) Paragraph 10 required the Authority to assign the tariff code "in accordance with…the FIT year in which the eligibility date for the accredited FIT installation falls."

    (c) Thereafter, the FIT generator or nominated recipient was entitled to receive FIT payments at the identified rate for 25 years, subject only to an adjustment for RPI (paragraph 3.3 of the Licence Modifications).

    Thus, contrary to the defendant's submissions, the cut-off date of 31 March 2012 was an important element of the FIT scheme: completion by that date dictated that the highest rate would be paid for a particular installation over a 25 year period.

2.4 Subsequent Modifications

15. On 7 February 2011, the defendant's Secretary of State announced a review of the FIT scheme which would "assess all aspects of the scheme including the tariff levels, administration and eligibility of technologies." He said that the tariffs would remain unchanged until April 2012 (the end of FIT Year 2) "unless the review reveals a need for greater urgency". The consultation paper sent out in March 2011 stressed at paragraph 11 that "the Government would not act retrospectively and any changes to generation tariffs implemented as a result of the fast-track review will only affect new entrants in to the FIT scheme. Installations which are already accredited for FIT at the time the changes come into force will not be affected." However it was noted that "the risk of rapid and unforeseen expansion of larger scale solar PV poses a threat to the ability of the FIT scheme to keep within the budget for the Spending Review period to 2014/15."

16. The principal modification introduced by the Amendment Order of May 2011 (S.I. 1181) was to identify a new sub-category of installation. Previously, the boundaries had been between installations of 4kw or less; between 4kw and 10kw but not exceeding 10kw; and between 10kw and 100kw. The amendment introduced a new sub-category: installations in excess of 10kw but not exceeding 50kw. In addition, the relevant tables were reissued to take into account the adjustments in respect of RPI. Thus for the category with which this case is concerned, namely those installations of up to 4kw, for installations completed by the end of FIT Year 2, the stated rate was 43.3p per kWh.

2.5 Summary

17. Accordingly, the claimants in these proceedings, who are generally either FIT generators or nominated recipients (although some are neither), were working towards the installation and completion of thousands of solar PV installations by the end of FIT Year 2 (namely 31 March 2012). On that basis, pursuant to the Licence Modifications, at paragraph 3, the electricity supply companies were obliged to make FIT payments to them calculated as accruing from the eligibility date of an eligible installation. If the eligible installation was completed, commissioned and accredited by 31 March 2012, and the tariff code had been assigned, "in accordance with the FIT year in which the eligibility date for the accredited FIT installation falls", the claimants would be entitled to FIT payments of 43.3p per kWh for 25 years. Or so they thought.

3. CHRONOLOGY

18. In a debate in the House of Commons on 20 October 2011, the Secretary of State for Energy and Climate Change (Chris Huhne) was asked about a newspaper report in the Financial Times which suggested that he was about to "completely pull the rug from underneath thousands of people up and down this country who might have taken steps to invest in solar power for their own houses and who are now finding that their investment is being completely undermined by his decisions". The Minister said that there was no question of anybody's investment being undermined because "this Government are very committed to not having retrospection in legislation and legislative changes". However he went on to say that they were keeping all their subsidies under review.

19. The retrospective 'pulling of the rug' (which the Minister had denied) duly took place 10 days later on Monday 31 October 2011. In a written ministerial statement, the Minister of State (Gregory Barker) announced a consultation paper on proposed changes to the FIT scheme. Although the consultation process would conclude on 23 December 2011, one of the proposals was that new – lower – generation tariffs would apply from 1 April 2012, and that these lower rates would apply to all new solar PV installations "which become eligible for FITs on or after an earlier 'reference date' which we propose should be 12 December 2011." Thus it was proposed that the cut-off date for eligibility for the payment of the highest rates of FIT would be brought forward to a date just six weeks away, before the consultation process had even been completed.

20. The consultation paper said that the tariff for solar PV was originally intended to provide a return of around 5%, but the Government's analysis suggested that the

returns available were now substantially more than that. It was said that this was not sustainable, because it would risk solar PV generators being overcompensated, and it would very rapidly result in the spending envelope for the FIT scheme being breached. The paper indicated the significant scale of the proposed reduction. Instead of 43.3p per kWh, the proposed rate was reduced to 21p per kWh. The paper went on to explain the relevance of the earlier 'reference date' of 12 December 2011. "Installations with an eligibility date between the reference date and 1 April 2012 would be eligible for the current generation tariffs for electricity generated before 1 April 2012, but would move to the new generation tariffs for electricity generated on or after 1 April 2012." In other words, the rate would be more than halved for all but possibly a few weeks for installations completed after the new reference date of 12 December 2011 but before the date marking the end of FIT Year 2 of 31 March 2012.

21. It is convenient at this point to identify three of the Assumed Facts for the purposes of these preliminary issues only, and which concern the background to the proposal on 31 October 2011. They are:

> "46. The background to the proposal in October 2011 was the defendant's concern over the increasing cost of the FIT scheme as set out at paragraphs 23-26 of Consolidated Defence. The defendant made the proposal for the reasons set out in paragraphs 37-39 of the Consolidated Defence. The consultation was open-minded and genuine and the outcome was not predetermined…
>
> 50. The defendant knew that it was very likely that, and intended that, those operating businesses in the area of small-scale solar PV electricity generation, including businesses such as those operated by the claimants, would from the time the October 2011 Consultation was published, conduct their businesses on the assumption that the proposal would come into effect as set out in that Consultation.
>
> 51. The defendant knew that it was very likely that, and intended that, the publication of the Proposal would have an immediate effect on the actions of those involved in Solar PV installation such as the Claimants, in that the proposed tariff would be regarded by the vast majority of such businesses as economically unacceptable, with the consequence that they would be deterred from proceeding with Solar PV installations."

Assumed Fact 46 is in the defendant's favour; Assumed Facts 50 and 51 are in the claimants' favour.

22. At least some independent support for Assumed Facts 50 and 51 can be found in the Impact Assessment dated 2 November 2011 produced by the defendant as part of the Comprehensive Spending Review. One of the key assumptions was that there would be a reduction of 70% in the number of installations in the sub-4kw category. In the analysis that went with that assessment, it was estimated that, without the change, the cost of the FIT scheme would be £7.1 billion whereas, with the new 12 December

2011 eligibility date, the cost would be £5.5 billion. The claimants are therefore right to say that, on the face of it, the proposal of 31 October 2011 was being made on the basis that it would save £1.6 billion. The consequences of the proposal for the environment were not the subject of any analysis in this Impact Assessment, nor in any other document that I have seen.

23. That the bringing forward of the cut-off date for FIT Year 2 was a central feature of these proposals can be seen in two further statements made on 31 October. First, the Minister said in a press announcement that "people who are now thinking of installing solar PV need to do so with their eyes wide open and I would encourage them to call the Energy Saving Trust for the latest advice." Anyone following that advice would have been provided with the Trust's fact sheet, also dated 31 October, which said: "we recommend customers should use the figures in the consultation if they are planning to install after 12 December 2011." In other words, if the installation was not completed/commissioned and registered by 12 December 2011 (six weeks from then) the Government's advice was that the rate was going to be halved.

24. Later that day, there was a debate in the House of Commons about the proposal. The Minister was asked about the cut-off date of 12 December 2011, and the position of those who had commissioned solar PV installations but, through no fault of their own, would not be able to register it by 12 December 2011. The Minister was unsympathetic, and said that, without a new date, "there would be a massive gold-rush". He did not address the position of those who had entered into binding commitments based on the original rates. When later in the debate the Minister was asked if he would keep the cut-off date of 12 December 2011 under review, with the intention of perhaps extending it, the Minister said: "No, I am afraid that would deliver the most terrible uncertainty to business. It has to be clear that there is a cut-off date. We mean what we say, I am afraid."

25. The impact of the proposed changes was regarded by many as catastrophic for the solar PV industry. The results of a survey dated 7 November 2011 made that plain, which story was picked up by the Financial Times on the same date. Friends of the Earth indicated that it would challenge the Government by way of judicial review in relation to the cut in small-scale FIT from 43.3p per kWh to 21p per kWh unless the plans were immediately rethought. One director of a small-scale energy provider said that they could have handled the tariff cut if the April date had been maintained, but by bringing the date forward, the Government was "castrating" the industry.

26. As noted above, judicial review proceedings were commenced. Although there is now a dispute as to whether the defendant sought to delay the hearing, it took place on 21 December 2013. One of the issues was whether judicial review was available to challenge a proposal not yet passed into law. At paragraph 33 of his judgment, Mitting J concluded that it was. He said:

> "I am satisfied that it [the proposal] has had, in principle and in practice, a significant impact. In principle because it is 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 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 the manner which is not authorised by a statutory procedure."

27. On the substance, by reference to section 41 to 43 of the Energy Act 2008, Mitting J said that he could not discern a Parliamentary intention to permit the Secretary of State to make a modification which had a significant adverse impact on those proposing to install small solar systems before the date on which the modification was made and came into effect. He therefore said the proposal to make such a modification was unlawful.

28. The defendant appealed. The Court of Appeal upheld Mitting J's ruling, albeit for slightly different reasons. Moses LJ said that the question was whether Parliament conferred a power to make a modification which would have a retrospective effect. He said that to do so would be to take away an existing entitlement without statutory authority and was therefore unlawful. His reasoning was in these terms:

> "40. The concept of a rate of payment fixed during the period of generation by reference to the date the installation became eligible for payment is fundamental to the Scheme. It provides an assurance as to the rate of return to an owner who has paid a capital sum prior to the installation coming into operation…The fixed return to the owner assured by the Scheme was rightly described by [Counsel for the claimants] as analogous to the fixed rate of return on a Government bond.
>
> 41…It is not possible to recognise in the Order or the Standard Licence conditions a scheme in which the tariffs may vary, without regard to the date when the installation became eligible and without any indication within the scheme of what amount the owner of the installation might receive, or as to how it is to be calculated. The scheme provides for a pre-determined rate, not such rate as from time to time may be determined.
>
> 42. That conclusion seems to me crucial to resolution of this appeal. Modification of the FIT Payment Rate, in respect of installations becoming eligible prior to the modification, would have a retrospective effect. Because the Scheme fixes a rate by reference to the year the installation becomes eligible, reduction of that rate (apart from fluctuations in RPI) would have a retrospective effect…Any modification of the rate, apart from fluctuations due to RPI, takes away the owner's entitlement under the Scheme to payment at that fixed and pre-determined rate. The Secretary of State appeared to contend to the contrary, submitting that any changes to the rate would not have any retrospective effect. I would reject that submission.
>
> 43. I have concluded that the delegated legislation proposed in the consultation of 31 October 2011 would have retrospective

> effect in respect of any installation becoming eligible for payment prior to the modification coming into effect, as proposed on 1 April 2012. Such legislation would only be valid if the empowering provision contained in s.41 of the 2008 Act authorises such an effect…
>
> 50…Whilst it is true that the section [Section 41] contemplates provision specifying how a payment is to be calculated, that it may be decreased and that provision may be made as to the circumstances in which no payment or reduced payment may be made, it is notable that Section 41 makes no reference whatever to the power to decrease the rate of return, other than in accordance with a formula.
>
> 51. It is not impossible but it would be curious to contemplate a statutory provision which envisages a scheme for financial incentives to capital investment to encourage small-scale electricity generation in which the return could be varied once the capital expenditure had been incurred. It is in that context that the presumption against retrospective operation is so important…
>
> 52. In those circumstances, I conclude that there was no power contained within Section 41 to introduce a modification which reduced a rate fixed by reference to an installation becoming eligible prior to the modification. To do so would be to take away an existing entitlement without statutory authority."

Although the defendant then petitioned for permission to appeal from the Supreme Court, the petition was refused.

29. As noted above, in the result different modifications were made by the defendant, by reference to a new eligibility date of 3 March 2012. The rates for installations completed after 2 March 2012 were, from 1 April 2012, reduced to 21p per kWh as foreshadowed in the consultation. No issue arises in these proceedings in relation to those changes.

4. THE PRELIMINARY ISSUES

4.1 A1P1

30. A1P1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions.
>
> No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

4.2 The Claimants' Claims

31. Some of the claimants in these proceedings are small-scale solar PV generators or nominated recipients under the FIT scheme; others engage in a variety of businesses connected in some way with solar PV generation. There are broadly three types of business:

    (a) FIT-payment recipients: These companies procure, install and register solar PV systems for owner-occupiers with suitable premises. The occupier will receive the benefit of cheaper electricity but the claimant or its nominated subsidiary would be entitled to receive the FIT payments as nominated recipient, either on the basis of a contract between the claimant and the owner-occupier, or on the basis of 'block' contracts for a group of properties, between the claimant and a broker company with its own direct arrangement with the owner-occupier.

    (b) Fee recipients: These companies procure, install and register solar PV systems for owner-occupiers with suitable premises, whether on the basis of a contract between the claimant and the owner-occupier (pursuant to which a fee would be paid to the claimant), or a block contract with a third party nominated recipient, again on the basis of a fee. In addition, some claimant companies would find and prepare sites for a third party who would arrange for the installation of the solar PV system for which they would be paid a fee and would be entitled to an ongoing share of the profit from electricity sold to the grid.

    (c) Equipment suppliers: These companies supply solar PV equipment to other installation companies.

    It is also important to note the wide range of customers that the claimants had in connection with their solar PV installations. They included not only private homeowners, but local authorities, schools, social housing landlords and commercial businesses. The claimants were therefore playing the wide role envisaged for the private sector in the consultation paper and the response to the consultation paper in 2009.

32. For these reasons, I accept paragraphs 45-48 of the skeleton submissions of Mr Fordham QC and Mr Murray on behalf of the Breyer group of claimants. It does not matter that the claimants are not themselves occupiers of buildings in respect of which the entitlement to FIT payments would arise. The whole basis of the scheme meant that the relevant payments would cover the expenditure in installing the solar PV equipment at the premises. The precise design of the particular arrangements or business models to which an individual claimant may be working is irrelevant to its right to bring a claim. What does matter, and it is a point which I analyse in **Section 6.2** below, is whether or not the relevant contracts were signed/concluded, or not.

33. The claimants' claims stem from what they say was the catastrophic effect of the proposal to bring forward the eligibility date. Assumed Facts 52 and 53 (assumed in the claimants' favour) are in the following terms:

> "52. The matters referred to above had an immediate and serious adverse impact on the claimants' business, which impact was reasonably foreseeable. It was not economically viable for the claimants to continue their business in relation to the installation of solar PV systems, unless such systems could be installed and commissioned by the reference date of 12 December 2011, which was six weeks from the publication of the proposal; and that the majority of installations which had been planned and contracted for by the claimants could not be completed and accredited in this timeframe.
>
> 53. The nature of the impact upon the Breyer claimants and the question of the viability of their businesses are as described in paragraphs 155-185, 189-211, 220-225, 227-228, and 230-242 of and in the Schedule of Loss to the Consolidated Particulars of Claim. In the HomeSun action these matters are as described in paragraphs 47 and 52 of the Particulars of Claim. In the FPFS [action] these matters are as described in paragraphs 43 and 47, and likewise paragraphs 47 and 51 for Touch Solar."

It is unnecessary to set out the referenced paragraphs in any detail. Suffice to say that they identify graphically the alleged consequences of the proposals for the claimants' businesses. It is the claimants' case that the proposal therefore wrongfully interferes with their enjoyment of their possessions in breach of A1P1.

4.3 The Preliminary Issues

34. Although the Preliminary Issues are set out at the end of Appendix 1, it is convenient to reproduce them here:

> "1. Whether the Claimants and/or any of them had possessions within the meaning of Article 1 of the First Protocol ("A1P1") of the European Convention on Human Rights, consisting of:
>
> (a) an enforceable legitimate expectation, as described in the respective Particulars of Claim, concerning the timing of any changes to rates payable pursuant to the FIT Scheme and the manner in which the related review process would be conducted;
>
> and/or
>
> (b) the marketable goodwill in the Claimants' business, as described in the respective Particulars of Claim;

and/or

(c) the signed contracts or contracts which would, but for the Proposal, have been signed, agreeing:

(i) That the FIT payments would be receivable by any of the Claimants, or their subsidiaries and/or their assignees.

(ii) The consideration due to any of the Claimants, or their subsidiaries and/or their assignees, in respect of: (1) the installation of Solar PV equipment, (2) the commissioning of sites ready for installation of Solar PV equipment; (3) the maintenance of the equipment; or (4) the supply of the equipment, as the case may be.

2. If the Claimants and/or any of them had such possessions within the meaning of A1P1;

(a) whether the Defendant interfered with any of these A1P1 possessions; and

(b) the nature of any such interference.

3. Whether any such interference was justified, as described in the Defences.

4. If not, whether the Claimants are entitled in principle to an award of damages, assessed by reference to their loss of profits caused by the Defendant's interference with their A1P1 possessions."

5. PRELIMINARY OBSERVATIONS

5.1 The Preliminary Issue Process

35. As I have already noted, these preliminary issues arise out of an initial order by Master Leslie dated 1 November 2013, and a comprehensive order made by Andrews J on 24 January 2014. Although I had no involvement in the case prior to the trial of the preliminary issues, it seems evident that the defendant was less enthusiastic about the process than were the claimants. A lingering echo of that could be found in paragraphs 10 and 11 of the skeleton argument provided by Mr Beloff QC and Mr Cornwell, on behalf of the defendant, in which they indentified the recent warning by Lord Sumption in ***Woodland v Essex County Council*** [2013] UKSC 66 about the hearing of a preliminary issue which would not be decisive of the litigation either way, and where he identified the delays involved in taking such an issue all the way to the Supreme Court. Mr Beloff QC and Mr Cornwell then went on to make their written submissions "on the assumption that the Court feels it can fairly dispose of the preliminary issues".

36. As a result of that implicit challenge, I raised this question with the parties at the outset of the hearing. I made it plain that, having had no involvement in the matter up until now, I was not in a position to say whether or not, in the final analysis, the hearing of these preliminary issues was a sensible or efficient use of court time. What was clear, however, was that to decline to hear such issues at the last moment would have merely led to a colossal waste of time and money.

37. Lord Sumption is only the most recent of numerous appellate court judges who have, in recent years, questioned the utility of preliminary issues. There can be no doubt that they are often tempting for lawyers with an over-enthusiasm for the law and a corresponding lack of appetite for the facts. As we shall see from time to time in this Judgment, I think there are important matters here which can only be decided on the facts. That said, I consider that this is a much more promising candidate for the hearing of preliminary issues than many other similar cases. Unlike in ***Woodland***, the preliminary issues set out in paragraph 34 above go to the heart of the matters in dispute. If I found no 'possessions' or no interference with their quiet enjoyment within the meaning of A1P1, then these claims would fail at the outset. On the other hand, if I found against the defendant on possessions, interference and justification, then it is highly likely that some, perhaps even significant, financial recompense would follow. Accordingly, although I hope I am not insensitive to Lord Sumption's general warning, I turn to a consideration of the preliminary issues so ably argued before me.

5.2 The Effect of the Court of Appeal Decision

38. On occasion during the claimants' submissions, the impression was given that the defendant's liability had already been established by the Court of Appeal in January 2012 (paragraph 28 above), and that the current proceedings were, in one sense, merely designed to identify the appropriate remedy available to them. Mr Beloff QC took issue with that assumption. In my view, he was right to do so: the Court of Appeal was dealing with a different issue, and their decision, although important, does not address the kernel of these claimants' claims at all.

39. The Court of Appeal were not concerned with the reasons behind the October proposals (see paragraph 7 of the judgment of Moses LJ). They were not concerned with the potential impact of those proposals (paragraph 13). They were only concerned with the "hard-edged question" of whether the defendant was entitled to make a modification which reduced the tariff in respect of installations becoming eligible for payment prior to the coming into force of the modification (paragraph 14). Moses LJ found at paragraphs 40-42 of his judgment that "the concept of a rate of payment fixed during the period of generation by reference to the date of the installation becoming eligible for payment is fundamental to the scheme". He went on to conclude that, because the FIT scheme provided for a pre-determined rate, payable to all those whose installation become eligible for payment before 31 March 2012, a modification of the rate would have a retrospective effect and was therefore unlawful.

40. In the present case, in respect of those signed or unsigned contracts affected by the proposal of 31 October 2011, the claimants did not become entitled to payment at the rate of 43.3p per kWh, because they did not complete the relevant installations by March 2012. Instead, those installations were abandoned. Of course, the claimants'

say that that was because of the proposal. But it means that their claims (or types of claim), were not in issue in the proceedings before Mitting J and the Court of Appeal. The Court of Appeal has ruled that those who had an entitlement to specific FIT payments could not have that entitlement taken away by retrospective legislation. But this case is about those who ultimately had no entitlement to those payments under the FIT scheme (because there was no eligible installation) and the reasons why that lack of an entitlement came about.

5.3 Floodgates?

41. Although, with commendable restraint, leading counsel only used the word "floodgates" once during the three day hearing, there can be no doubt that both sides were suggesting that an overall conclusion in favour of the other would give rise to unacceptably wide-ranging consequences. Thus the claimants argued that, if the Government could avoid the devastating consequences of its own actions by saying that the change to the date was merely a proposal, then the way would be open for the Government to cause huge financial losses to its citizens without regard to the consequences, by claiming that a mere proposal cannot amount to interference for A1P1 purposes.

42. On the other hand, the defendant maintains that, if the claimants' claims were allowed, no Government would be able even to propose modifications to policy in future without risking huge losses, even if those proposals were never actually implemented. They say this would give rise to a limitless field of potential liability far beyond anything envisaged by A1P1.

43. I am not persuaded that, in the real world, either of these doomsday scenarios is likely to be very common. These claims arise against a background of unusual, if not unique, factors. Schemes like the FIT scheme, paying what Moses LJ identified as a fixed rate for 25 years, are very rare. Proposals made by Government departments retrospectively to change either primary or secondary legislation are, happily, also rare. And, in my view, it will be very rare for the simple announcement of a proposal itself to have a dramatic effect, as opposed to the consequences if that proposal were enacted in law. Accordingly, whilst I have taken note of what both sides say are the unacceptable consequences of finding for the other, I have concluded that neither of the gloomy pictures painted by the parties about their opponent's case is likely to become a recurring problem.

6. POSSESSIONS

6.1 General

44. The concept of possessions under A1P1 is freestanding. The claimants say that they can demonstrate that they have possessions within the meaning of A1P1, and maintain that they have three different routes by which they can establish this proposition. Taking them in a different sequence to the manner in which they are set out in the preliminary issues, they are: (a) the existence of contracts, whether completed or 'imminent'; (b) the marketable goodwill of the claimants' businesses; and (c) their legitimate expectation of an entitlement under the statutory scheme. The defendant maintains that the claimants have no relevant possessions and that, in essence, these

are claims for loss of future income, which both the domestic courts and Strasbourg have repeatedly ruled are not possessions within the meaning of A1P1.

45. I have not found it easy to reconcile all of the authorities concerned with possessions under A1P1. To that extent at least, I find I am in good company: in ***R (Countryside Alliance and Others) v AG and Another*** [2007] UKHL 52; [2008] 1 AC 719, Lord Bingham concluded at paragraph 21 that he did not find the jurisprudence on this subject very clear. That said, however, there are two certainties of which I am confident. The first is that, subject to the points addressed below, the existence of a concluded contract is capable of constituting a possession for the purposes of A1P1. That is why I take as my starting point that way in which the claimants put their case (even though they sequenced their arguments differently). The second is that, whilst loss of future income is not protected by A1P1, marketable goodwill may be, although sensibly distinguishing between the two is a Herculean task.

46. With those points in mind, I turn to deal with the way in which the claimants put their case under these three heads. I do so noting that there has been very little attempt to correlate one way of putting the claim on possessions with the other two. I consider it important that there should be a coherent and consistent analysis of the basis of the claimants' claims on all three bases, rather than an arid analysis under three unconnected headings.

6.2 Contracts

6.2.1 Signed or Concluded Contracts

47. The signed/concluded contracts in question are those into which the claimants entered on or before 31 October 2011 with occupiers, contractors, financiers, brokers or suppliers in connection with intended solar PV installations, which installations would have been completed by 31 March 2012. The claimants' case is that these contracts were predicated on their anticipated entitlement to the FIT rate of 43.3p per kWh, and that the 31 October proposal rendered these concluded contracts valueless because of the proposal that such a rate would no longer be paid for installations that were not completed by 12 December.

48. It is perhaps helpful to identify, by way of example only, some of the signed/concluded contracts which would appear to fall within this category by reference to the claimants' various Statements of Case. Thus:

(a) The contracts which Breyer had concluded with Colchester Borough Council, the Peabody Trust, Group Corporate Health Care limited and Dartford Borough Council, referred to at paragraphs 83-85 of the Consolidated Particulars of Claim setting out the claims of the 21 Breyer claimants;

(b) E-Tricity's contracts with Mole Valley Farmers and Lightsource (referred to at paragraphs 88-91 of the Consolidated Particulars of Claim);

(c) FoZ's contracts refereed to with the various Local Council Housing Authorities referred to at paragraph 93 of their Consolidated Particulars of Claim;

(d) Freetricity's contracts had with major external funders referred to at paragraph 95 of their Consolidated Particulars of Claim (to the extent that they were based on installations being completed by 1 April 2012);

(e) SE4F's contracts referred to at paragraph 114 of the Consolidated Particulars of Claim;

(f) Green Home's contracts referred to at paragraph 117 of the Consolidated Particulars of Claim (to the extent that they had been concluded);

(g) Cleaner Air's contracts with Solar Capital Limited, Zero Carbon Power Limited and Pickering and Ferens Homes Housing Association, as well as the other contracts referred to at paragraph 120-122 of the Consolidated Particulars of Claim.

(h) EVO Energy's contracts referred to at paragraph 132(c) and (d) of the Consolidated Particulars of Claim (but only to the extent that they had been concluded);

(i) The contracts referred to in HomeSun's Particulars of Claim at paragraph 39(iii) (i.e. the 1,974 leases that had been signed by both customers and the relevant HomeSun subsidiary company). I deal with the other contracts and prospective contracts referred to in that paragraph of the pleading at paragraph 76 below;

(j) The 1,472 contracts referred to in paragraphs 35 and 36 of Free Power for School's Particulars of Claim;

(k) The 592 contracts (referred to in paragraph 39 (ii)) of Touch Solar's Particulars of Claim.

These were examples of where, on the claimants' case, contractual arrangements had been concluded prior to 31 October 2011, but where it is now said that those contracts could not be completed or were adversely affected by the 31 October 2011 proposal. Of course, it will be an issue of fact as to whether any of the examples to which I have referred actually falls within the relevant category of a concluded contract predicated on the basis of the FIT rate of 43.3p per kWh.

49. It was common ground that concluded contracts could be a possession for the purposes of A1P1. The most authoritative guidance on that topic is the decision of the Court of Appeal in ***Murungaru v Secretary of State for the Home Department*** [2008] EWCA Civ. 1015. There, the Court of Appeal dismissed the claimant's claim that his contract with a private health provider for medical treatment in England was a possession protected by A1P1. In the judgment of Lewison J (as he then was) the court made plain that, in certain circumstances, contractual rights could amount to possessions under A1P1. He said:

> "48. The Strasbourg jurisprudence establishes that the mere fact that rights are contractual does not disqualify them from counting as property or possessions…But the converse: viz. that all contractual rights are property or possessions, does not

> follow. Mr Rabinder Singh QC accepted that the logic of his argument entailed that conclusion.
>
> 49. As Mr Rabinder Singh QC pointed out, a claim may count as a possession even though no court has yet adjudicated on its validity. But a claim justiciable in domestic law can amount to a possession for the purposes of A1 P1 only if it is sufficiently established to be enforceable. By contrast, a claim may amount to an assignable chose in action in domestic law, even if it is not established. Indeed it may be a speculative claim, but it would still be classified, domestically, as a chose in action. In my judgment this demonstrates that there is no necessary coincidence between the autonomous Convention concept of property or possessions and the domestic concept of property…
>
> 58. In the present case, Dr Murungaru's contractual rights have none of the indicia of possessions. They are intangible; they are not assignable; they are not even transmissible; they are not realisable and they have no present economic value. They cannot realistically be described as an "asset". That is the touchstone of whether something counts as a possession for the purposes of A1 P1. In my judgment Dr Murungaru's contractual rights do not."

50. The other authority principally relied on in this connection was the decision of the ECtHR in ***Paeffgen GmbH v Germany*** [AP 25379/04, decision 18/09/07]. There, the applicant company had registered thousands of domain names and concluded contracts with the registration authority which granted them exclusive use of those names. In Germany the courts had allowed claims by those with the proper title to use those domain names. The applicant company brought a claim under A1P1. The ECtHR said:

> "In the instant case, the contracts with the registration authority gave the applicant company, in exchange for paying the domain fees, an open-ended right to use or transfer the domains registered in its name. As a consequence, the applicant could offer to all internet users entering the domain name in question, for example, advertisements, information or services, possibly in exchange for money, or could sell the right to use the domain to a third party. The exclusive right to use the domains in question thus had an economic value. Having regard to the above criteria, this right therefore constituted a "possession", which the court decisions prohibiting the use of the domains interfered with."

The court then went on to reject the underlying claims on the basis that any interference with the possessions represented by the contracts with the registration authority was justified.

51. On the basis of the Assumed Facts, it would seem that the concluded contracts in this case (examples of which I have set out in paragraph 48 above) had all of the indicia of

possessions in accordance with Lewison J's analysis in ***Murungaru***. They were tangible; they were assignable; on the face of it they had a present economic value. Of course I accept that, if there are arguments about particular contracts, those can only be dealt with on the facts but, as a matter of general impression, I would conclude that the signed/concluded contracts in this case were assets, and therefore possessions under A1P1.

52. Mr Beloff QC maintained that this was not enough and that it was necessary to look at each contract to see whether or not it was possible for the claimant, either to require performance from the other party, or to sue that other party for damages if the contract was not performed. His argument was that, if the claimant company could enforce the contract, then he would get relief, in one way or another, against the other party to the contract. Thus he said there was no relevant A1P1 possession. On the other hand, he said that if, on an analysis of the contract, the claimant company did not have the right to call for either specific performance or for damages (i.e. that the other party could withdraw), then it was not an asset at all. Thus, on his analysis, whatever the contract said, it could not be a possession for A1P1 purposes.

53. I do not accept that submission. No authority was cited in support of it. Although Mr Beloff QC pointed to the fact that, in ***Paeffgen***, the contract could only be terminated for cause, in order to argue that a contract vulnerable to termination due to an external event (like the October 2011 proposal) could not be a possession, I was unpersuaded by that argument. The decision in ***Paeffgen*** was not based in any respect upon the termination provisions of the contract. Neither were termination provisions or the like identified as a relevant factor in ***Murungaru***.

54. More widely, I consider that it is wrong in principle to say that a concluded, valid contract, with a clear economic value and an enforceable set of terms, cannot be an asset until its terms have been scrutinised to see what they say about termination, and then, if necessary, attempts are made to enforce the contract or sue for damages. The contract is an asset, whatever the terms relating to termination. At most those terms might have a bearing on the residual value of that contract. It is inappropriate for the defendant (who on this basis interfered with that asset) to seek to place a further burden on the claimants by requiring them to become involved in enforcement or litigation with other parties.

55. Furthermore, such an approach would be fraught with difficulties of both logistics and principle. Let us say, for example, that a particular contract had provisions which would have allowed the claimant company to enforce that contract against the other party. It may be that the terms were such that it was the other party who bore the financial risk of the October proposal. That other party may be unable to do so and might promptly go into liquidation. In those circumstances, although the contract could have been enforceable by the claimant company, such enforcement would be, for practical purposes, impossible or worthless, because the other party to the contract has gone bust. Such an argument cannot avail the defendant in these proceedings, particularly as the liquidation of the other party would, on these facts, have been caused by precisely the same underlying problem, namely the 31 October proposal.

56. For those reasons, therefore, whilst I accept that, ultimately, each relevant contract might have to be scrutinised in order to see whether it meets the relevant indicia identified by Lewison J in ***Murungaru***, it seems to me that as a matter of principle,

signed/concluded contracts in this case are assets and possessions for the purposes of A1P1.

6.2.2 Unsigned Contracts

57. In relation to contracts which had not been signed or concluded, Mr Fordham QC, on behalf of the claimants, appeared to differentiate between what he called "imminent contracts" and those whose completion lay further down the line. Mr Beloff QC argued that all incomplete contracts could not be possessions protected by A1P1 because they were not assets at all.

58. The distinction between imminent contracts and other kinds of incomplete contracts was not one drawn in the claimants' various Statements of Case. I am not sure if it a helpful distinction in any event. Instead the Statements of Case recognise that there were contracts which were never signed or concluded but which, on the claimants' case, would have been signed or concluded but for the 31 October 2011 proposal. Examples of these unsigned contracts are:

(a) The "work opportunities" referred to in paragraph 86 of the Consolidated Particulars of Claim (at least to the extent that these were not opportunities which had been signed off or concluded contractually);

(b) The "prospective contracts" for EVO Energy referred to in paragraph 132(e) of the Consolidated Particulars of Claim;

(c) The prospective contracts referred at paragraph 39(i) of the HomeSun Particulars of Claim and, possibly, the leases signed by customers but not by HomeSun referred to in paragraph 39(ii) of the HomeSun Particulars of Claim.

59. Save for one possible exception, dealt with in paragraph 61 below, I have concluded that, in principle, these unsigned/incomplete contracts cannot be possessions within A1P1. Again, the first reason for that is because there is no authority for the proposition that an unsigned/incomplete contract is an asset. Secondly, an unsigned/incomplete contract would not meet the indicia of possessions as per paragraph 58 of Lewison J's judgment in ***Murungaru***. An unsigned/incomplete contract is not a contract at all. It is therefore intangible; it is not assignable; and it can have no present economic value.

60A. Mr Fordham QC argued that the court would have to look, in connection with all unsigned contracts, at features such as how far the negotiations had progressed, how firm the arrangement was by reference to commercial experience; what the character was of the tendering procedure which had been entered into; and whether there was a present economic value. However, none of those matters are identified in any authority and, more importantly, they are all characteristics of the underlying reality: that the claimant company and the other party had not yet agreed a contract. They might have done or they might not have done, but a possible contract in the future is, on the European analysis, no more than a hope or aspiration, and cannot be regarded as an asset or possession.

60B. In his reply, Mr Fordham QC said that a claimant who was a preferred bidder and had a reasonable prospect of acquiring a contract was in possession of "an arrangement of

value". This is not a term known to the law: I have concluded that it does not add to the analysis.

60C. Finally, although Mr Fordham QC suggested that, in some way, the difference between a signed/concluded contract and a unsigned/incomplete contract was a difference of form, not substance, I profoundly disagree. There is a substantial difference between a completed contract – with its combination of rights and obligations binding on both parties – and a contract that might or might not be agreed in the future.

61. As indicated above, there is one possible exception to that general position. Sometimes two parties to a proposed contract will spend an inordinate amount of time arguing over the details of the contract and, sometimes, the work can be started or even completed without final agreement on that detail having been reached. Such an outcome does not always prevent the court from concluding that a simple contract has come into existence. That depends on a proper analysis of the contract negotiations: see ***Pagnan v Feed Products*** [1987] 2 Lloyd's Rep 601 at 611 and ***G Percy Trentham v Archital Luxfer*** [1993] 1 Lloyd's Rep 25 at 27. Accordingly, Mr Fordham QC's category of "imminent contracts" *may* include contracts where all that remained was the dotting of i's or the crossing of t's, or the agreement of an inessential term, and may not prevent a court from concluding that a binding contract had come into existence. I accept that some of the contracts referred to in paragraph 39(ii) of HomeSun's Particulars of Claim may fall within that category. But of course, such situations are not common and will be unlikely to arise if no work has been done pursuant to the basic arrangement.

62. Accordingly, subject to that exception, which may or may not arise on the facts, I conclude that, in general, contracts which were not signed or concluded do not meet the test in ***Murunqaru***, and are not therefore assets or possessions protected by A1P1. As to which particular contracts may fall the right side of the line, that is ultimately a matter of fact and lies above these preliminary issues.

6.3 Marketable Goodwill

6.3.1 Loss of Future Income

63. A possession for the purposes of A1P1 will not include a right to acquire possessions. If future income has not yet been earned, and in respect of which an effective legal claim cannot be made, it is not a possession: see ***Marckx v Belgium*** [1979] EHRR 330. This is a common theme in both the domestic and Strasbourg decisions.

64. As to the domestic law, both sides relied on the decision of the Court of Appeal in ***R (Malik) v Waltham Forest NHS PCT*** [2007] EWCA Civ. 265; [2007] 1 WLR 2092 where, at paragraph 29, Auld LJ noted that "mere prospective loss of future income cannot amount to possession". That same point was echoed by Sir Anthony Clarke MR in paragraph 114 of his judgment in the Court of Appeal in ***Countryside Alliance*** [2006] EWCA Civ. 817, when he said that "any element of a claim that relates to loss of future income does not qualify in this respect, unless an enforceable claim to future income already exists." Lady Hale made the same point in the House of Lords in the same case when she said at paragraph 128:

> "There is no Convention right to continue to enjoy a particular level of trade. There is no Convention right to retain one's job beyond the 'right to a job' which is recognised by domestic law. The Convention does not guarantee the right to acquire property: see ***J A Pye (Oxford) Ltd v United Kingdom*** (App no 44302/02) (unreported) 30 August 2007, [2007] 41 EG 200, para 61. All sorts of laws may reduce demand for particular services and thus affect the profits of the self-employed or the job security of employed people. They do not in my view usually have to be justified under article 1 of the protocol no 1, although that should not be difficult."

65. In Europe, the same approach has been followed. This can be seen in two similar cases arising out of gun control legislation in the United Kingdom, ***Ian Edgar (Liverpool) Ltd v United Kingdom*** [2000] Application No. 37683/97 and ***Denimark Ltd and Others v United Kingdom*** [2000] 30 EHRR CD144. In the latter case the court said:

> "The Court recalls its case-law that goodwill may be an element in the valuation of a professional practice, but that future income itself is only a 'possession' once it has been earned, or an enforceable claim to it exists (***Edgar***)…The Court considers that the same must apply in the case of a business engaged in commerce. In the present case, the applicants refer to the value of their businesses based upon the means of earning an income from those businesses as 'goodwill'. The Court considers that the applicants are complaining in substance of loss of future income in addition to loss of goodwill and a diminution in value of their assets. It concludes that the element of the complaint which is based upon the diminution in value of the business assessed by reference to future income, and which amounts in effect to a claim for loss of future income, falls outside the scope of Article 1 of Protocol No. 1."

66. More recently, the Strasbourg Grand Chamber confirmed in ***Centro Europa 7 Srl v Italy*** [2012] 32 BHRC 417 that A1P1 "applies only to a person's existing possessions. Thus future income cannot be considered to constitute 'possessions' "unless it has already been earned or it is definitively payable." This was reiterated by the ECtHR in ***Malik v United Kingdom*** [2012] Application No. 23780/08 where they reiterated the approach in ***Edgar*** and ***Denimark*** and said:

> "Where an applicant refers to the value of his business based upon the profits generated by the business, or the means of earning an income from the business, as 'goodwill', the Court has indicated that this reference is to be understood as a complaint in substance of loss of future income. The Court has previously found that this element of the complaint falls outside the scope of Article 1 of Protocol No. 1…"

However, further analysis demonstrates that, because goodwill is or can be recoverable under A1P1, drawing the right line between a loss of future income, on the one hand, and loss of marketable goodwill, on the other, is far from straightforward.

6.3.2 Goodwill

67. It was again common ground that marketable goodwill could amount to a possession: see ***Van Marle v Netherlands*** [1986] 8 EHRR 483. At paragraph 41 of that decision, the court stated:

> "The right relied upon by the applicants may be likened to the right of property embodied in Article 1 (P1-1): by dint of their own work, the applicants had built up a clientèle; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1 (P1-1). This provision was accordingly applicable in the present case."

This approach was subsequently applied in ***Tre Traktorer AB v Sweden*** [1989/1991] 13 EHRR 309 (about the consequences of a revocation of an alcohol license on a restauranteur who had built up valuable goodwill in his restaurant), and in ***Buzescu v Romania*** [2005] Application No. 61302/05 which again concerned an annulment, this time of an applicant's registration as a lawyer, which led to a partial loss of his clientèle and a corresponding loss of income, and where the goodwill in the legal practice was said to amount to a possession under A1P1. This was subsequently explained by the ECtHR in ***Malik*** on the basis that the clientèle which had been built up "had, in many respects, the nature of a private right and constituted an asset". They went on to note that the 'vested interest' in an applicant's medical practice could also be regarded as a possession: see ***Karni v Sweden*** No. 11540/85.

68. The attempt to find a meaningful distinction between loss of future income on the one hand, and loss of marketable goodwill on the other, is not helped by the difficulties in defining the concept of goodwill. Although the claimants rather scoffed at Mr Beloff QC's reliance upon the attempted definition of goodwill by Lord Macnaghten in ***Commissioners of Inland Revenue v Muller and Co. Margarine Ltd*** [1901] AC 217, I found it of assistance, particularly because it stressed that goodwill was something which has to have been built up over a period of time. His Lordship described it in these terms:

> "It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different

> businesses in the same trade…The goodwill of a business is one whole, and in a case like this it must be dealt with as such."

69. In the reported cases, one of the principal difficulties has been the ability of the claimants to demonstrate a proper claim for goodwill because, for example, their organisation or accounts were not set up in such a way as to identify an element of marketable goodwill or, for those such as NHS doctors, the claimants had no right in law to the goodwill in their medical practices. In the well-known case of ***R (Nicholds) v Security Industry Authority*** [2007] 1 WLR 2067, Mr Recorder Kenneth Parker QC (as he then was) endeavoured to identify whether the claim for goodwill in that case was recoverable or was, in truth, a claim for loss of future profits (although I note that he ultimately refused the claim on the basis that the changes in legislation were justified). On the topic of goodwill, his (obiter) analysis was that the loss of goodwill that may be protected by A1P1 was:

> "…being used rather in the economic sense of the capitalised value of a business or part of a business as a going concern which, according to modern theory of corporate finance, is best understood as the expected free future cash flows of the business discounted to a present value at an appropriate after tax weighted average cost of funds…
>
> 73 The business has a capital value or goodwill only if the entity can be, and is, organised in a way that allows future cash flows to be capitalised…The distinction between the situations seems to me to rest largely, if not wholly, on organisational factors. Nonetheless, it is clear on Strasbourg jurisprudence, now confirmed by high domestic authority, that Article 1 of the First Protocol protects only 'goodwill', as a form of asset with a monetary value, and does not protect an expected stream of future income which, for mainly organisational reasons, cannot be or is not capitalised. In other words, the Convention, differing perhaps in this respect from the law of the European Union, protects assets which have a monetary value, not economic interests as such."

70. He then went on to consider the permissions (to act as door supervisors) in issue in that case, and concluded that they were possessions. He was not, therefore, wrestling with the same issue that arose in the present case: again this was a case concerned with a specific annulment of a previous licence or permission, not a potential change to a statutory scheme.

71. There is no doubt that the learned recorder's analysis in ***Nicholds*** has been very influential. Thus it was cited in both the Court of Appeal in ***Malik*** and in the House of Lords in ***Countryside Alliance*** and his analysis was described by Auld LJ in the former as "powerful", and by Lord Bingham in the latter as "very convincing". But the uncomfortable difficulty for me remains that in ***Nicholds***, ***Malik*** and ***Countryside***, the observations about goodwill were not only obiter, but in ***Nicholds*** and ***Malik*** they arose out of the straightforward revocation of a licence, as opposed to the rather more amorphous situation here of the cancellation, termination or failure to perform various contracts because of the terms of the 31 October 2011 proposal.

72. The difficulties are highlighted in a number of passages in the judgements of the Court of Appeal in ***Malik***. Thus, Rix LJ concluded that "there will be no interference with possessions within A1P1 if the value of a business (including, presumably, its goodwill) declines only so far as loss of future income is anticipated." He made clear that in the Strasbourg cases of ***Denimark*** and ***Edgar***, the practical difficulties of this distinction did not have to be explored. He went on at paragraph 65 to say that that distinction "has never had to be determined on the facts. That such a distinction may turn out to be difficult, possibly even unworkable, given that the present-day value of any business will inevitably reflect its future profit-earning capacity, has been highlighted by the analysis of Kenneth Parker QC in ***Nicholds***."

73. Rix LJ went on to doubt whether the solution to the problem could be solved only by looking at marketability. He said that the goodwill of a professional practice may not be readily marketable but, on the other hand, he could conceive that a professional practice could perhaps only or best be thought of as involving a vested possession in terms of goodwill consisting in its clientèle. Also in ***Malik***, Moses LJ asked the same question before concluding that, on the facts, the goodwill, which was founded on the doctor's reputation, could not be sold and had no economic value other than being that which a professional man may exploit in order to earn or increase his earnings for the future. He found that that was not protected by A1P1. It was no more than a complaint of a risk of loss of future income.

74. Although a number of more recent decisions on this topic were cited to me, I did not derive any particular assistance from them. Thus in ***R (Lumsdon) v Legal Services Board*** [2014] EWHC 28 (Admin) the Divisional Court dismissed a challenge to the QASA scheme for monitoring barristers on the grounds, inter alia, that barristers did not have a client base and goodwill in the sense used in ***Malik***, let alone something that was marketable. And in ***R (New London College Ltd) v Secretary of State for the Home Department*** [2012] EWCA Civ. 51 (another case about withdrawing licences this time from a college as a result of concerns about immigration),[2] the Court of Appeal refused the claim for a number of reasons, and expressed doubt as to whether the expected income stream from students could be capitalised as part of the value of the business, in particular because it depended on a licence that was non-transferable and had no market value in itself. Accordingly this was another case where, assuming that loss of goodwill was protected, the claim failed because the particular claimant could not demonstrate that it was entitled to and/or had lost marketable goodwill.

6.3.3 Analysis of Claimants' Claims

75. I consider that the following principles can be taken from the cases analysed above:

(a) Loss of future income is not a possession protected by A1P1;

(b) Loss of marketable goodwill may be a possession protected by A1P1;

(c) There are a number of factors which may point towards the loss being goodwill rather than the capacity to earn profits in the future. One of those will be

[2] Many of the reported authorities deal with revoked licences or permits. I am inclined to agree with Mr Beloff QC that they are of limited assistance in the present case.

marketability. Another will be whether or not the accounts and arrangements of the claimant are organised in such a way as to allow for future cash flows to be capitalised.

(d) In addition, the reason why goodwill may be an asset, and therefore a possession under A1P1, is because it is something which has been built up in the past and has a present-day value, as distinct from something which is only referable to events that may or may not happen in the future.

(e) Thus, if there is interference which causes a loss of marketable goodwill at the time of the interference, and if that can be capitalised, then it is prima facie protected by A1P1. If, on the other hand, the interference causes only a potential loss of goodwill for the future, then it is a claim for loss of future profit and is not recoverable.

76. The application of these principles to the claimants' claims in this case is perhaps best demonstrated by reference to paragraph 39 of HomeSun's Statement of Case. Under the heading 'Goodwill in HomeSun's Business as at 31 October 2011', it identifies five separate categories of potential or actual contracts as follows:

(i) 5,703 leases which had been requested and sent to customers following successful desktop and technical surveys. Of these, it is alleged that (based on existing conversion ratios), 3,415 would have led to installations of solar PV systems by the cut-off date.

(ii) 1,774 leases had been signed by customers. Of these, it is alleged that (based on existing conversion ratios) 1,430 would have led to installations of solar PV systems by the cut-off date.

(iii) 1,974 leases had been signed by customers and relevant HomeSun subsidiary company but the solar PV systems had not yet been installed and commissioned as defined in the 2010 S.I. Of these, it is alleged that (based on existing conversion ratios) 1,923 would have led to installations of solar PV systems by the cut-off date.

(iv) 1,441 solar PV systems had been installed and commissioned as defined by the 2010 Order, following the associated leases having been signed by customers and relevant HomeSun subsidiary company. Applications to the relevant FIT licensees were subsequently made for all of these solar PV systems entitling HomeSun, through their subsidiaries, to the benefit of a FIT income stream at the 43.3p per kWh rate.

(v) 2,539 solar PV systems had been installed and commissioned and an application had been made to the relevant FIT licensee as required by the 2010 Order which also entitled HomeSun, through their subsidiaries, to the benefit of a FIT income stream at the 43.3p per kWh rate.

77. The contracts/installations identified at (iv) and (v) above plainly constituted an element of HomeSun's marketable goodwill. But, as Mr Grodzinski QC accepted, those were not relevant to HomeSun's claim against the defendant, because those installations/contracts were unaffected by the proposal of 31 October 2011. Thus the

battleground was the installations/contracts under categories (i), (ii) and (iii) above. They have to be analysed by reference to what they actually represent, not the label put on them by HomeSun.

78. In my view, as at the date of the alleged interference, the contracts referred to in category (iii) were *prima facie* an element of the marketable goodwill in HomeSun's business. On the assumption that this goodwill could be capitalised, and therefore represented marketable goodwill at that date, then it seems to me that that goodwill is prima facie protected as an asset, and therefore constitutes a possession under A1P1. It falls on the right side of the line as identified in ***Nicholds*** and ***Malik***.

79. Equally clear, so it seems to me, is the conclusion that the possible future contracts identified in category (i) are not an asset and not a possession under A1P1. They were much too speculative to represent an element of the marketable goodwill in the HomeSun business: they were a hope, and no more. The same would apply to the 'expressions of interest' referred to in paragraph 39 (ii) of Touch Solar's Particulars of Claim

80. The most difficult category to pigeon-hole under the rather artificial exercise required by the Strasbourg authorities is category (ii). Some of these may be capable of being treated as concluded contracts: see paragraph 61 above. But in general I have to conclude that, to the extent these proposed contracts had not been concluded, and were therefore not legally binding, they had more in common with a claim for loss of future income than a claim for loss of marketable goodwill. Accordingly, I conclude that *prima facie* those potential future contracts do not give rise to a recoverable claim, although any issue of fact would have to be resolved at a later date.

81. The analysis set out above is therefore consistent with my approach to the issue of contracts as possessions. At paragraphs 47 to 62 above I have concluded that signed/completed contracts which were then unfulfilled or unperformed as a result of the interference were possessions under A1P1, and that possible future contracts were not. My answer to the separate issue as to goodwill leads to the same result: marketable goodwill referable to concluded contracts is protected, but the loss of possible future contracts simply reflects a possible failure to earn profits in the future and is not protected. There is, I hope, a logical coherence to that analysis.

82. For completeness, I ought to deal with two further points raised by Mr Beloff QC on behalf of the defendant. First it was said that the contracts in HomeSun's category (iii) did not represent marketable goodwill because they were transient, in particular because they had not ultimately been performed because of the unjustifiably high rate of return resulting from the FIT set out in the statutory scheme. He indicated that this was a speculative "bubble" which should not give rise to a possession. I reject that submission. First, the rates had been set by the defendant, so it hardly lies in its mouth then to say that they were unjustifiable. Furthermore, it cannot be said that this was a bubble; on the contrary, it was a carefully graded scheme in which there were clear incentives if the cut-off date of 1 April 2012 was met. And to the extent that the claimants' businesses are now criticised for being vulnerable to a rate change, I consider that the claimants are right to counter that by saying that their vulnerability should have been protected by the consultation and scrutiny of any changes required by the 2008 Act, which consultation and scrutiny were ignored by the defendant when it made its proposal on 31 October 2011.

83. Mr Beloff QC also suggested that, because the claim for loss of marketable goodwill might be difficult to isolate and/or identify, it was not a legitimate claim. I do not accept that submission either. The mere fact that the value of the possession may be difficult to assess is not a reason for rejecting the claim in principle. In any event, because I have (in general terms), stripped out the claims based on unsigned/non-concluded contracts, and limited the claim for loss of marketable goodwill to those contracts which had been signed/concluded by the date of interference, I am confident that the loss can be properly identified.

6.3.4 Conclusion

84. For the reasons set out above, I consider that, to the extent that the claimants had entered into contracts by 31 October 2011, which contracts became incapable of performance (in one way or the other) as a result of the proposal, then those contracts represented an element of the marketable goodwill in the claimants' businesses, and therefore represented a possession protected by A1P1. The claimants can in principle recover for the loss of that element of the marketable goodwill in their businesses.

85. Also for the reasons set out above, I consider that, even if the loss of unsigned/non-concluded contracts could be said to have affected the claimants' goodwill, such losses are properly characterised as losses of future income and therefore irrecoverable under A1P1.

86. This conclusion is consistent with the conclusion at paragraph **6.2.4** above. In this way both the loss of concluded contracts and/or the loss of marketable goodwill represented by those contracts gives rise to claims in principle under A1P1, whereas claims referable to contracts that were not concluded, or the alleged goodwill represented by those non-concluded contracts, do not.

6.4 Legitimate Expectation

6.4.1 The Arguments

87. The third way in which the claimants put their case as to possessions is by reference to what they say was a guaranteed entitlement under the FIT scheme to the highest rate, if they completed the installations by 1 April 2012. They contend that they had a "legitimate expectation of obtaining an asset" and that that asset – namely the income from the FIT scheme – was definitely payable. The claimants maintain that there is no proper distinction to be drawn between occupiers, on the one hand, and solar PV installation businesses on the other, and that what matters is looking at the substance and reality of their expectation, rather than the form. By reference to ***AXA General Insurance Ltd and Others v HM Advocate and Others*** [2012] 1 AC 568, they say that it is important to focus on the practical reality, and that they are in real terms the victims of the interference.

88. The claimants' case as to legitimate expectation was put primarily by reference to two authorities. In ***Centro Europa 7 Srl v Italy*** [2009] Application No. 38433/09 (11 April 2012) (2012) BHRC 417, the claim was for losses as a result of certain promised digital frequencies not being made available to the claimant. The Strasbourg Grand Chamber concluded (by a majority) that there was a valid claim because, although the payments were conditional on surveys which never happened,

there was a statutory entitlement that was "definitely payable". The legitimate expectation was linked to property interests (the operation of an analogue television network by virtue of a licence) and constituted a possession.

89. The claimants also relied on the domestic case of ***Infinis v GEMA*** [2013] EWCA Civ. 70, where the defendant authority was providing accreditation. The defendant refused accreditation for generating stations owned and operated by the claimants. In consequence, under the relevant statutory scheme, they were excluded and no Renewable Obligation Certificates ("ROCs") were issued to them. The losses caused were not payments from GEMA, but the payments that Infinis would have received from other members of the industry, because the ROCs certificates were tradable assets. GEMA was required to pay compensatory just satisfaction by reference to A1P1, for the economic value of the income which Infinis would have received for the accreditation which had been unlawfully denied to it.

90. In response to the claimants' submissions, Mr Beloff QC maintained that legitimate expectation was only relevant where an applicant possessed an asset in respect of which he could then argue that he had a legitimate expectation of obtaining effective enjoyment of that property. He said that a free-standing expectation could not amount to a possession in the absence of some other asset to which it related, although he accepted that the asset could be a legal claim which had a settled basis.

91. He also argued that, for a legitimate expectation to arise from such a claim, there must be a "clear and unambiguous assurance devoid of all relevant qualification": see ***R v Inland Revenue Commissioners ex parte MFK Underwriters*** [1990] 1 WLR 1545. His case was that there was no clear unambiguous representation devoid of relevant qualification in this case and he referred to the fact that all of the material emanating from the defendant, from the 2009 consultation onwards, stressed the need for flexibility and balance within the low-carbon generation market and that there would be reviews of all aspects of the FIT scheme, including the rates. He referred expressly (paragraphs 11 and 15 above) to the warnings in 2011 that the existing tariff arrangements could change.

92. What the skeleton arguments on both sides failed to do was to tie in the arguments about legitimate expectation with the arguments (already dealt with) as to contracts and marketable goodwill. Both sides argued the pro's and con's of the legitimate expectation claim as if it was in a separate, self-contained box. That could conceivably has given rise to a result that was wholly inconsistent with the other ways in which the claimants' case on possession was put. To be fair to the parties, that approach may have been generated by the fact that much of the Strasbourg case law also fails to address these underlying tensions, and does not offer any sort of coherent overview.

93. This is, I think, more than just a tidy-minded complaint about form. Addressing the point head on in answer to a question from the court, Mr Fordham QC said expressly that, if he could show a legitimate expectation of future payments under the scheme, then the claimants' were entitled to everything they claimed, even if the claim was otherwise properly characterised as a loss of future income. In other words, his argument was that, if there was a legitimate expectation, the claimants won hands down and avoided any difficulty with (for example) the case law prohibiting the recovery of loss of future profit. For myself, I regard that as an unsatisfactory and

implausible outcome. Accordingly, the first issue for me to decide is whether a legitimate expectation can be seen as some sort of trump card, rendering the discussions at **Sections 6.2** and **6.3** above immaterial, or whether, when legitimate expectation is analysed, it should not give rise to an answer that is different to the other ways in which a possession case under A1P1 might be put.

6.4.2 Is Legitimate Expectation a Trump Card?

94. In my view, the claim for loss of a legitimate expectation is not a trump card, rendering everything else irrelevant. It does not provide a way round the difficulties of claiming a loss of future income, explored above. Indeed, there is clear domestic authority the other way: that if an answer presents itself on the dispute between loss of future income on the one hand, and loss of marketable goodwill on the other, then possible issues relating to a legitimate expectation become irrelevant.

95. Guidance on that topic can be found in the judgments of the Court of Appeal in ***Malik***. Both Auld LJ and Rix LJ were anxious to make plain that, if the goodwill argument failed, it could not be rescued by reference to a legitimate expectation. They said that any other analysis would blur the line between the two. Thus, at paragraph 29, Auld LJ said:

> "29. In summary on the issues of goodwill and legitimate expectation, there is clear Strasbourg authority, in ***Wendenburg*** and other cases, and domestic authority, in ***Countryside***, that the assets of a business may include possessions for the purpose of Article 1 in the form of 'clientele' or goodwill of the business…But where it does not exist, as it does not here, the Court of Appeal's decision in ***Countryside*** upholding the reasoning of the Divisional Court is also clear authority for the proposition that, without it, mere prospective loss of future income cannot amount to a possession for the purpose. Equally, any consideration of a further category of Article 1 possession based on a notion of legitimate expectation in this context would unacceptably blur that distinction of principle. It would also, as I have indicated, lead to great difficulties of practical application in the next stages of the Article 1 exercise of identifying precisely what legitimately expected 'possession' had been interfered with and to what extent, and in considering the 'legitimacy' of the expectation against considerations of the general interest on the issue of justification."

And at paragraph 64, Rix LJ made the same point:

> "I agree with Auld LJ that there is no intermediate ground between a vested possession and future income, whether described in terms of livelihood or glossed in terms of legitimate expectation."

96. I respectfully agree with that approach. That is another reason why I have dealt with the claim based on a legitimate expectation last in the sequence, rather than first (as the claimants did). I have found that, by reference to signed/concluded contracts,

and/or to the extent that those contracts reflect a loss of marketable goodwill, there is a possession protected by A1P1. Claims by reference to contracts which were merely aspirational, and claims for loss of future income by reference to such unsigned contracts, fall the wrong side of the line, for the reasons for which I have explained. In my view, following the approach of the Court of Appeal in ***Malik***, it is wrong in principle for the claimants then to seek to revive those types of claim which are not otherwise open to them, by reference to a catch-all reference to a loss of legitimate expectation. Accordingly, following the approach of the Court of Appeal in ***Malik***, having already decided the issues as to contracts and marketable goodwill, I consider that it is unnecessary for me to consider the claim put by reference to legitimate expectation any further.

97. The remainder of this section of the Judgment is relevant only if that conclusion is wrong.

6.4.3 The Need for an Existing Property Right

98. As I have said, Mr Beloff QC's principal submission in relation to this part of the case was that a legitimate expectation had to be linked to a property right that was already enjoyed; and that, conversely, the hope of future income, or a conditional claim to that income, could not be a possession under A1P1. I have concluded that on this issue, Mr Beloff QC is right.

99. Both parties took as their starting point the decision of the Strasbourg Grand Chamber in ***Kopecky v Slovakia*** [2005] 41 EHRR 43. This was itself curious because the claim was very different to this one, being concerned with a claim for restitution of gold and silver coins which was wholly unsuccessful. Notwithstanding that, the claimants set great store by paragraph 35 of the judgment where, in recapping the principle relevant to A1P1, the court said:

> "35. (c) An applicant can allege a violation of Art.1 of Protocol No.1 only in so far as the impugned decisions related to his 'possessions' within the meaning of this provision. 'Possessions' can be either 'existing possessions' or assets, including claims, in respect of which the applicant can argue that he or she has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a 'possession' within the meaning of Article 1 of Protocol No.1 , nor can a conditional claim which lapses as a result of the non-fulfilment of the condition."

100. Mr Fordham QC, on behalf of the claimants, argued, by reference to this passage, that a possession could be a claim in respect of which the claiming party had the legitimate expectation of obtaining effective enjoyment of the property right. He said a conditional claim could therefore be an asset.

101. In my view, the passage is a slender basis for alleging that, provided that a future claim had some prospect of success, it translated into an asset/possession protected by A1P1. ***Kopecky*** was a very different sort of case and the passage cited is a very

general recapitulation of principle. In my view, of more relevance is paragraph 48 of the judgment in which, having referred to ***Pressos Compania Naviera SA v Belgium*** (A/332); [1996] 21 EHRR 301, the court went on:

> "The Court [in ***Pressos***] did not expressly state that the 'legitimate expectation' was a component of, or attached to, a property right as it had done in ***Pine Valley Developments Ltd v Ireland*** [1992] 14 EHRR 319 and was to do in ***Stretch v United Kingdom*** [2004] 38 EHRR 12. It was however implicit that no such expectation could come into play in the absence of an 'asset' falling within the ambit of Article 1 of Protocol No.1, in this instance the claim in tort. The 'legitimate expectation' identified in ***Pressos Compañía Naviera SA*** was not in itself constitutive of a proprietary interest; it related to the way in which the claim qualifying as an 'asset' would be treated under domestic law and in particular to reliance on the fact that the established case law of the national courts would continue to be applied in respect of damage which had already occurred.
>
> 49…There was a difference, so the Court held, between a mere hope of restitution, however understandable that hope may be, and a 'legitimate expectation', which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision. (See ***Gratzinger and Gratzingerova v Czech Republic*** (Application No. 39794/98))."

102. I consider that this passage from ***Kopecky*** supports the proposition that, in order to be considered a possession for A1P1 purposes, what is needed is a legitimate expectation that the claimant will continue to have effective enjoyment of an expectation right. This was best summarised in ***Maurice v France*** (2006) where the ECtHR said at paragraph 65 that no legitimate expectation "could come into play in the absence of an 'asset'…the legitimate expectation…did not in itself constitute a proprietary interest". There are a number of other cases on this topic which, in my view, support that proposition. These include:

(a) ***Pine Valley***, referred to above, where the legitimate expectation was that the planning permission relating to the property would be operative.

(b) ***Stretch***, also referred to above, where there was a legitimate expectation that the option to renew, granted in respect of a building lease of industrial land, would be exercised.

(c) ***Rowland v Environment Agency*** [2003] EWCA Civ. 1885, where the Court of Appeal dismissed the claimant's claim that the public could not use a particular stretch of river because the defendant's representatives had earlier indicated that the stretch of river was private. However, the Court of Appeal held that the words and actions of the defendant's representatives had been sufficient to give rise to a legitimate expectation and emphasised that an expectation relating to property could be a possession the peaceful enjoyment of which was entitled to protection under A1P1. In the passages of his judgment dealing with this issue

(paragraphs 66-81) Peter Gibson LJ made plain that a legitimate expectation had arisen which related to the property (and whether or not the stretch of river was private).

(d) Sir Anthony Clarke MR's conclusion in ***Countryside Alliance*** (in the Court of Appeal) that there had to be a pre-existing enforceable claim (see paragraph 64 above).

103. In my view, each of those cases involved a public authority saying that something particular relating to the property (the asset) existed or would be done, and property was then acquired on the basis of that representation. When that which was promised did not happen, or was reneged on, there was interference with the claimants' legitimate expectation to continue to enjoy the relevant property rights. That is a different situation to that which occurred here where, (save in respect of signed/concluded contracts) all there was was a conditional or potential claim to FIT by reference to contracts that were never in fact signed. That is not enough.

104. The position in respect of concluded contracts is, I think, different. They were an asset that had been acquired by the claimants. They had a legitimate expectation that they could enjoy that asset, by fulfilling the terms of the contract and being paid in accordance with its terms, or improving its business and goodwill as a result of the rights and obligations it contained. On the Assumed Facts the defendant interfered with that legitimate expectation by creating a situation in which these contracts could not be performed.

105. The exceptionality of the position in respect of concluded contracts can, I think, be put in a different way, but to the same effect. It was accepted that, in order for a legitimate expectation to arise, there must have been a clear, unambiguous representation devoid of relevant qualification. But in my view that cannot be the case for contracts that may have been entered into in the future because, by reference to the documents referred to at paragraphs 11 and 15 above, it was always plain that tariffs might be reviewed in the future as well. In my opinion, the existence of that future risk tells against the establishment of a legitimate expectation in respect of future contracts.

106. But again, the position is different for contracts signed/concluded before 31 October 2011. In respect of those assets, there was a legitimate expectation of payment at the maximum rate for installations completed by 1 April 2012, because any possible reduction in the FIT rates would realistically have been considered to be inapplicable to such signed/concluded contracts. That is because the due process identified in Section 40 of the 2008 Act meant that the cut-off date could not be varied until there had been a consultation and a minimum of 40 days Parliamentary scrutiny. By 31 October 2011, in respect of those contracts, there would not have been enough time for the FIT rate cut-off date of 1 April 2012 to be significantly foreshortened. Moreover, the Minister had said on 20 October 2011 that existing rates would not be reduced retrospectively. So in respect of contracts signed/concluded by 31 October 2011, I find that there was a legitimate expectation of FIT payments at the highest rate, which expectation could be described as certain.

107. Finally, and for completeness, I should say that I accept Mr Beloff QC's submission that ***Centro*** and ***Infinis*** (the two cases relied on by the claimants, and identified in paragraphs 88-89 above) have little application to the present dispute.

(a) As to ***Centro***, the applicant company had been granted a licence to broadcast, but was then denied the opportunity to use that licence, because of the failure to allocate any frequencies. That was therefore another case where property was acquired on a clear basis, but peaceful enjoyment of it was then denied because of the annulment of a promised right.

(b) As to ***Infinis***, the judgment of Lindblom J at first instance, and Sullivan LJ in the Court of Appeal, both make plain that Infinis had acquired a right to the certificates which they could then trade. It was the denial of that right that gave rise to the claim. Here (save in respect of concluded contracts) the claimants did not have a claim to FIT at the enhanced rates, so there was no certain claim and/or no legitimate expectation. Mr Fordham QC summarised the FIT scheme on a number of occasions by saying that the entitlement was "if you build, we will pay", but that neat formulation is subject to the obvious general riposte that, since the building did not take place, there was no entitlement to payment.

6.4.4 Analysis of Claimants' Claims

108. Accordingly, it seems to me that many of the claimants' claims in these proceedings would not give rise to a legitimate expectation. That is because, where the contracts were matters of hope or aspiration, there was not a sufficient property right to which the legitimate expectation could be attached. Moreover, there was not a sufficiently certain basis of entitlement. But where a contract had been concluded prior to the proposal on 31 October 2011, and that contract was then incapable of sensible performance because of the proposal, then in my view that would give rise to a claim based on interference with a legitimate expectation. In my view, the claimant had a possession in the legitimate expectation of fulfilling the contract that he had signed, and the interference with his enjoyment of that possession was therefore protected by A1P1.

109. Accordingly, to the extent that it is relevant (see paragraph 97 above), my answer on legitimate expectation is the same as the answer on contracts and on marketable goodwill: where the claim is rooted in a contract which had been signed but could not be performed because of the proposal, it gives rise to a claim by reference to A1P1. *Prima facie*, if the claim does not arise out of such a signed/concluded contract, it cannot give rise to a claim.

7. INTERFERENCE

7.1 The Issues

110. The first issue in respect of interference is whether it is enough for the claimants to be able to point to "material economic consequences" (see Rix LJ in ***Malik***) caused by the alleged action or whether, in order to constitute interference, that is only one of a number of necessary conditions which the claimants must establish.

111. The second debate, and the most interesting single issue in this case, is whether the making of the Written Ministerial Statement on Monday 31 October 2011 and the consultation document published on the same day constituted action by the defendant sufficient to trigger a claim under A1P1. It is the defendant's case that the action was "merely a proposal" and would not and did not affect the obligations between the parties so as to give rise to an A1P1 claim.

112. There is also a third issue, raised by the defendant, to the effect that the concluded contracts were cancelled or repudiated, not by any action of the defendant, but by the claimants themselves, for economic reasons. The suggestion is that, in consequence, there is a causation argument open to the defendant, to the effect that it was not the proposal that caused any material economic consequences, but the claimants' independent reaction to it.

113. I deal with each of those submissions in turn below.

7.2 'Material Economic Consequences'

114. In ***Malik***, at paragraph 77, Rix LJ said:

> "It seems to me that it is strongly arguable that, if a relevant possession had been involved, then there would only have been an interference for the purposes of Article 1 First Protocol if there had been material economic consequences:"

The claimants relied on this passage to suggest that the demonstration of material economic consequences could be sufficient to amount to interference. The defendant contended that such consequences were a necessary condition for an interference with A1P1 rights, but did not, without more, establish interference.

115. In my view, the defendant's submissions are correct. In both ***Malik***, and in ***R (United Kingdom Association of Fish Producer Organisations) v Secretary of State of Food, Environment and Rural Affairs*** [2013] EWHC 1959 (Admin) (Cranston J), the court made plain that material economic consequences were necessary in order to establish an A1P1 claim but did not, of themselves, amount to such interference. What was required was some form of State action which caused those material economic consequences.

7.3 Merely A Proposal?

116. On behalf of the defendant, it was said that the mere publication of a proposal for consultation (which, on the basis of Assumed Fact 46, assumed in the defendant's favour, was to be open minded and genuine) could not amount to interference under A1P1, particularly in circumstances where the proposal had no legal effect; never took effect; and was never implemented. I have considered this submission carefully. I have concluded that, on the Assumed Facts in this case, and/or as a matter of law, and/or as a matter of commonsense, it cannot be supported. On the contrary, in my view, the making of this proposal in these circumstances did amount to interference.

117. On the Assumed Facts, the position is straightforward. I refer in particular to Assumed Facts 50 and 51, set out at paragraph 21 above. On the basis of those

Assumed Facts, which are assumed in favour of the claimants, the defendant announced this proposal, knowing that it would have a significant and adverse impact on the claimants, whatever happened thereafter. The defendant acted carefully and deliberately. They also acted unlawfully. On that basis, it would be unrealistic now to suggest that what they were doing somehow did not amount to State action necessary to amount to interference for A1P1 purposes.

118. Furthermore, as a matter of law, the proposition that this was merely a proposal, and was therefore incapable of amounting to interference, cannot be sustained. First, I note that this same proposition was advanced before Mitting J in the original proceedings. At paragraphs 32-33, Mitting J rejected that submission:

> "32. The true principle 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 paragraph 33:
>
> > '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 [of 31 October 2011] 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."

I respectfully agree with that analysis. Suggesting that this was "merely a proposal" was not an answer in law then, and is not an answer in law now.

119. During the oral submissions, much attention was given to the case of ***Sporrong and Lonnroth v Sweden*** [1982] 5 EHRR 35. In that case, State authorities had issued expropriation permits. These permits did not mean that expropriation action in respect of the relevant properties would necessarily follow, but they meant that such action was permissible. The permits lasted for lengthy periods of time. The court

held that this was an unjustified interference with the applicants' property rights because it placed them in a "precarious and defeasible" position. In essence, the court differentiated between the applicants' legal position (which was largely unaffected by the permits), and the practical reality that their properties were worth less because of the permits.

120. In my view, there are strong similarities between the present case and the basis of the claim in ***Sporrong***. There, as here, the mischief was not what would necessarily happen in the future as a result of the proposal, but the immediate 'blight' created by the possibility of that future action, in particular the effect upon those signed/concluded contracts predicated on the basis of the FIT rate of 43.3p per kWh.

121. Also of assistance was the case of ***Agrotexim and Others v Greece*** [1996] 21 EHRR 250, that was put before the court by Mr Beloff QC and relied upon by Mr Lawrence QC. Although the case was decided on a 'corporate veil' issue, there detailed discussion that the nature of the State action in that case. Athens Council had conveyed an intention to expropriate an area of land where the claimant companies had property interests, but without introducing a formal expropriation procedure. The plan was manifested in that case by (amongst other things) the putting up of signposts to indicate that the area was to be expropriated. The proposal to expropriate the land was found to be interference for the purposes of A1P1.

122. The Commission's opinion was stated in the following terms:

> "64. The Commission has also examined the Government's argument that in the absence of enforceable administrative decisions the company's property rights remain intact and that, therefore, no interference with such rights can be established. It finds that, in the present case, the repeated declarations of officials of the administration that the Municipality of Athens will acquire the company's land and, above all, the placement and maintenance of signposts indicting that the area would be expropriated even though they left intact in law the company's property rights could in practice affect substantially the possibilities to exercise these rights.
>
> 65. Although the applicants have not proved that the devaluation of their shares was the direct result of the situation described above, it is, in the Commission's view, established that these measures must have affected the company's capacity to negotiate development projects for its properties. Notwithstanding the absence of formal expropriation proceedings until 1989 the impression was created that the Municipality of Athens would proceed to the expropriation whenever it found it expedient to do so. Therefore, the Commission finds that the situation created by the placement of the signposts and the repeated declarations of the Municipality's intention to acquire the company's land amounts to an interference with the applicants' right to peaceful enjoyment of their possessions."

The judgment of the court was in a similar vein.

123. It seems to me that ***Agrotexim*** supports the proposition advanced by the claimants in this case: that the Written Ministerial Statement on Monday 31 October 2011 and the consultation document published on the same day, can amount to interference for A1P1 purposes. Mr Beloff QC sought to distinguish ***Agrotexim*** on the basis that, in that case, signposts were put up indicating the likely redevelopment, which he said was a positive act by the State which was missing here. But, with respect, that really is splitting hairs: how can the putting up of signposts in a street in Athens be a positive act capable of constituting interference, whilst the announcement of a deliberate proposal in the House of Commons on 31 October 2011 is not?

124. Finally, it seems to me that, as a matter of commonsense, the Written Ministerial Statement on Monday 31 October 2011, and the consultation document published on the same day, was part of a deliberate plan with carefully thought-through economic consequences, and was, in a real and practical sense, an act of interference. The European cases repeatedly stress that the court must have regard to practical reality, not form. So whilst the form of the interference in this case may have been an announcement of a proposal in the House of Commons, the practical reality, for the claimants, was, on the Assumed Facts, a decisive and catastrophic effect on their businesses which the defendant intended to bring about. It would be a very odd result in all the circumstances if the claimants could show possessions for A1P1 purposes, but could not show interference with those possessions because the proposal did its damage immediately, and therefore never needed to be enacted.

125. During the course of his oral submissions, Mr Lawrence QC pointed out that in reality, what the defendant was seeking to do was to take advantage of the fact that it would inevitably take a certain amount of time for the unlawfulness of the proposal – if that is what it was - to be identified by the courts. Although the Administrative Court and the Court of Appeal acted with admirable speed, it was inevitable that there would be a time gap between the announcement of the proposal on 31 October 2011, and the final rejection of the application for permission to appeal to the Supreme Court in March 2012. In one sense, it was that litigation delay which is at the root of the problem. If the unlawfulness of the proposal could have been decided conclusively on 31 October 2011, none of these problems would have eventuated. Again as a matter of commonsense, it would be wrong in principle to allow the defendant to take advantage of that litigation delay to argue that there was no interference.

7.4 Indirect Causal Effect

126. In their skeleton argument, at paragraph 93, Mr Beloff QC and Mr Cornwell submitted that:

> "The direct cause of solar PV installations not being completed by 3.3.12 appears to have been the actions and commercial decisions of, variously, the Claimants, their customers, their potential customers, their contractors, their funders and/or (in relation to alleged supply or labour shortages or alleged increases in the cost of materials) the decisions or actions of other players in the solar PV market and supply chain, rather

> than anything done and/or proposed to be done by [the defendant]."

Accordingly, it was suggested on behalf of the defendant that A1P1 was irrelevant, because the alleged interference came not from the defendant, but from the actions of the claimants themselves.

127. In support of this proposition, they relied on the decision of the Court of Appeal in the ***Countryside Alliance*** case ([2007] QB 305) and in particular the reference at paragraph 48 of the speech of Lord Clarke MR to the fact that, what was unusual in that case was that the claim was based, not on what the legislation said, but on the claimants' reaction to the legislation "and how that reaction may impact, at one or more removes, on other individuals…" Mr Beloff QC said that here too the claim for interference was based on the claimants' reaction to the proposal, not the proposal itself.

128. I do not accept that submission. Take a contract which was concluded before or on 31 October 2011 and which would, but for the proposal, have proceeded to a completed installation. The loss as a result of the non-performance or failure of that contract was the direct consequence of the proposal. It was not a reaction to it of the sort in the ***Countryside Alliance*** case: it was the inevitable economic consequence of the proposal which, on the Assumed Facts, the defendant deliberately and knowingly brought about. Moreover, it is often the case that commercial enterprises which are not always directly linked to the interference will suffer the loss and will be able to recover: see paragraphs 24-27 of the speech of Lord Hope in ***AXA***. For these reasons, therefore, there is nothing in this alleged causation point.

7.5 Conclusions

129. As set out in the preceding section, the possessions which give rise to an A1P1 claim here were those contracts which had been concluded on or before 31 October 2011. In my view, to the extent that those contracts were then not fulfilled, or could not proceed as anticipated, because of the proposal of that date, there was interference with the claimants' possessions within the meaning of A1P1. The fact that this was a proposal does not stop it from being the action of the State. On the Assumed Facts, on the law and as a matter of commonsense, the proposal constituted interference. Even leaving aside the rhetorical flourish with which it was advanced, there is much to be said for the claimants' collective submission that any other finding would allow the defendant to achieve by the backdoor (a threat of retrospective changes held to be unlawful), that which they could not achieve by the front door (by making legitimate and non-retrospective changes to primary legislation). That really would be a surprising result, and it is not one that commends itself to me.

8. HAS THE DEFENDANT JUSTIFIED THE INTERFERENCE?

8.1 General

130. It is the defendant's case that the proposal of 31 October 2011 struck a fair balance between the demands of the general interests of the community and the requirement to protect the claimants' fundamental rights. The defendant stressed in particular the legitimate aim of the proposal and the wide margin of appreciation that a State has in

seeking to maintain that balance: see ***Sporrong and Lonnroth v Sweden***, referred to above, and ***James v United Kingdom*** [1986] 6 EHRR 123.

131. In relation to the purpose of the FIT scheme and the proposed modification that was proposed, Assumed Facts 40-48 are, for the purposes of these Preliminary Issues, assumed in the defendant's favour. Although they are set out in Appendix 1, it is convenient to note them (but not the lengthy pleading to which they refer) again here:

> "40. The FIT Scheme was proposed by a Consultation in 2009 for the reasons and with the aims set out at paragraphs 18 and 19 of the Consolidated Defence.
>
> 41. Solar PV had traditionally had high installation and equipment costs compared to other low-carbon generation technologies (although those costs have fallen very sharply over recent years). For that reason the tariff level for solar PV was originally set at a higher level than for other technologies when the FIT Scheme was introduced in order to incentivize generators to overcome those higher installation costs. Solar PV was thus a relatively expensive way of generating low-carbon electricity.
>
> 42. Although under the FIT Scheme the payment to the FIT Generator is made by the electricity supplier, the cost of the FIT is passed on to all electricity consumers thereby raising prices for consumers - it is, therefore, a subsidy paid by consumers. The cost of the FIT Scheme is accordingly treated by HM Treasury as "imputed tax and spend" and the Defendant is concerned to keep the costs of the Scheme under control to ensure the impact on consumers is proportionate and reasonable.
>
> 43. The cost of the FIT Scheme was one of the matters addressed in the Spending Review initiated following the election in May 2010. The Spending Review announcement was made in October 2010, and provided that the cost of the FIT Scheme was to be reduced by 10% in 2014/15 (i.e. by £40 million).
>
> 44. By its 2010 Response paper, the Defendant adopted an approach that it believed would provide the best overall balance between the FIT Scheme's objectives and consideration of the Scheme's costs, as set out in paragraph 20 of the Consolidated Defence.
>
> 45. Moreover, by the end of 2010 it was also considered by the Government to be necessary to ensure that the cost of the FIT Scheme for the period up to 2014/15 was maintained within the limit set in the Spending Review.

46. The background to the Proposal in October 2011 was the Defendant's concern over the increasing cost of the FITs Scheme, as set out at paragraphs 23-26 of Consolidated Defence. The Defendant made the Proposal for the reasons set out in paragraphs 37 to 39 of the Consolidated Defence. The consultation was open-minded and genuine and the outcome was not predetermined.

47. When the FIT Scheme was made, the Defendant anticipated (from the projections used) that in the early years of the Scheme there would be a large number of small solar PV installations on buildings, but that no installations over 4kW would be accredited in the first three years of the scheme with only limited numbers of such installations being accredited in subsequent years. In fact, by December 2010, it was apparent that the FIT Scheme was producing results that had not been anticipated in April 2010. In particular, the following had occurred:

(c) By December 2010 there were 208 new accredited installations greater than 4kW but less than 10kW, and 51 installations between 10 and 100 kW. Many more similar projects were pending of which two were above 50kW.

(d) The greater than expected development of larger scale solar PV installations was due at least in part, to a greater than expected reduction in the costs of setting up such installations (at the time in the region of a 20-30% reduction since the beginning of 2010). (This reduction in the cost of solar PV has been a world-wide phenomenon and has led Germany, France, Spain, Italy and Belgium to reduce their feed-in tariffs for solar PV.)

(e) One consequence of this was to increase the rate of return for such developments at the then-current tariff levels above the 5-8% rate of return (5% for solar PV) on which the FIT Scheme was based.

(f) The increased number of solar PV projects raised the prospect that what the Defendant considered to be disproportionate amounts of funding could be taken by such schemes.

48. In relation to the 'fast-track' review referred to at paragraph 23 above, the Defendant was aware that some solar PV projects that were in the process of development or installation might not be commissioned before 1 August 2011, however the Defendant decided not to implement any transitional provisions. The Defendant also relies on the matters described in his consolidated Defence at paragraph 18-19, 23-26, 37-39

> and 65-69 and the corresponding passages in DECC's other Defences."

132. In response, the claimants maintain that a fair balance cannot be demonstrated, and they contrast the £1.6 billion allegedly saved by the defendant in consequence on the proposal, against the total value of the claims in these proceedings, of just under £200 million. But the claimants have a much more fundamental submission on justification. They say that, since the proposal was – and has been ruled to have been – unlawful, the defendant cannot now justify the proposal. Even if the court accepted the defendant's reasons for making the proposal, that could not amount to justification because it was a legally impermissible action which prevented the claimants from obtaining that to which they were entitled in law. As Mr Fordham QC put it during argument, the attempted justification put forward by the defendant is overshadowed by the fact that it posited an illegal world (where instead of consultation and Parliamentary scrutiny there was an unlawful breach of the principle of non-retrospectivety), and that this prevents the defendant from justifying the proposal on the grounds of public interest.

133. Mr Beloff QC, on behalf of the defendant, recognised the importance of this issue of lawfulness. So his response was to say that the only thing that was unlawful was the <u>way</u> in which the defendant attempted to accelerate the relevant date by way secondary legislation. He said that, since the defendant could have changed the date through retrospective primary legislation, which would not have been the subject of the same complaint which found favour with Mitting J and the Court of Appeal, there in nothing in the unlawfulness point, because it went only to <u>how</u> the defendant sought to implement a legitimate aim, as apposed to the legitimacy of the aim itself. He went as far as to say that, because the Court of Appeal was dealing with the legitimacy of the proposed modifications by way of Statutory Instrument, and did not address whether there was another, lawful way in which the proposal may have been achieved, this court should ignore the decision of the Court of Appeal altogether.

134. Before going on to consider that issue in detail, for completeness I should make one point plain. There was a suggestion in Mr Beloff QC's written submissions that, because this was merely a proposal, in some way the principle of justification either did not apply at all or only applied very loosely. To the extent that that submission was maintained, I reject it. I have already found in **Section 7** above that the proposal of 31 October 2011 was sufficient to amount to interference under A1P1. On that basis, the onus is then on the defendant to justify the interference. The fact that it was a proposal rather than anything else does not, in my view, have any impact on the balancing exercise required to demonstrate justification.

8.2 <u>Unlawfulness</u>

135. There can be no doubt that, if the interference is unlawful, justification may become irrelevant. In ***<u>AXA General Insurance Ltd and Others</u>***, referred to above, Lord Reed said at paragraph 116:

> "116. The Strasbourg court has often said that the first and most important requirement of A1P1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: see, for example, ***<u>Iatridis v Greece</u>*** [1999] 30

> EHRR 97, para 58. In this context, as elsewhere in the Convention, the concept of "law" does not merely require the existence of some domestic law, but requires it to be compatible with the rule of law: see e.g. ***James v United Kingdom***, [1986] 8 EHRR 123 at para 67."

And in the more recent case of ***Centro Europa***, also referred to above, the ECtHR made the same point. Having referred to the most important requirement of A1P1 being that the interference had to be lawful, they went on:

> "188. However, the court has already held under Article 10 of the Convention that the interference with the applicant company's rights did not have a sufficiently foreseeable legal basis within the meaning of its case law (see paragraph 156 above). It can only reach the same finding in relation to Article 1 of the First Protocol, and this is sufficient to conclude that there has been a violation of that Article.
>
> 189. The above conclusion dispenses the court from reviewing whether the other requirements of Article 1 of the First Protocol was satisfied in the present case, in particular whether the control of the use of the applicant company's 'property' was 'in accordance with general interest'."

136. A recent domestic example of a case in which an unlawful application of a statutory scheme led to a successful claim under A1P1 is ***Infinis***, also referred to above. The ROCs had an ascertainable value which formed the basis of the damages claim. Lindblom J concluded that the claimants were entitled to the benefits of accreditation under the statutory scheme and that the decision to refuse them that accreditation was unlawful. In consequence, there was no question of justification. He said:

> "I have held the claimants' argument on accreditation to be well-founded. Though acting in good faith, the Authority misapplied the statutory scheme, and the claimants were unlawfully denied that to which they were statutorily entitled. Their rights under article 1 of the First Protocol were thus breached."

137. On the face of it, therefore, it seems to me that, if the interference was held to be unlawful then, as a matter of principle, it cannot be justified. As the above cases demonstrate, the most important thing is the rule of law and if, although acting in good faith, the State acts unlawfully, then the inevitable conclusion is that its interference cannot be justified.

138. That leaves Mr Beloff QC's argument to the effect that the unlawfulness here was concerned with the means by which the State interfered with the claimants' possessions, rather than the lawfulness of their underlying intention, which was to prevent those in the position of the claimants from receiving FITs beyond that which the State considered to be generally affordable. If, as he submits, the court concludes that the State could have achieved that legitimate aim through primary legislation instead, then it would be wrong to ignore the balancing exercise on justification

merely because the means by which the State had chosen to implement its aim have been found to be unlawful.

139. I do not accept any of those submissions. First, I note that there is no authority for them. Secondly, it seems to me to be wrong in principle for the State to seek to defend itself by reference to something that it did not do, in order to divert attention away from the unlawful action that it did choose to take. The State has to take responsibility for its actions, and that includes its selected method of implementation.

140. Thirdly, I consider that it is unrealistic and unhelpful to seek to differentiate between the actual act of interference (which was unlawful) and other ways which that interference may have been achieved (which may or may not have been unlawful). Not only is that not a distinction drawn in any authority, but it is potentially unworkable in practice. It would require the court to reach detailed findings about things which did not happen – a legislative programme which were never implemented – in order to compare those hypothetical outcomes with what actually happened. In my judgment, that is not an appropriate investigation on which the court should embark for the purposes of an A1P1 claim.

141. Fourthly, I am not persuaded that the comparison is in any event valid on the facts here. It is central to Mr Beloff QC's submission that the appropriate primary legislation, with a retrospective effect, would have been passed by both Houses of Parliament. But there is nothing on which I could base such an assumption. I am aware that the Select Committee which has looked into this whole issue has (unsurprisingly) been very critical of the defendant and the way in which it acted. I decline to find that, even on the balance of probabilities, primary legislation would have been passed to achieve by another means the aim of the unlawful proposal.

142. Finally, I consider that Mr Grodzinski QC was right to say in his reply that, if there was anything in this point, any judicial review application arising out of secondary legislation could always be defeated by the Government, because it would simply say that they would or could pass primary legislation to get round the difficulty. In my judgment, that is not an answer here. The proposal was unlawful and, as such, it cannot now be justified.

143. This conclusion obviates the need for me to consider in any detail the question of the fair balance to which I have already referred. But in case I am wrong to attach such significance to the issue of lawfulness, I deal briefly with the 'fair balance' points below.

8.3 Fair Balance

144. I accept that there were some legitimate aims underlying the proposal, as noted at paragraphs 117 and 118 of the skeleton argument of Mr Beloff QC and Mr Cornwell. These included:

(a) The budgetary requirement to reduce the cost of the FIT scheme;

(b) The greater-than-expected reduction in the costs of setting up solar PV installations and the equivalent increase in the rate of return for the claimants and others;

(c) The increased number of solar PV projects and the risk that these were taking a disproportionate amount of funding;

(d) The legitimate desire to avoid the need to close the FIT scheme for financial reasons; and

(e) The need to encourage a range of low-carbon generation methods.

145. On the other hand, there are a number of factors which point the other way. These include:

(a) The certainty promised by all of the consultation documents at paragraphs 8 to 10 above, aimed deliberately to encourage investors;

(b) The importance of the original April 2012 cut-off date (see paragraph 10 above) which was itself linked to questions of certainty;

(c) The statement made in the House of Commons by the relevant Minister, just ten days before the proposal, to the effect that any modifications would not be retrospective (paragraph 18 above);

(d) The scale of the investments by the claimants based entirely upon the FIT scheme as originally laid out; and

(e) The fact that the proposals were deliberately intended to reduce the number of solar PV installations (Assumed Facts 50 and 51, as set out in paragraph 21 above).

146. There is also the question of the environment more generally. This was an issue I raised, somewhat tentatively, on the last day of the hearing, because it had not been a matter to which any submissions had previously been addressed. A reduction in the number of solar PV installations must be detrimental to the environment. There is no suggestion that those who would otherwise have installed solar PV installations will now use some other low-carbon technology. The reason for the popularity of solar PV installations is, at least in part, because it is the most obvious and easiest way in which an ordinary householder can reduce his reliance on carbon-generated power. Thus, in my view, it would be idle to say that the vast reduction in the number of solar PV installations triggered by the 31 October 2011 proposal will not, at least in the short term, have a detrimental effect on the environment. In my view that is also a factor that I have to bear in mind in undertaking the fair balance.

147. In my judgment, taking all these matters in the round, I do not accept that the defendant has made out a case for justification on its own terms (in other words, regardless of the question of lawfulness). In the end, I consider that the matter can fairly be summarised, as Mr Fordham QC put it, by comparing the savings which this unlawful act has generated (£1.6 billion), with the outstanding claims in these proceedings of around £200 million. That suggests that, in the absence of compensation paid to the claimants, a fair balance has not been achieved as a consequence of this proposal.

148. Mr Beloff QC sought to argue that this was a case similar to ***Tate and Lyle Sugars Ltd v Secretary of State for Energy and Climate Change*** [2011] EWCA Civ. 664. In that case, Tate and Lyle sought to argue that a review of subsidies for renewable energy should have corrected one error in the Government's figures but left all other information as it was, so that the Secretary of State should not have carried out a fresh review of everything, with more up to date information. That argument was rejected by the Court of Appeal. At paragraph 34 Elias LJ said:

> "I am not persuaded that as a consequence of this review the appellant is being unfairly treated. They are in fact receiving the appropriate subsidy for someone incurring the costs involved in developing their particular technology. It is true that they were not obtaining the windfall resulting from the increase in electricity prices which they would have received had no error been made. Furthermore, it may be the case that other producers are receiving a windfall as a result of that price increase and will continue to do so until their technologies are reviewed…That is not, in my judgment, a sufficient reason to confer this benefit on the appellant. It may be bad luck that but for the error the appellant would have been treated more favourably than was necessary properly to subsidise their technology, particularly since some others will have received the more favourable treatment. It does not follow that it was unfair and an abuse of power to carry out a full review."

149. In my view, this case is far removed from the situation in ***Tate and Lyle***. Here, there was an entitlement under the statutory scheme if the installations were completed by April 2012. The proposal to bring that date forward was found to be unlawful. By contrast, Tate and Lyle's case could not be put any higher than a potential expectation of a windfall, itself based on seeking artificially to limit the terms of a statutory review. The full review was clearly justified in ***Tate and Lyle***; the interference in the present case was not.

8.4 Conclusion

150. I have concluded that, because the interference was unlawful, the defendant is unable to justify it. If I am wrong about that, on the fair balance test, I conclude that, on the balancing exercise, taking into account everything (including the environmental impact), the defendant has not made out the necessary case on justification, notwithstanding the wide margin of appreciation. Accordingly, on either approach, I find that the interference was unjustified.

9. MEASURE OF JUST SATISFACTION

9.2 General

151. In relation to this issue, there was a broad measure of agreement between the parties. There was also an understanding that the trial of these preliminary issues could not go very far towards determining precise entitlements on the part of the claimants, given that such matters are inevitably going to be fact-sensitive. However, it is thought that some issues could be resolved by the court at this stage.

9.3 Principles

152. In my view, the following principles are beyond argument:

(a) Damages for wrongful interference under A1P1 may only be awarded if a court is satisfied that they are necessary to give just satisfaction to the claimant having regard to, *inter alia* any other relief granted (see HRA, Section 8(3)).

(b) Damages in such a case are assessed on the basis of *restitutio in integrum* (***Anufrijeva v Southwark London Borough Council*** [2004] QB 1124, approved in ***R (Greenfield) v Secretary of State for the Home Department*** [2005] UKHL 14).

(c) Damages will generally not be awarded unless the court is satisfied that the loss was demonstrably and directly caused by the violation of A1P1: see ***Kingsley v United Kingdom*** [2002] 35 EHRR 10.

(d) The usual approach will be to put the applicant in the position it would have been had the violation not occurred, even if precisely calculating the sums necessary to make full reparation might be impossible: see ***Basarbaood v Bulgaria*** (Application No. 77660/01, 20 January 2011).

153. Again, the decision in ***Infinis*** is a good example of the usual approach. In that case, the claimants had been deprived of ROCs to which they were otherwise entitled as a result of a misapplication of a statutory scheme. Lindblom J held that: "Just satisfaction requires that damages be awarded to them."

154. There was a suggestion in Mr Beloff QC's written and oral submissions that the court should be slow to award damages in cases of this sort because that would come close to (if not violate) the principle that damages are not awarded for maladministration. To that end, he relied on ***Jain v Trent Strategic Health Authority*** [2009] UKHL 4, [2009] 1 AC 853. But that case, which concerned the wrongful destruction of the claimants' nursing home business because of the unlawful cancellation of the owner's registration, arose prior to the coming into force of A1P1. Indeed, Lord Scott was anxious to make this plain and at paragraphs 11-18 of his speech he indicated that, had the events happened after the relevant date, the claimants "would have had a sound case for contending for a remedy under that [the Human Rights] Act. At paragraph 54 of his speech, Lord Neuberger said that there was "considerable force" in the notion the claimants' rights under A1P1 had been infringed. Indeed it appears that it was on this basis that the claimant appealed to the ECtHR, where an eventual settlement was recorded (Application No. 39598/09). Accordingly, I do not consider that ***Jain*** suggests that damages would not be due to the claimants; on the contrary, I conclude that it supports such a claim in principle[3].

155. At one point there was a suggestion that damages may not be awarded if they were complex to establish and/or calculate. To the extent that that argument was maintained I reject it. It is clear on the authorities that, even if the assessment of damages cannot precisely restore the claimant to the position in which it was before

[3] I also regard ***Jain*** as authority for the proposition that unlawful action means it cannot be justified, as discussed in paragraphs 135-137 above.

the violation that does not mean that, as a matter of principle, damages are an inappropriate remedy. As in so many types of commercial and public litigation, the court simply has to do its best on the material provided in order to evaluate the loss.

9.4 Analysis

156. In my view, in general terms, the claimants will be entitled to damages, to put them back in the position they would have been in had the violation not occurred. The likely limits on those damages, and the potentially complex factors that will have to be assessed when calculating damages, seem to me to be likely to arise from a consideration of the particular contracts and/or particular elements of goodwill (as dealt with in **Section 6** above) which make up the possessions which have been interfered with.

157. Arguments as to whether individual claimants have been directly and demonstrably affected by the violation will, as Mr Beloff QC correctly submitted, depend on the facts. However, there is one general matter which I ought to address which arises out of that part of the case. He appeared to be suggesting that, because the claimant companies deliberately chose not to go ahead with the solar PV installations which are at the heart of this claim, they could not say that they had been directly affected by the proposal. In other words there was a hint that, in some way, the fact that the relevant decision to scrap a particular installation or abandon a particular contract had been taken by the claimant companies themselves, rather than by the defendant, meant that there was a break in the chain of causation and that the defendant would argue that the damages had been caused by the claimant's own actions, rather than by the defendant's proposal of 31 October 2011.

158. Whilst individual disputes of that kind may depend on the facts, in my view the general position must be that the defendant cannot rely on such an analysis so as to escape its potential liability for damages. If the claimant company in question can identify the commercial decision that it took as having been due to the proposals (that, but for the proposal, the decision to scrap the contract or abandon the project would not have been taken) then in my view they can demonstrate a direct consequence. The defendant cannot rely on the fact that there were a number of private companies investing in this technology and taking the commercial risk now to argue that it was those companies that were responsible for the losses, rather than the defendant. The whole point of the FIT scheme was that private companies were positively encouraged by the Government to invest and take the commercial risk required. The defendant cannot now hide behind that structure (which it promoted) in seeking to avoid liability for the losses that it has caused.

9.5 Conclusions

159. Whilst a particular claimant's entitlement to damages will ultimately turn on the facts, I consider that, as a matter of general principle, these claimants will be able to recover damages for the wrongful interference with their possessions. Those possessions are, of course, those limited by my analysis in **Section 6** above.

10. ANSWERS TO PRELIMINARY ISSUES

160. For the reasons set out above, I consider that the answers to the preliminary issues (themselves set out at paragraph 34 above) are as follows:

(a) Question 1 (a), (b), (c)

Yes, the claimants had possessions within the meaning of A1P1, albeit limited to contracts signed/concluded by 31 October, or alternatively the marketable goodwill constituted by, or referable to, those signed/concluded contracts.

(b) Question 2 (a), (b)

Yes, by its proposals of 31 October 2011, the defendant interfered with those A1P1 possessions. On the Assumed Facts, such interference was deliberate and caused the assets to be lost or rendered of no value.

(c) Question 3

No, such interference was not justified. It was unlawful. Alternatively, on a fair balance, the defendant has not satisfied the court that the interference was justified.

(d) Question 4

Although the entitlement to damages will ultimately depend on the facts, as a matter of general principle, the claimants have demonstrated an entitlement to damages assessed by reference to the loss of those possessions for which recovery is permissible, namely signed/concluded contracts and/or the marketable goodwill referable to such contracts.

161. Although these answers are something of a 'halfway house' between the two extremes advocated by the parties, and were therefore not as such the answers I was invited to give, I am satisfied that the result in this case was encompassed by (and arises out of) the parties' submissions. I would therefore ask the parties to draw up the order to reflect this Judgment, which they saw in draft a week prior to its handing down.

APPENDIX 1

INTRODUCTION

1. This document is intended to provide the framework for a trial of a number of preliminary issues in the four actions that are to be heard together[4], without the need for evidence to be deployed and tested at such a trial. It is divided into three parts:

    a) Part A – Agreed Facts: A list of facts which are agreed on the parties' respective Statements of Case, and thus where there will be no need for evidence to be adduced.

    b) Part B – Assumed Facts: A list of facts which are disputed (or not agreed) on the parties' respective Statements of Case. In respect of such disputed factual allegations, the Parties propose that the Court assumes that the assumed facts are true but only for the limited purpose of the preliminary issues trial.

    c) Part C: A list of preliminary issues, for resolution by the Court on the basis that the facts in Parts A and B are either agreed or assumed to be true for the limited purpose identified above.

2. It is not proposed that the parties adduce evidence at the trial of the preliminary issues, save for documents specifically referred to in this document and annexed to it. Where facts are assumed to be true for such limited purpose this assumption is to be made without prejudice to any submission that a party might wish to make as to the relevance of such facts or the admissibility of evidence in relation to them, which each party reserves the right to contest if the matter goes to a full trial. The parties reserve their position to challenge at any full trial any assumed fact save insofar as assumed in that party's favour, subject to any application for permission to amend a pleading, and/or any finding dependent upon such assumed fact.[5] The parties also reserve the right to refer at the trial of the preliminary issue to the full contents of any of the documents listed as Annexes to this Schedule.

[4] (1) Breyer Group Plc & Others (HQ12X03560); (2) Free Power for Schools LP (HQ12X04456); Homesun Holdings Limited & Another (HQ12X04457); and, (4) Touch Solar Limited (HQ13XO3998).

[5] The facts at paras.40-48 are assumed in the Defendant's favour and those at paras.49-54 in the Claimants' favour.

A. AGREED FACTS

The FIT Scheme

3. The following paragraphs describe the Feed-in Tariff Scheme ("the FIT Scheme") as it existed at all times material to the present claims, and statements made by the Defendant in relation to that Scheme.

4. The FIT Scheme was made under ss. 41-43 of the Energy Act 2008 ("the 2008 Act"), through the Feed-In Tariffs (Specified Maximum Capacity and Functions Order) 2010 ("the 2010 Order") and the Standard Conditions of Electricity Supply Licences (the "Licence Conditions") issued pursuant to s.6A of the Electricity Act 1989, as modified by the Secretary of State, following the procedure specified in s.42 of the 2008 Act.

5. The 2010 Order and the modifications were made by the Secretary of State pursuant to s.41 of the 2008 Act. Condition 33 of and Schedule A to Condition 33 (among other matters): (a) provide for FIT payments to be made by electricity suppliers to small-scale producers of low-carbon electricity; (b) specify the generation tariff and export tariff applicable to eligible installations; and (c) specify the eligibility period for each installation (i.e. the maximum period during which the tariff applicable to the installation when it became eligible will be paid in respect of that installation).

6. Section 42 of the 2008 Act identifies the procedure to be followed when using the section 41(1) power (see s.41(10)). It provides, *inter alia*, that:

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

7. Unless Parliament resolves not to approve the modification within 40 days the Secretary of State may make the modification (s.42(4), (5)).

8. Prior to the introduction of the FIT Scheme the Defendant published a consultation paper in July 2009, "*Consultation on Renewable Electricity Financial Incentives 2009*" ("the 2009 Consultation") (Annex A to this document); and in February 2010 the Defendant published a response to the consultation exercise that summarised the decision taken and the basic elements of the FIT Scheme that was to be implemented with effect from 1 April 2010 ("*Feed-in Tariffs: Government's Response to the Summer 2009 Consultation*" – "the 2010 Response") (Annex B).

9. The 2009 Consultation proposed, *inter alia*, the introduction of a system of Feed-in Tariff ("FIT") payments for small-scale low-carbon electricity generators to supplement the existing Renewables Obligation scheme which was (and still is) focused on larger generation projects provided by commercial generation companies. The 2009 Consultation stated, *inter alia*:

a) FITs were to be provided across the range of low-carbon technologies;

b) the FIT would be set at a level to encourage investment in small-scale low-carbon generation that would make a contribution to meeting the United Kingdom's renewable energy and carbon targets;

c) it was important to ensure value for money for the scheme as a whole, bearing in mind that the costs of support were shared by all electricity consumers and to avoid distortions in the market and perverse outcomes;

d) FIT levels would be set so as to provide a rate of return of approximately 5-8% for well-sited installations, taking into account the risks associated with deploying the different technologies and the likely effect those risks would have on investors' willingness to invest;

e) The Scheme would involve a fixed payment for every kilowatt hour (kWh) of electricity generated ("the generation tariff") plus a guaranteed minimum payment, additional to the generation tariff, for every kWh exported to the wider electricity market ("the export tariff"); and

f) Any individual installation, once starting to receive a tariff at a certain level, would continue to receive the same generation tariff level throughout its entire support period under the FITs.

10. The 2009 Consultation also identified the possibility for review of the proposed FIT Scheme; paragraphs 3.96 - 3.102 of the document stated as follows:

"*3.96 We want to provide certainty in the FITs mechanism going forward but recognise that it will be important to review and adapt it as circumstances change including technology costs and supply chains. Therefore, we propose having a programme of reviews after which it will be possible to make changes to FITs.*

3.97 Reviews should take into account other policy developments...

3.98 There are three potential approaches to reviewing support levels across schemes (or a mixture of two or more):

- *Early reviews (based on a significant change in technology costs or other agreed criteria);*
- *Periodic reviews of pre-defined periods; and*
- *Tariff reviews on the achievement of specific milestones (e.g. when a predetermined amount of renewable energy capacity has been achieved).*

3.99 A policy framework with long periodic revisions will generally lead to higher investment security for the supply chain than one with short periodic reviews. We need to strike the right balance between flexibility and investment security. It is also important to note that we have only a relatively short time horizon to 2020.

3.100 ... Existing projects will receive the same level of support throughout their participation in FITs (i.e. support will be grandfathered); and as costs of technologies fall, we expect that levels of support for new projects will reflect that. Project costs will be considered as part of reviews.

3.101 We propose to conduct periodic reviews of FITs with their timing to coincide with the Renewables Obligation banding reviews taking into account the above factors and affordability. Therefore, any changes to the scheme resulting from the first major review of FITs would be implemented in 2013, alongside any changes required to the RO following the proposed RO banding review, with a set programme of reviews thereafter. In the interim, the degression rates that we set when the scheme is launched would apply annually.

3.102 We propose, if necessary, to use early reviews to consider any significant changes to the fundamentals affecting the operation of the scheme outside of the periodic review timetable. This approach is similar to the approach to early banding reviews under the RO."

11. The 2010 Response adopted an approach that was stated by the Defendant to provide "*the best overall balance between delivering the scheme's core objectives (including contributing to the UK's renewable energy target and enabling greater participation by households, businesses and communities in the renewable energy agenda) whilst having consideration for scheme costs*". When formulating the FIT Scheme (including when setting the tariff rates) the Defendant made projections based on modelling of: (a) the number of each type of installation expected to be accredited for FIT payments each year, (b) the electricity expected to be generated by those installations, and (c) the value of payments expected to be made under the FIT Scheme.

12. The 2010 Response stated, *inter alia*, the following in relation to the FIT Scheme:

    a) Tariffs were to be set through consideration of technology costs (of acquisition, installation and maintenance) and electricity generation expectations at different scales and to deliver an approximate rate of return of 5-8% for well-sited installations (5% in the case of solar PV).

    b) Tariffs that were available for new installations would "degress" each year (i.e. reduce to reflect predicted technology cost reductions to ensure that new installations received the same approximate rates of return as installations already supported through FITs).

    c) Once an installation had been allocated a generation tariff, that tariff was to remain fixed (save that it would alter with inflation) for the life of that installation or the life of the tariff, whichever was the shorter.

    d) Tariffs would be paid for 25 years for solar photovoltaic generators.

13. As to review of the FIT Scheme, the 2010 Response stated, *inter alia*, as follows.

"*7. ...The anticipated reviews of the scheme once it was operational would provide opportunities for any further adjustment to the scheme if necessary.*

...

161. An objective of FITs is to provide long-term certainty for investors but we recognise it will be important to review and adapt it as circumstances change including technology costs and supply chains and other policy developments. Therefore, we will be putting in place a programme of reviews after which it will be possible to make changes to FITs.

162. We will undertake periodic reviews of FITs with their timing to coincide with the Renewables Obligation reviews. Therefore, any changes to the scheme resulting from the first major review of FITs would be implemented in 2013...

163. If necessary, early reviews will be set up to consider any significant changes to the fundamentals affecting the operation of the scheme outside the periodic review timetable....

164. All aspects of the FITs Scheme will be subject to review, including: tariff levels, degression rates and methods, eligible technologies, arrangements for exports, administrative and regulatory arrangements, interaction with other policies, accreditation and certification issues including the MCS.

165. Reviews will focus on whether the tariffs offered deliver the target returns, and whether those returns are appropriate in continuing to ensure a real contribution from small scale generation to our renewables and other targets, and that the scheme continues to deliver value for money.

166. In order to ensure that existing investors may proceed with certainty, any changes to future levels of support will apply only to investments following the review; generation tariffs [for] the installations existing at the time of the review will be maintained..."

14. Pursuant to the FIT Scheme, the Secretary of State required holders of Electricity Supply Licences to purchase electricity from small-scale producers of low-carbon electricity at rates fixed by the Secretary of State. Electricity suppliers were obliged to make payments to the owner of an eligible low-carbon electricity generation installation, which was accredited by the Gas and Electricity Markets Authority (the executive branch of which is known as OFGEM). The payments are designed to incentivise small-scale producers to become involved in electricity production. Small-scale producers can take advantage of this rate (the "FIT") if they are accredited for the purposes of the scheme.

15. Among the low-carbon generation technologies to which the FIT Scheme applies is solar photovoltaic ("solar PV").

16. There were two kinds of FIT payments: (a) the generation tariff; and (b) the export tariff.

17. Payments under the generation tariff depended *inter alia* on: the kind of generation technology used (in the present case Solar PV technology); the total generating capacity of the installation; and the date on which the installation became eligible.[6] The export

[6] Usually the rate will remain the same for installations accredited at any point during a particular FIT Year, but on occasion the Secretary of State has modified the FIT Payment Table so that different tariffs apply to

tariff was set at the same unit price regardless of the generation technology used or the size of the installation, so payments of the export tariff depended on the amount of electricity exported to the grid.[7] Each tariff is payable to the small-scale producer from the time that the installation is eligible in accordance with the provisions of the scheme.

18. The Licence Conditions set out the "Eligibility Period" for various types of installation, which is the maximum period during which the owner of a low-carbon electricity generation installation ("the FIT Generator") or his Nominated Recipient can receive FIT payments for a particular installation. For the Solar PV equipment at issue in this case, this period was 25 years. The rate of payment in respect of a particular accredited installation could, during the Eligibility Period, be adjusted in line with the Retail Prices Index, but could not otherwise be decreased by the Secretary of State.

19. The FIT Scheme came into force on 1 April 2010, although subsequently amendments have been made to the Scheme.

20. For Solar PV installations on existing rooftops, the FIT Payment Rate Table annexed to the Licence Conditions (modified on 21 July 2011) provided for FIT payment rates for the generation tariff for the 2011/12 FIT Year as shown in the following table:

Band (kW)	***Tariff for 2011-12***
≤4 kW	*43.3 p/kWh*
>4 – 10 kW	*37.8 p/kWh*
*>10 – 100 kW**	*32.9 p/kWh*

*only applicable to >10 - 50kW from 1 August 2011

21. The fixing of the rate of payment (subject to an adjustment in accordance with RPI), for the duration of the Eligibility Period was intended by the Defendant to encourage investment in small scale low-carbon electricity generation.

22. On 7 February 2011, the Defendant announced the first "comprehensive review" of the FIT scheme. A Written Ministerial Statement by Chris Huhne MP, then Secretary of State for Energy and Climate Change, stated that the review would assess all aspects of the scheme including tariff levels, administration and eligibility of technologies and would be completed by the end of 2011. Mr Huhne stated, *inter alia*, as follows:

> "*I am today announcing the start of the first review of the Feed-In Tariffs (FITs) scheme for small scale low carbon electricity generation.*
>
> *The FITs review will:*
>
> - *Assess all aspects of the scheme including tariff levels, administration and eligibility of technologies*

---

installations accredited after a date within a particular FIT Year (for example the modifications announced on 21 July 2011).

[7] The export tariff is not in issue in the present claims.

- *Be completed by the end of the year, with tariffs remaining unchanged until April 2012 (unless the review reveals a need for greater urgency)*

…
Broad terms of reference for the review are available from the First review of Feed-In Tariffs web page and we are seeking views on specific issues to be considered. The Government will not act retrospectively and any changes to generation tariffs implemented as a result of the review will only affect new entrants into the FITs scheme. Installations which are already accredited for FITs at the time will not be affected."

23. The first "comprehensive review" began with a "fast track consultation" regarding larger scale solar PV installations (i.e. those generating over 50kW – not those at issue in the present claim) and anaerobic digestion plants. On 10 February 2011, Gregory Barker MP, Minister of State for Energy and Climate Change, gave a written answer to a question in the House of Commons stating as follows:

> "*The comprehensive review of FITs announced on 7 February 2011 will consider all aspects of the FITs scheme, including photovoltaic for all bands and applications, including social housing. It will report before the end of this year for implementation in April 2012. The review will also include specific fast-track consideration of large-scale solar photovoltaic installations of more than 50 kW and fast-track consideration of farm based Anaerobic Digestion. …*
>
> *On this basis, the review of tariffs for installations below 50 kW would not be fast-tracked. This is regardless of whether they are installed on private housing or social housing. The Government fully supports "rent roof" models (third party ownership financial packages), especially in the context of opening up the benefits of FITs to those living in social housing. However, the effectiveness and costs of all elements of the FITs scheme will be considered as part of the comprehensive review which will be tasked with improving the scheme to deliver both greater long term certainty to industry and investors and also deliver value for money to consumers.*"

24. The "fast-track" review for larger scale solar PV installations commenced with a period of consultation that lasted from 18 March to 6 May 2011. Following a period in which the responses to the consultation were considered, the Defendant published its response paper on 9 June 2011 ("the June 2011 Response"), announcing its decisions concerning larger scale solar PV installations. The parties reserve their right to refer at the trial of preliminary issues to the full contents of the March 2011 consultation paper (Annex F) and the June 2011 Response (Annex G).

25. In accordance with the requirements of s.42 of the 2008 Act, modifications to the payment rate table for these larger scale installations were made on 21 July 2011, to come into effect for new eligible installations accredited from 1 August 2011.[Annexed document H refers]

26. The new FIT rates for large scale solar PV installations only took effect for new installations accredited after: (a) the consultation had closed; (b) the responses had been considered; (c) the modification to the Standard Licence Conditions had been laid before

Parliament; and (d) the 40 day period for Parliamentary approval had elapsed, a total of approximately 20 weeks.

27. The June 2011 Response also stated, *inter alia*, as follows about the comprehensive review that would affect smaller scale solar PV installations (i.e. those at issue in the present claims):

> "*A consultation on the comprehensive review will be launched this summer with the intention that any resulting changes to the scheme will take effect from 1 April 2012, unless the review itself reveals the 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.*" (paragraph 27)

28. On 20 October 2011, the Secretary of State gave a statement in answer to the following question in the House of Commons [Annexed document I refers]:

> "***Chris Leslie MP (Nottingham East) (Lab/Co-op)*** *…What is the Secretary of State's view of the report on the front page of today's Financial Times, which suggests that he is completely pulling the rug from underneath thousands of people up and down this country who might have taken steps to invest in solar power for their own houses and who are now finding that their investment is being completely undermined by his decisions?*
>
> *"**Chris Huhne**: There is no question of anybody's investment being undermined by any of our decisions, because this Government—in this respect, I think we are no different from previous Governments— [we] are very committed to not having retrospection in legislation and legislative changes. However, we keep all our subsidies under review. I just told the hon. Member for Daventry (Chris Heaton-Harris) that we are cutting subsidies for onshore wind turbines by 10%, and that reflects what is going on in the real world. I recently visited a project run with the city council in Birmingham, where people were able to show me invoices from solar panel suppliers showing that they had managed to get a 33% reduction in the cost of solar panels in just one year. It is absolutely right that the Department goes on looking at the appropriate levels of subsidies to bring on these important technologies, and that is obviously what we will do.*"

The October 2011 Consultation Paper

29. Both the Secretary of State for Energy and Climate Change, Mr Chris Huhne, and the Minister, Gregory Barker, delivered speeches at the Renewable UK Conference, on 26 and 27 October 2011 respectively. The parties reserve the right to refer to the full terms of the Impact Statement and these speeches. [Annexed documents J, K, and L refer]

30. As part of the comprehensive review referred to above, a further consultation document, "*Feed-in Tariffs Scheme: consultation on Comprehensive Review Phase 1 - tariffs for solar PV*" ("the October 2011 Consultation Document") was published on 31 October 2011. There was a closing date for responses of 23 December 2011. (Annex J).

31. The October 2011 Consultation Document set out four proposed decisions. The first proposal was a reduction in the generation tariff payable under the FIT Scheme to the owners of small-scale solar PV generation installations (see Executive Summary at paragraph 6(i)). This proposed decision was to affect installations with a generating capacity of up to 250kW. The second proposal ("the Proposal") was stated as follows (see Executive Summary at paragraph 6(ii)):

> *"[to] apply new generation tariffs [i.e. the tariffs proposed at para.6(i) of the document] from 1 April 2012 to all new solar PV installations with an eligibility date on or after an earlier 'reference date' which we propose should be 12 December 2011. Installations with an eligibility date before the reference date will not be affected and will continue to be eligible for the current generation tariffs. Installations with an eligibility date between the reference date and 1 April 2012 would be eligible for the current generation tariffs for electricity generated before 1 April 2012, but would move to the new generation tariffs for electricity generated on or after 1 April 2012 (see section 2 for more detail).*"

32. Under the Proposal the generation tariffs payable in respect of Solar PV would, from 1 April 2012, have been as shown in the following table:

Band (kW)	***Existing Tariff***	***Proposed Tariff***
≤4 kW	*43.3 p/kWh*	*21 p/kWh*
>4 – 10 kW	*37.8 p/kWh*	*16.8 p/kWh*
>10 – 50 kW	*32.9 p/kWh*	*15.2 p/kWh*

33. The October 2011 Consultation Document was accompanied by a written statement by the Minister, Mr Barker, *Written Ministerial Statement on Feed-In Tariffs Scheme*, 31 October 2011, and the Defendant's press release, *Barker: Boom and Bust for Solar must be Avoided*, Press Notice: 11/091, 31 October 2011. In the House of Commons, the Minister, Mr Barker, answered questions from MPs, which included exchanges with Barry Gardiner MP and Andrew George MP which *inter alia* read as follows [Annexed documents N, O and P refer]:

> *"**Barry Gardiner (Brent North) (Lab):** Given that the installation and registration deadline for the existing tariff is 11 days prior to the close of consultation, will the Minister confirm whether it is a new Government policy to consult on things despite having already fixed a deadline? If, on the other hand, the consultation finds that the deadline is inappropriate and the Government reach that conclusion after listening to the public, what will they do about those who fall into the gap in the meantime?*
>
> ***Gregory Barker**: This is a difficult issue. The hon. Gentleman will appreciate that we are trying to save the budget. If we were to leave this scheme open until next April, as we had originally intended – although we said that we would act if there was an urgent need, and there is – there would be a run on the fund. The cut-off date will be 12 December, but people will not get a reduction in tariffs until April. It is complex. It is driven by the fact that there is a run on the budget, and we are acting responsibly to preserve the budget for lots of other consumers and to ensure that it does not disappear in the next few months."*

...

*"**Andrew George (St Ives) (LD):** I appreciate that the Minister understandably wants to defend his budget, but further to the question asked by the hon Member for Brent North (Barry Gardiner), and bearing in mind that the policy will be implemented before the end of the consultation period, may I plead with him to keep the matter under review and come back to the House before 12 December to explain where he has reached at that point? Will he keep the cut-off date under review, with the intention of perhaps extending it?*

***Gregory Barker**: No, I am afraid that that would deliver the most terrible uncertainty to business. It has to be clear that there is a cut-off date. We mean what we say, I am afraid."*

34. Guidance for consumers was published by the Defendant, also on 31 October 2011, *Solar Photovoltaic (PV) Installations: Proposed changes to Feed-In Tariffs – How does this affect me?,* and by the Energy Saving Trust, *Fact Sheet on the proposed changes to Solar PV Feed-in-Tariff rates* and *UK Government proposed changes to solar PV Feed-in-Tariffs*, both dated 31 October 2011. [Annexed documents Q, R and S refer]. The Defendant undertook an impact assessment, *Impact Assessment: Comprehensive Review Phase 1*, dated 2 November 2011 ("the Impact Statement"), which identified 3 options in relation to the FIT tariff rates.

35. The Renewable Energy Association conducted a survey of its membership's reaction to proposed changes to the FIT tariff rates, *REA Survey,* 7 November 2011 ("the REA Survey"), and this survey was reported in the Financial Times, *Forecast shows thousands of solar jobs at risk,* 7 November 2011. [Annexed documents T and U refer]

The Judicial Review

36. The lawfulness of the Proposal was challenged in judicial review proceedings brought by one of the present Claimants, Homesun Holdings Ltd ("Homesun''), Friends of the Earth, and others. On 2 November 2011 a letter before claim was served by Solar Century Holdings Limited ("Solar''). On 4 November 2011 a claim was issued by Solar. Claims were subsequently issued by Homesun on 15 November 2011 and by Friends of the Earth on 16 November 2011 following letters before claim issued on 10 and 4 November 2011, respectively. The Administrative Court (Mitting J) and the Court of Appeal (Lloyd, Moses and Richards LJJ) held that the Proposal, if implemented, would be *ultra vires* the Secretary of State's powers under s.42 of the 2008 Act: see *R (Friends of the Earth, Homesun Holdings Ltd & Others) v Secretary of State for Energy and Climate Change* [2011] EWHC 3575 (Admin); and [2012] EWCA Civ 28. The High Court and Court of Appeal decisions were handed down on 23 December 2011 and 26 January 2012 respectively. The Defendant's application for permission to appeal was subsequently refused by the Supreme Court on 22 March 2012.

37. The Defendant did not implement the Proposal. Instead on 19 January 2012, the Defendant laid draft modifications to the Standard Licence Conditions before Parliament. These modifications were made on 2 March 2012 and, with effect from 3 March 2012, reduced the FIT rates payable for installations with Eligibility Dates on or after 3 March 2012 ("the Actual Modification"). For such solar PV installations of 4kW or less, where attached to or wired to provide electricity to a building which was already occupied, the

FIT rate payable until 31 March 2012 remained at 43.3p/kWh and from 1 April 2012 onwards was 21.0p/kWh.[8] [Annexed document V refers]

38. When laying the Actual Modification the Minister, Greg Barker, made a Written Ministerial Statement on 19 January 2012, in which he stated, *inter alia* [Annexed document W refers]:

> "*We are now waiting for a judgment from the Court of Appeal and we cannot be sure of the date on which this will be issued.*
>
> *We continue to stand by our original proposal. However, I know that the uncertainty while we await the Court's decision is difficult for the industry. A retention of the 43p tariff could also create substantial risks to the FITs budget if our appeal is unsuccessful. For these reasons, we believe it is prudent to bring forward our decision on one aspect of the consultation: the proposals for new solar PV tariffs.*
>
> *We are therefore laying before Parliament today some draft licence modifications which, subject to the Parliamentary process set out in the Energy Act 2008, makes provision for a reduced tariff rate (from 1 April 2012 onwards) for new PV installations with an eligibility date on or after 3 March 2012.*
>
> *If the Court finds in favour of the Government's appeal, we intend to stand by all our consultation proposals, including an earlier (December) reference date, subject to the Parliamentary procedure and consideration of consultation responses. It is very important that we reserve this as an option because these 43p payments will take a disproportionate share of the budget available for small-scale low-carbon technologies. We want instead to maximise the number of installations that are possible within the available budget rather than use available subsidy to pay a higher tariff to a smaller number of installations.*
>
> *The consultation closed on 23 December 2011 and over 2,000 consultation responses were received which we have been analysing carefully. We are intending to announce the outcome of the consultation by 9 February 2012, in time for any resulting legislative changes to come into effect from 1 April 2012. Our aim is that this announcement will be accompanied by a set of reform proposals for the next phase of the comprehensive review of the FITs scheme, which will be the subject of a further consultation."*

39. In a Written Ministerial Statement on 26 January 2012 following the Court of Appeal's judgment Mr Huhne stated, *inter alia* [Annexed document X refers]:

> "*Yesterday, the Court of Appeal handed down a negative judgment on the Government's appeal against an earlier decision by the High Court. We respectfully disagree with the judgment and are seeking permission to appeal to the Supreme Court. In the light of that, we cannot rule out the possibility that lower tariffs could be applied to installations which became eligible for FITs on or after the proposed reference date. It is important that consumers are aware of this.*"

[8] At page 2 §3 the agreed case summary says: The actual modification has not been, and is not in the present Claims, challenged.

B. ASSUMED FACTS

Assumed facts as to the purpose of the FIT Scheme and the later proposed modifications

40. The FIT Scheme was proposed by a Consultation in 2009 for the reasons and with the aims set out at paragraphs 18 and 19 of the Consolidated Defence.

41. Solar PV had traditionally had high installation and equipment costs compared to other low-carbon generation technologies (although those costs have fallen very sharply over recent years). For that reason the tariff level for solar PV was originally set at a higher level than for other technologies when the FIT Scheme was introduced in order to incentivize generators to overcome those higher installation costs. Solar PV was thus a relatively expensive way of generating low-carbon electricity.

42. Although under the FIT Scheme the payment to the FIT Generator is made by the electricity supplier, the cost of the FIT is passed on to all electricity consumers thereby raising prices for consumers - it is, therefore, a subsidy paid by consumers. The cost of the FIT Scheme is accordingly treated by HM Treasury as "imputed tax and spend" and the Defendant is concerned to keep the costs of the Scheme under control to ensure the impact on consumers is proportionate and reasonable.

43. The cost of the FIT Scheme was one of the matters addressed in the Spending Review initiated following the election in May 2010. The Spending Review announcement was made in October 2010, and provided that the cost of the FIT Scheme was to be reduced by 10% in 2014/15 (i.e. by £40 million).

44. By its 2010 Response paper, the Defendant adopted an approach that it believed would provide the best overall balance between the FIT Scheme's objectives and consideration of the Scheme's costs, as set out in paragraph 20 of the Consolidated Defence.

45. Moreover, by the end of 2010 it was also considered by the Government to be necessary to ensure that the cost of the FIT Scheme for the period up to 2014/15 was maintained within the limit set in the Spending Review.

46. The background to the Proposal in October 2011 was the Defendant's concern over the increasing cost of the FITs Scheme, as set out at paragraphs 23-26 of Consolidated Defence. The Defendant made the Proposal for the reasons set out in paragraphs 37 to 39 of the Consolidated Defence. The consultation was open-minded and genuine and the outcome was not predetermined.

47. When the FIT Scheme was made, the Defendant anticipated (from the projections used) that in the early years of the Scheme there would be a large number of small solar PV installations on buildings, but that no installations over 4kW would be accredited in the first three years of the scheme with only limited numbers of such installations being accredited in subsequent years. In fact, by December 2010, it was apparent that the FIT Scheme was producing results that had not been anticipated in April 2010. In particular, the following had occurred:

    a) By December 2010 there were 208 new accredited installations greater than 4kW but less than 10kW, and 51 installations between 10 and 100 kW. Many more similar projects were pending of which two were above 50kW.

b) The greater than expected development of larger scale solar PV installations was due at least in part, to a greater than expected reduction in the costs of setting up such installations (at the time in the region of a 20-30% reduction since the beginning of 2010). (This reduction in the cost of solar PV has been a world-wide phenomenon and has led Germany, France, Spain, Italy and Belgium to reduce their feed-in tariffs for solar PV.)

c) One consequence of this was to increase the rate of return for such developments at the then-current tariff levels above the 5-8% rate of return (5% for solar PV) on which the FIT Scheme was based.

d) The increased number of solar PV projects raised the prospect that what the Defendant considered to be disproportionate amounts of funding could be taken by such schemes.

48. In relation to the 'fast-track' review referred to at paragraph 23 above, the Defendant was aware that some solar PV projects that were in the process of development or installation might not be commissioned before 1 August 2011, however the Defendant decided not to implement any transitional provisions. The Defendant also relies on the matters described in his consolidated Defence at paragraph 18-19, 23-26, 37-39 and 65-69 and the corresponding passages in DECC's other Defences.

Assumed Facts as to the Claimants' businesses

49. As a result of the FIT Scheme, the Claimants each had established or adapted businesses to operate within the area of the small-scale Solar PV electricity generation market, although their precise roles within that market varied. In particular:

a) In relation to the claims in Breyer Group plc et al, case number HQ12X03560, ("the Consolidated Claim"):

i. Breyer Group plc ("Breyer")'s business was at the material times as described at paragraphs 6-7, 83-87, and 165-168 of the Consolidated Particulars of Claim. Breyer operated a 'free solar' business model, whereby the end user would not have to pay for the installation of Solar PV and would enjoy reduced energy costs, and the FIT income generated by the installation would be assigned to a third party. Breyer would contract with social housing landlords to conduct large-scale installations on their housing stocks, for which Breyer would be paid a fee per installation. Funding for the installations would be provided either by Breyer or by a third party funder. The FIT income received by each installation in respect of the electricity it generates would be assigned to the funder, with Breyer receiving a share of the FIT income over the course of the 25-year period in respect of which it would be paid. Breyer would also contract with the owners of the housing stock to provide ongoing maintenance of the installations.

ii. E-Tricity Limited ("E-Tricity")'s business was at the material times as described at paragraphs 8-9, 88-91, and 169-173 of the Consolidated Particulars of Claim. E-Tricity's business model was to provide a 'turn-key' development service, whereby it would hand over sites ready for

installation on the 'free-solar' model. E-Tricity contracted with Mole Valley Farmers to provide access to potential installation sites and with the third party funders who would find the installation and take an assignment of the FIT income. E-Tricity would be paid a fee per site it commissioned and receive a share of the FIT income over the course of the 25-year period in respect of which it was paid.

iii. Foz Electrical Limited ("Foz")'s business was at the material times as described at paragraphs 10-11, 92-93, and 174-180 of the Consolidated Particulars of Claim. Foz's business model entailed contracting with social housing landlords to conduct large-scale installations on their housing stocks, for which Foz would be paid a fee per installation.

iv. Freetricity plc ("Freetricity")'s business was at the material times as described at paragraphs 12-13, 94-97, and 181-185 of the Consolidated Particulars of Claim. Freetricity's was a "free solar" installation business model, whereby the end user would not have to pay for the installation of Solar PV and would enjoy reduced energy costs, and the FIT income generated by the installation would be assigned to a third party. Freetricity had three business streams; (a) contracts with social housing landlords to conduct large-scale installations on their housing stocks; (b) contracts for large commercial sites, and (c) contracts for smaller commercial sites. Freetricity would be paid a fee per installation. Funding for the installations would be provided by third party funders. The FIT income received for each installation in respect of the electricity it generates would be assigned to the funder, with Freetricity receiving a share of the FIT income over the course of the 25-year period in respect of which it would be paid.

v. Viscount Solar Limited and Visolar Limited (together "Viscount")'s business was at the material times as described at paragraphs 16-19, 101-103, and 189-192 of the Consolidated Particulars of Claim. Viscount's was a 'direct-sale' 'free solar' installation business model, whereby Viscount would source individual residential customers via advertising, who would be offered free installations funded by a third party funder. Viscount would receive a fee per installation. The FIT income received for each installation in respect of the electricity it generated was assigned to the funder, with Viscount receiving a share of the FIT income over the course of the 25-year period in respect of which it was paid.

vi. Crystal Windows & Doors Limited ("Crystal")'s business was at the material times as described at paragraphs 20-22, 104-105, and 193-206 of the Consolidated Particulars of Claim. Crystal's was a 'direct-sales' 'paid-for solar' business model, whereby Crystal would source individual residential customers via advertising, who would then pay Crystal for the installation of Solar PV at their homes. Crystal also had one-off block contracts for multiple installations, for which it would be paid per installation.

vii. Solar Power PV Limited ("Solar Power")'s business was at the material times as described at paragraphs 23-24, 106-107, 193-201, and 207-208 of

the Consolidated Particulars of Claim. Solar Power's was a 'direct-sales' 'paid-for solar' business model, whereby Solar Power would source individual residential customers via advertising, who would then pay Solar Power for the installation of Solar PV at their homes.

viii. Solarlec PV Solutions Limited ("Solarlec")'s business was at the material times as described at paragraphs 25-26, 108-109, 193-201, and 209-211 of the Consolidated Particulars of Claim. Solarlec's was a 'direct-sales' 'paid-for solar' business model, whereby Solarlec would source individual residential customers via advertising, who would then pay Solarlec for the installation of Solar PV at their homes. Solarlec also had a 'direct-sales' 'free solar' installation business stream, whereby Solarlec sourced individual residential customers via advertising, who were offered free installations funded by Solarlec via a third party funder. The FIT income was assigned to Solarlec.

ix. Monitor My Solar Limited has taken an assignment of the claim of Solar Energy 4 Free Limited (In Liquidation) ("SE4F").[9] SE4F's business was at the material times as described at paragraphs 29-30, 113-115, and 220-223 of the Consolidated Particulars of Claim. SE4F was a 'direct-sales' installation business that operated both a 'paid-for' and a 'free solar' model. In each case individual residential customers would be sourced via advertising. The 'paid-for' solar customers would pay SE4F for the installation of Solar PV at their homes. The 'free solar' customers' installations would be funded by a third party funder. SE4F would receive a fee per installation. The FIT income received for each installation in respect of the electricity it generates would be assigned to the funder, with SE4F receiving a share of the FIT income over the course of the 25-year period in respect of which it would be paid.

x. The Green Home Company (South) Limited ("Green Home")'s business was at the material times as described at paragraphs 31-33, 116-117, and 224-225 of the Consolidated Particulars of Claim. Green Home's was a 'direct-sales' 'free solar' installation business model, whereby Green Home either would source individual residential customers via advertising, or from a third party who would have sourced them. The customers would be offered free installations funded by a third party funder. Green Home would receive a fee per installation. Green Home also entered into contracts for ongoing maintenance of installations.

xi. Cleaner Air Solutions UK Limited ("Cleaner Air")'s business was at the material times as described at paragraphs 37-39, 120-122, and 227-228 of the Consolidated Particulars of Claim. Cleaner Air's business had three streams. First, it operated a 'direct-sales' 'paid-for solar' business model, whereby Cleaner Air would source individual residential customers via advertising, who would then pay Cleaner Air for the installation of Solar PV at their homes. Second, Cleaner Air operated a 'free solar' model

[9] The inclusion of Monitor My Solar Limited ("Monitor") is specifically without prejudice to the Defendant's contention that Monitor are not entitled to pursue a claim under s.8 of the Human Rights Act 1998 as purported assignee of a chose in action.

whereby it would contract with social housing landlords to conduct large-scale installations on their housing stocks, funded by a third party funder. Cleaner Air would be paid a fee per installation. Third, Cleaner Air had regular contracts to supply other installation companies with Solar PV kit.

xii. Ecovision Energy Solutions Limited and Ecovision Systems Limited (together "Ecovision")'s business was at the material times as described at paragraphs 45-48, 126-129, and 230-232 of the Consolidated Particulars of Claim. Ecovsion's was a 'direct-sales' 'free solar' installation business model, whereby Ecovision would source individual residential customers via advertising, who would be offered free installations funded by a third party funder. Ecovision would receive a fee per installation. The FIT income that would be received for each installation in respect of the electricity it generated would be assigned to the funder, with Ecovision receiving a share of the FIT income over the course of the 25-year period in respect of which it would be paid. Ecovision also conducted a limited amount of 'direct-sales' 'paid-for' solar business.

xiii. Evoenergy Limited ("Evoenergy")'s business was at the material times as described at paragraphs 49-53, 130-132, and 230-239 of the Consolidated Particulars of Claim. Evoenergy's business had three streams. First, it operated a 'direct-sales' 'free-solar' scheme, whereby Ecoenergy would source individual residential customers via advertising, who would be offered free installations funded by a third party funder. Ecoenergy would receive a fee per installation. The FIT income which would be received for each installation in respect of the electricity it generated would be assigned to the funder, with Ecoenergy receiving a share of the FIT income over the course of the 25-year period in respect of which it would be paid. In addition, Evoenergy entered into contracts for ongoing maintenance of the installations. Second, Evoenergy operated a 'free solar' business model, whereby it would contract with social housing landlords to conduct large-scale installations on their housing stocks supported by third party funding, for which Evoenergy would be paid a fee per installation. Third, Evoenergy operated a 'direct-sales' 'paid-for solar' business model, whereby Evoenergy would source individual residential customers via advertising, who would then pay Evoenergy for the installation of Solar PV at their homes.

xiv. New Energy Solutions Limited ("NES")'s business was at the material times as described at paragraphs 54-56, 133-135, and 240-242 of the Consolidated Particulars of Claim. NES operated a 'direct-sales' 'paid-for solar' business model, whereby NES would source individual residential customers via advertising, who would then pay NES for the installation of Solar PV at their homes.

b) In relation to the Homesun Claimants ("Homesun"), the business operated in the manner described in paragraphs 29 to 38 of their Particulars of Claim. In summary, it involved Homesun procuring and installing Solar PV systems on the roofs of customers with whom contracts would be agreed, in return for which Homesun would be entitled to receive the FIT payments for the electricity generated thereby, for the term of the contracts, being 25 years and 3 months.

c) In relation to Free Power for Schools LP ("FPFS"), the business operated in the manner described in paragraphs 29 to 38 of its Particulars of Claim. In summary, it involved English schools contracting with FPFS for FPFS or its assignees to procure and install Solar PV systems on their roofs, in return for which FPFS or its assignees would be entitled to receive the FIT payments for the electricity generated thereby, for the term of the contracts, being not less than 25 years. FPFS would agree the assignment for value of such contracts to a long-term institutional investor.

d) In relation to Touch Solar Limited ("TS") the business operated in the manner described in paragraphs 29 to 38 of its Particulars of Claim. In summary, it involved TS procuring and installing Solar PV systems on the roofs of customers with whom contracts would be agreed, in return for which TS would be entitled to receive the FIT payments for the electricity generated thereby, for the term of the contracts, being 26 years.

Assumed facts as to the Defendant's knowledge and intention concerning the Proposal

50. The Defendant knew that it was very likely that, and intended that, those operating businesses in the area of small-scale Solar PV electricity generation, including businesses such as those operated by the Claimants, would from the time the October 2011 Consultation was published, conduct their businesses on the assumption that the Proposal would come into effect as set out in that Consultation.

51. The Defendant knew that it was very likely that, and intended that, the publication of the Proposal would have an immediate effect on the actions of those involved in Solar PV installations such as the Claimants, in that the proposed tariff would be regarded by the vast majority of such businesses as economically unacceptable, with the consequence that they would be deterred from proceeding with Solar PV installations.

Assumed facts as to the impact of the Proposal

52. The matters referred to above had an immediate and serious adverse impact on the Claimants' businesses, which impact was reasonably foreseeable. It was not economically viable for the Claimants to continue their businesses in relation to the installation of solar PV Systems, unless such Systems could be installed and commissioned by the reference date of 12 December 2011, which was 6 weeks from the publication of the Proposal; and that the majority of installations which had been planned and contracted for by the Claimants could not be completed and accredited in this timeframe.

53. The nature of the impact upon the Breyer Claimants and the question of the viability of their businesses, are as described at paragraphs 155-185, 189-211, 220-225, 227-228, and 230-242 of, and in the Schedule of Loss to the Consolidated Particulars of Claim. In the HomeSun action, these matters are as described in paragraphs 47 and 52 of the Particulars of Claim. In the FPFS these matters are as described in paragraphs 43 & 47, and likewise paragraphs 47 and 51 for Touch Solar.

Assumed facts as to other matters

54. It would have been reasonable for the market, including the Claimants, to assume that if the Defendant's application for permission to appeal to the Supreme Court had been

granted, and had the Defendant's appeal succeeded, the Defendant would have reverted to its Proposal of reducing the FITs payable for installations with Eligibility Dates on or after 12 December 2012. Thus, it was not until 23 March 2012 that those in the market, including the Claimants, could be sure about the rate of FITs payable for installations with Eligibility Dates in the period 12 December 2011 to 3 March 2012.

ISSUES[10]

55. Whether the Claimants and/or any of them had possessions within the meaning of Article 1 of the First Protocol ("A1P1") of the European Convention on Human Rights, consisting of:

    (a) an enforceable legitimate expectation, as described in the respective Particulars of Claim, concerning the timing of any changes to rates payable pursuant to the FIT Scheme and the manner in which the related review process would be conducted[11];

    and/or

    (b) the marketable goodwill in the Claimants' business, as described in the respective Particulars of Claim[12];

    and/or

    (c) the signed contracts or contracts which would, but for the Proposal, have been signed, agreeing[13]:

        i. That the FIT payments would be receivable by any of the Claimants, or their subsidiaries and/or their assignees.

        ii. The consideration due to any of the Claimants, or their subsidiaries and/or their assignees, in respect of: (1) the installation of Solar PV equipment, (2) the commissioning of sites ready for installation of Solar PV equipment; (3) the maintenance of the equipment; or (4) the supply of the equipment, as the case may be.

56. If the Claimants and/or any of them had such possessions within the meaning of A1P1;

    a) whether the Defendant interfered with any of these A1P1 possessions; and

    b) the nature of any such interference.[14]

57. Whether any such interference was justified, as described in the Defences.[15]

58. If not, whether the Claimants are entitled in principle to an award of damages, assessed by reference to their loss of profits caused by the Defendant's interference with their A1P1 possessions.

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[10] For the avoidance of doubt reliance in the footnotes below on the Claimant's pleadings includes the matters relied on in their Replies, relating to the corresponding paragraphs.

[11] Paragraphs 68-81 of the Consolidated Particulars of Claim, paragraphs 14-28 of the Homesun Particulars of Claim, paragraphs 14-28 of the FPFS Particulars of Claim and paragraphs 14-28 of the TS Particulars of Claim

[12] Paragraphs 82-97, 101-109, 113-117, 120-122, and 126-135 of the Consolidated Particulars of Claim, paragraphs 39 to 40 of the Homesun Particulars of Claim, paragraphs 4, 13, 38 and 47(iii) of the FPFS Particulars of Claim and paragraphs 39 to 40 of the TS Particulars of Claim.

[13] In relation to Breyer, Foz, Freetricity, Viscount, Crystal, Solar Power, Solarlec, Monitor, Green Home, Cleaner Air, Ecovision, Evoenergy and NES set out in paragraphs 83-86, 88-91, 93, 95-97, 102-103, 114-115, 117, 120-122, 126-127, 130, and 132 of the Consolidated Particulars of Claim.

[14] Paragraphs 136-242 of the Consolidated Particulars of Claim, paragraphs 42-54 of the Homesun Particulars of Claim, paragraphs 39-47 of the FPFS Particulars of Claim and paragraphs 42-52 of the TS Particulars of Claim.

[15] Paragraphs 37 to 39 and 65 to 69 of the Consolidated Defence, and the equivalent paragraphs in the Defences in the other actions.