Neutral Citation Number: [2014] EWHC 3677 (Admin)

Case No: CO/3605/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2014

Before :

MR JUSTICE GREEN

- -

Between :

Solar Century Holdings Limited & Others	**Claimants**
- and -	
Secretary of State for Energy & Climate Change	**Defendant**

- -
- -

Michael Fordham QC, **Duncan Sinclair** and **Simon Murray** (instructed by **Prospect Law**) for the **Claimant**
Robert Palmer (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing date: 17th October 2014

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Approved Judgment

Mr Justice Green :

A. Introduction: Issues, parties and conclusion.

(i) Issues

1. There is before the Court a rolled up application for permission to apply for judicial review and, if granted, a hearing of the substantive application. The Claimants, a group of companies generating electricity from renewable sources, challenge a change of policy on the part of the Department for Energy and Climate Change ("DECC") as a result of which it is bringing to a premature close a "*levy*" supported scheme which was due to run until 2017 but which is now to close in 2015. In this judgment I shall refer to the scheme in issue as the "RO scheme". The Claimants also challenge the "*periods of grace*" introduced as part of the RO scheme closure arrangements which seeks to take account of and protect the interests of those operators who have not yet had projects accredited under the RO scheme but who have incurred significant investment.

2. The Claimants submit that it has been consistent Government policy, confirmed loudly and clearly over a number of years, that the RO scheme would not close before 2017 in recognition of the acknowledged need for operators to have a secure and stable legal and investment environment in which to plan. They submit that the bringing forward of the closure date pulls the rug from under their feet and thwarts their rights. They submit as follows. First, that the decision to introduce a statutory instrument implementing early closure is *ultra vires* the basic statutory power (contained in sections 32LA and 32LB Electricity Act 1989 ("EA 1989")) since a firm and clear "*purpose*" of that statutory power was to preserve the closure date (of 2017) but not to accelerate it. The Claimant's submit that this is clear from a range of admissible pre-legislative materials. Second, it is submitted that properly construed certain pre-legislative statements that the RO scheme would run until 2017 amount to an *assurance* which, according to the principles laid down by Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 at paragraph [6], are admissible and, in effect, bind the Executive. It is submitted that the early closure of the scheme violates the assurances given. Third, it is contended that in any event statements made by the Government, consistently from 2010 onwards, that the scheme would not close before 2017 in order to protect commercial certainty were clear and unequivocal representations which gave rise to a legitimate expectation which, on the facts of this case, cannot be trumped or thwarted by any of the policy considerations which the Government now advances to justify the early closure. Finally, they submit that the periods of "*grace*" will be retrospective in its operation in a manner which is unfair in a public law sense and hence unlawful.

3. The Secretary of State advances an entirely different analysis in response to the Claimant's case. It is said that context is everything. In particular it is said that an ever-present and all pervasive feature of the levy schemes for renewable energy were the limits imposed upon their financing by HM Treasury set out in a March 2011 document entitled "Control framework for DECC levy-funded spending" ("the LCF"). This instituted a control framework designed to ensure that the DECC achieved its policy objectives *"...in a way that is consistent with economic recovery and minimising the impact on consumer bills*". The LCF makes clear that overspend in relation (for example) to support measures for one category of renewable generator

or supplier would have to be balanced by cuts elsewhere. It imposes a cap on expenditure which, in substance, cannot be exceeded. It recognises that some support methods are demand led and involve levels of financial support which may rise unpredictably; but makes no allowances for this for example by allowing DECC extra funding to cover the over-spend. Where expenditure rises cuts elsewhere must be found. The Secretary of State says that these limits were known to the market; their articulation was and is in the public domain and they therefore represent a form of systemic risk necessarily accepted by *any* operator who invests upon the basis of levy schemes. That systemic risk is that if uptake (demand) is unexpectedly high then DECC might need, in order to adhere to LCF principles, to take steps to limit expenditure under the scheme and one such step might be curtailment of a scheme. This explains why the amendments to the Electricity Act 1989 ("EA 1989") introduced to confer express powers on the Defendant to change levy schemes cannot, sensibly, be construed as having the purpose of tying the hands of the Minister as to obvious steps that might be taken to regulate expenditure. It also explains why there could never have been any species of "*assurance*" given to Parliament by the Government that it would not close the RO scheme before its allotted time. It further undermines the notion that any operator could ever have any form of legitimate expectation that the scheme would not be closed early if expenditure exceeded expectations and placed the cap at risk and also explains why, *even if* such an expectation did arise, there would still be a good reason for nonetheless frustrating that expectation. Finally, the Secretary of State argues that he did address his mind carefully to the position of those who had not yet been accredited under the relevant scheme but who had nonetheless incurred expenditure along the way towards accreditation. He submits that reasonable and fair "*grace*" measures were put in place to protect those who made a significant investment but he readily accepts that this will not be everyone who has incurred a more than de *minimis* expenditure. He submits that the line has to be drawn somewhere and that, in this case, the line that has been drawn in the scheme closure regulations is, *prima facie*, a matter for his discretion and is neither unfair nor irrational.

4. The issues for me are as follows:

a) **Issue I**: Whether the purpose(s) behind the introduction of sections 32LA and 32LB EA 1989 includes the preservation of a 2017 end date and therefore whether any exercise of the power in those sections which closed the scheme before 2017 was unlawful and *ultra vires*?

b) **Issue II**: Whether pre-legislative statements include an admissible and binding "*assurance*" that the scheme would not be closed prior to 2017?

c) **Issue III**: Whether the Claimants have a legitimate expectation that the RO scheme would not be closed prior to 2017 and whether, if such an expectation did exist, the Government has a sufficient policy justification for defeating that expectation?

d) **Issue IV**: Whether the new scheme is retrospective and unlawful?

(ii) Parties

5. The Claimants are four companies engaged, inter alia, in the installation of large scale solar photovoltaic systems ("solar PV"). These are sometimes called "solar farms". Many of the installations are over 5 megawatts in size. A common feature is that the projects can involve a significant lead time from first investment to accreditation.

6. The Defendant is the Secretary of State for Energy and Climate Change. He is responsible for schemes supporting and encouraging renewable energy sources.

(iii) Conclusion

7. I have concluded that this application for judicial review does not succeed.

8. As to the issues arising, first, I do not construe the relevant and admissible history leading up to the enactment of Sections 32LA and 32LB EA 1989 as incorporating any purpose which included keeping the RO scheme in place until 2017. Second, no "*assurances*" were given at any point that the scheme would be maintained until 2017. Third, whilst clear and repeated representations were made by Government to the effect that the scheme would remain in place until 2017 this was always subject to the overriding risk that if uptake of the scheme was such that DECC's spending limits were exceeded then the scheme would have to be modified and/or curtailed in some way in order to bring expenditure back into line. As such no undertaking investing in projects within the purview of the RO scheme had a legitimate expectation that the scheme would <u>inevitably</u> last until 2017 irrespective of the broader financial implications for Departmental spending. And, in any event, even if such an expectation did arise the Minster was entitled on the facts of the case to frustrate that expectation. Finally, I do not accept that the transitional "*grace*" arrangements put in place to take into account the interest of pipeline investors were unfair, albeit that I accept that the way in which the line is to be drawn will exclude some persons who have incurred expenditure which now risks being wasted.

B. Relevant Facts

(i) The Decision under challenge

9. This case concerns the legality of a proposal first contained in a Consultation paper of 13th May 2014 and decisions upon that Consultation reflected in a Response to Consultation dated 2nd October 2014. I shall, for the sake of convenience, refer to the relevant subject matter of the Response to Consultation as the "Decision". The Decision must now be implemented into law in the form of a statutory instrument. The Decision was adopted following the application for judicial review (which was upon the basis that any decision taken in pursuit of the proposals set out in the Consultation would be unlawful) but the pith and substance of that which the Claimants now object to is set out in the Decision. The Decision is to the effect, *inter alia*, that the RO scheme will terminate early in 2015 for new solar PV capacity above 5 MW, not in 2017 as originally intended. Further, that the benefits of the old scheme will be extended but only to those who by a specified, historical, date can show that they meet certain conditions relating to the nature and maturity of the investments they have made in order to bring renewable energy generation projects to fruition.

10. The reasoning in the Decision is the conclusion of the Secretary of State that the RO scheme has become too expensive as a consequence of unforeseen growth in the sector. In particular, the Secretary of State is concerned about the impact that rapid deployment will have upon permitted departmental spending under the LCF and upon consumer prices.

(ii) The LCF

11. The LCF was issued by HM Treasury in March 2011. It is an important document relied upon by the Secretary of State to justify the Decision. The starting point is the 2010 Spending Review introduced in the first few months following the coming into power of the Coalition Government in May 2010. In the introduction to the LCF the need to balance public policy objectives in the field of energy and climate change with budgetary discipline is emphasised:

> "1.1 The purpose of the Control framework for DECC levy-funded spending ("the Control framework") is to make sure that DECC achieved its fuel poverty, energy and climate change goals in a way that is consistent with economic recovery and minimising the impact on consumer bills.
>
> 1.2 The 2010 Spending Review set an overall cap for DECC's tax and spending through policies that entail levy-funded spending. This cap will be managed through the control framework. It therefore requires DECC and the Treasury ("the Departments") to ensure that they are focused on achieving these goals efficiently while safeguarding investor and stakeholder confidence.
>
> 1.3 The implementation of the Control framework will be consistent with relevant legislation, regulations, the Treasury guidance – *Managing Public Money* – and Government policy announcements. The Government remains committed to maintaining support levels for those existing investments where it has said it would do so and not to making retrospective changes.
>
> 1.4 The Treasury has responsibility for the Government's public spending framework, and the Control framework forms part of that. Therefore any changes to Treasury's budgeting framework may also apply to those policies covered by the Control framework".

12. The LCF sets <u>overall</u> limits upon the costs of DECC's levy-funded policies. If, therefore, spend in one area increases it must be matched by decreases elsewhere. Chapter 3 of the LCF is entitled "*Exceeding the cap*". It addresses what must happen when forecasted or actual expenditure exceeds the cap. In such circumstances, the Treasury will take steps to ensure that there is a "*robust*" plan to bring expenditure down to within the cap, even where the forecasted expenditure remained within the acceptable headroom. Exceeding the cap brings potentially far reaching consequences for policy making within the DECC:

> "3.2 Where forecast or actual spend exceeds the agreed cap then the presumption will be that the Treasury will deny any changes to the policy that do not seek to bring this forecast down, even if such changes are cost-neutral".

13. In any agreement between DECC and HM Treasury over cost-reduction measures it is recognised that there remains a need to maintain levels of support where, hitherto, DECC has stated that it would do so:

> "3.4 Where spend exceeds or is projected to exceed the range of acceptable headroom, DECC will rapidly agree with the Treasury a plan for bringing spending back down to the agreed profile. This plan will set out the adjustments that DECC proposes to make to its policies to reduce their spend, and the impact by year of taking action. *The Departments recognise the duty to follow statutory and other requirements before making adjustments and the need to maintain levels of support where it has said it would do so.*
>
> 3.5 The Treasury will need to agree this plan, and may refuse to do so where it does not have confidence in its efficacy in returning spend to within the cap. The absence of an effective plan could ultimately result in the Treasury refusing DECC permission to retain all or part of the tax income received above the agreed cap, which would leave DECC to fund all or part of the spending gap from within its Departmental Expenditure Limit".
>
> (emphasis added)

14. An issue to which I will return is the caveat reflected in paragraphs [1.3] and [3.4] that the Government will remain committed to maintain levels of support where it has said it will (see paragraph [83] below). The Claimants submit that this means that any commitment to preserve a scheme until a specified date (such as 2017 in the case of the RO scheme in issue) overrides the harsh disciplines of the LCF. The Secretary of State submits that this is a very limited caveat which applies to banding and in any event only to those who are <u>already</u> acrredited and cannot, on any view, protect those who do not have an accredited right to support.

(iii) The RO scheme in a nutshell

15. The RO scheme provides financial incentives for the creation of generation capacity from renewable sources. It does this in the form of Renewables Obligation Certificates ("ROC"). These are certificates issued to operators of accredited renewable generating stations in respect of the eligible renewable electricity that they generate. Under the RO scheme licensed electricity suppliers are required to submit a specified number of ROCs to the Gas and Electricity Market Authority ("Ofgem") for each megawatt of electricity that they supply during the period from 1st April to 31st March or, alternatively, pay a penalty. The RO scheme has been the main support mechanism used by the Government for large scale renewable electricity since 2002.

(iv) Directive 2009/28/EEC: promoting the use of renewable energy sources

16. Directive 2009/28/EEC of the European Parliament and of the Council of 23rd April 2009 upon the promotion of the use of energy from renewable sources (the "*Directive*") set a target for the UK to derive 15% of its energy consumption from renewable sources by 2020. Under the Climate Change Act 2008 the Secretary of State is under a duty to ensure that net greenhouse gas emissions for the year 2050 is at least 80% lower than the 1990 baseline figure. DECC's long-term renewable strategy is to facilitate decarbonisation of electricity yet ensure security of supply at the least cost to consumers.

(v) Eligibility for ROCs

17. To be eligible within the RO scheme electricity must be generated by a station that has been accredited by Ofgem as capable of generating renewable electricity in respect of which ROCs may be issued. The RO scheme is hence a demand led scheme with all generation satisfying the relevant conditions being accredited. For solar PV it is a relevant condition that the generating station must exceed 50 kilowatts in size. Generators are issued with ROCs by Ofgem according to the amount of eligible renewable electricity generated. They may sell their ROCs to suppliers, which allows them to receive a premium in addition to the wholesale electricity price. The price of a ROC is determined by the market, there is no fixed rate. The number of ROCs that an electricity supplier is required to submit for each megawatt of electricity they supply is known as the "Renewables Obligation" or "RO". The level of this is determined by the Secretary of State by 1st October in each year preceding the start of each obligation period.

18. The Secretary of State is required to calculate the level of the obligation in accordance with a formula set out in subordinate legislation. This includes a requirement to estimate the amount of renewable electricity likely to be supplied during the relevant obligation period and having regard to that estimate to calculate the number of ROCs likely to be issued.

(vi) The move towards contracts for difference

19. In July 2011 the Government announced new measures to increase the rate of decarbonisation of electricity. The central component of the proposed reforms was the introduction of a scheme to support renewable generation based upon Contracts for Difference ("CfD") which would replace the existing RO regime. A CfD is a long term contract between a generator and a Government owned counter-party. Pursuant to the contract the counter-party will pay the generator the difference between an estimate of the market price for electricity (the "reference price") and a "strike price" being an estimate of the long term price needed to bring forward investment in the relevant renewable technology. Unlike under the RO scheme generators would know in advance the value of the renewable energy which it generated. The CfD scheme falls within the LCF because payments made to a generator would be funded by a levy on electricity suppliers. The purpose of the new CfD scheme is to provide long term price stability for generators of low carbon electricity, but also a subsidy. When this scheme was introduced in the July 2011 Electricity Market Reform White Paper it was promoted upon the basis that it provided to generators and investors a higher degree of protection from change in policy. Paragraph [65] of the White Paper stated:

> "Another benefit of [CfD] over a low-carbon obligation is that the investor gets certainty when they sign the contract about the level of support they would receive, rather than the support level being set after construction, once the installation is built and connected to the grid, i.e. with ROCs generators are exposed to the policy risk that the level of support changes in between an investment decision and a project being accredited under an obligation based scheme".

20. The White Paper made clear that the Government intended to phase out the RO scheme in favour of the CfD scheme. Transitional arrangements were proposed.

(vi) The statements made by Government in the period 2010-2014 that the RO scheme would close in 2017

21. Between 2010 and early 2014 there were many statements made by the Government to the effect that under the new measures to be introduced the RO scheme would not be closed until March 2017. This is not disputed by the Defendant. The specific context to those statements does however have particular legal significance and is the subject of dispute between the parties and I have therefore summarised the evidence in the section on the particular point of law at [53] – [60] below.

(vii) The change in Government policy in early 2014

22. On 13th May 2014 in a consultation paper entitled "*Consultation on changes to financial support for solar PV*", DECC set out for the first time the Government's change of policy and its proposal to close the RO scheme across Great Britain for new solar PV capacity above 5 MW from 1st April 2015. The proposals included a grace period to protect developers that had made a significant financial commitment to projects on or before 13th May 2014. The proposed conditions for establishing a significant financial commitment were, at that point in time:

    i) A grid connection offer and acceptance of that offer dated no later than 13th May 2014 and a letter from the network operator estimating or setting a date for the grid connection which was on or before 31st March 2016.

    ii) Relevant planning consent dated no later than 13th May 2014.

    iii) A director's Certificate confirming that as at 13th May 2014 the developer or proposed operator of the station owned the relevant land or had an agreement to lease the relevant land.

    iv) Evidence demonstrating that a minimum of £100,000 per MW of expected consented capacity in project had been incurred upon the project by 13th May 2014 or proof that all material equipment contracts had been entered into for the project by 13th May 2014.

23. The justification for the proposed curtailment of the RO scheme for solar PV was said to be the unexpectedly high projected levels of large scale solar PV deployment and the adverse consequences on the cost cap under the LCF. The position, in the consultation paper was summarised in the following way. In December 2012 when

the Government announced the levels of support for solar PV under the RO scheme, large-scale solar PV deployment was anticipated to be circa 900 MW by the end of March 2017. However, by the end of March 2014 545 MW had already been accredited and there was evidence indicating that circa 3.2 GW of large-scale solar PV could be deployed under the RO by the end of March 2015. Conservative estimates indicated that there would be a total deployment of 5 GW by the end of March 2017 which exceeded by a considerable margin the upper end of the potential rate of deployment contemplated by the Government in December 2013 (see Consultation Paper paragraphs [4], [5], [17] – [19]). The consequences of this were expressed in the following way:

> "20. This is more than we can afford and would have adverse consequences for Government's management and use of the LCF as a whole. The proportion of the LCF which is available for deployment under CfDs would be reduced, as a higher proportion of the LCF would necessarily be allocated to the RO to cover the costs of the additional solar projects. Government's view is that the CfD is a more cost-effective mechanism than the RO. Because the CfD provides for earlier certainty of support levels than the RO and greater stability of revenue streams by providing a fixed strike price, investors are protected from wholesale price volatility and should therefore be able to reduce the costs of capital, making the development of low carbon generation cheaper for both investors and consumers".

24. Since the publication of the Consultation paper the projected deployment of solar PV increased even further. Work conducted within DECC to calculate the level of the RO for 2015/16 estimated that between 2 GW and 4 GW of solar PV could be accredited under the RO in 2014/15 alone.

25. Mr Gareth Redmond, Head of the Renewables Programme Team within DECC, in his first Witness Statement, stated of this further development as follows:

> "175. Without any action to constrain deployment, it is estimated that 6.6 to 10 GW of solar PV could deploy by the end of 2016/17: this is twice as much as was predicted at the date of consultation. This would result in £210 to £400 million extra spending per year, above the EMR Delivery Plan base case. Furthermore, it would result in DECC exceeding the Levy Control Framework cap by around £40m in 2016/17 if no action was taken to constrain other technologies or reduce spending on other policies. As I have already explained, the prospect of the cap being breached is inconsistent with the Government's commitments on the Levy Control Framework and its objective to minimise the impact on consumer bills".

26. The reference to the impact upon consumers is explained by Mr Redmond as follows:

> "8. It is assumed that any costs incurred by suppliers in complying with the requirements placed upon them by these

> policies are passed on to consumers. As a result, these policies are described as levy-funded policies and the budget for these policies has an effect on the cost of household electricity bills".

27. An Impact Assessment conducted on 13th May 2014 expressed the problem in the following manner;

> "What is the problem under consideration? Why is government intervention necessary? "
>
> The EU Renewable Energy Directive commits the UK to meeting 15% of its energy needs from renewable sources by 2020. The Renewables Obligation (RO) is currently the Government's main financial policy mechanism for incentivising the deployment of large scale renewable electricity generation in the UK. As part of the Electricity Market Reform, large-scale renewable electricity will be eligible to receive support through the new Feed-in Tariff with Contract-for-Difference scheme (CfD). The first allocation round is expected to open in October 2014. The Levy Control Framework (LCF) sets annual limits on the overall cost of DECC's levy funded policies, including the RO. The accompanying analysis to the Final Delivery Plan (December 2013) published indicative scenarios of deployment of renewable technologies in 2020, suggesting around 2.4GW to 4GW of solar could be deployed to the end of 2020, within the LCF budget. Figures from Ofgem and industry projections suggest that solar deployment under the RO could exceed what is set out in the Final Delivery Plan before 2017."

28. In response to the Consultation DECC received 65 responses of which approximately 60% came from solar developers, investors and others with an interest in the solar industry. A clear majority of the responses disagreed with the proposal emphasising the repercussions of closure for investor confidence and the ability to attract foreign investment into the non-domestic solar sector. Many respondents were critical complaining that there was a lack of sufficient data to form a conclusive assessment of the impact of the proposals. A minority agreed with the proposals. Evidence on the Government's views on the responses was given to the Court in a second Witness Statement of Mr Redmond. In particular he explains how negative comments made as to the conditions for protection of existing investment (prior to accreditation) were taken into account and how this led to a lowering of the "*grace*" conditions. The new modified conditions are now reflected in the Decision.

29. In the light of this the Government considered it necessary to take action to control the costs of large-scale solar PV. It proposed to achieve this by closing the RO scheme across Great Britain to new solar PV generating stations, both ground – and building – mounted, above 5 MW from 1st April 2015. The closure would also apply to any additional capacity added to an accredited solar PV station from 1st April 2015 where the station was, or would become, above 5 MW. This would mean, for instance, that a generating station that was already above 5 MW in size could not add incremental capacity under the RO after 31st March 2015 unless it qualified for a

grace period in respect of the additional capacity. Irrespective of the changes proposed solar PV installations above 5 MW would be eligible to apply for support under the new CfD scheme with the first allocations expected to open in October 2014.

(viii) The Government's acknowledgement that there had been a change in policy

30. The Government acknowledged in the Decision that this reflected a change in policy:

> "1.15. We have considered very carefully the arguments presented on both sides of this question. We acknowledge that bringing forward closure of the RO for large-scale solar PV projects represents a change of policy from that previously announced and given effect in the RO Closure Order 2014, and that the majority of respondents are against us doing so. We have taken into account the fact that large-scale solar PV developers expected that the RO would remain open until 31 March 2017. However, we cannot ignore the very clear evidence that large-scale solar PV is deploying faster than can be afforded and, in addition, that there is significantly more potential deployment of large-scale solar PV than estimated when we published our consultation less than five months ago, and the heightened risk that this poses to the LCF. The position of large-scale solar PV developers who have made significant financial commitments in reliance on their expectation of the previously adopted closure date is addressed by our proposals for a grace period, as discussed under question 4 below. **The Government has therefore decided to close the RO to new solar PV projects above 5MW in scale from 1 April 2015, and to additional capacity added to existing accredited stations from that date, where the station is, or would become, above 5MW**".
>
> (emphasis in original)

(ix) The modified grace periods

31. As already explained to mitigate the effects of this change in policy the Government addressed itself in the Decision to a relevant period of grace which would serve to protect those who had made a "significant" level of investment which otherwise risked being stranded by the change of policy:

> "1.33 Having considered all of the consultation responses to this question carefully, **the Government has decided to provide a grace period to projects that had made a significant financial commitment on or before 13 May 2014. Additional capacity added to stations with an accreditation date on or before 13 May 2014 will also be eligible for the grace period subject to fulfilling the evidential requirements for significant financial commitments made**

> **on or before 13 May 2014 in respect of the additional capacity**". (emphasis in original)

32. The Decision sets out new conditions which had to be satisfied in order to take the benefit of the grace period. These were softened relative to the conditions that had been earlier proposed (summarised at paragraph [22] above). The £100,000 minimum spend condition was removed. In particular a particular concern of consultees had been that the requirement to prove planning consent meant that those whose applications were extant would be excluded. Before me evidence was adduced as to the substantial expenditure that could be incurred in the stages prior to consent being granted or as a result of the appeals processes which would follow an initial refusal before ultimate success, and also as to the time that could elapse between preparation of application until ultimate decision.

33. In the light of these concerns the new conditions were as follows:

> "151. The adjustments above mean that projects will be required to present the following three forms of evidence to Ofgem in order to access the grace period, unless they had obtained preliminary accreditation by 13 May 2014;
>
> A grid connection offer and acceptance of that offer, both dated no later than 13 May 2014;
>
> A Director's Certificate confirming ownership of the land, lease of the land or an option to lease or to purchase the land as of 13 May 2014; and
>
> Confirmation that a planning application had been received by the relevant planning authority in respect of the project on or before 13 May 2014. "

34. In submissions before me Mr Robert Palmer, for the Secretary of State, acknowledged that the line which had been drawn to, in effect, define what was meant by a "significant" investment (worthy of protection) was <u>not</u> based upon a *de minimis* test and that, accordingly, it was understood that there would in fact be a category of operator who had incurred significant capex, but for whom that investment would be, or risked being, wasted.

(x) The October 2014 Impact assessment

35. An impact assessment issued on 2nd October 2014, accompanying the Decision, brought the analysis up to date:

> "The accompanying analysis to the EMR Final Delivery Plan (December 2013) published indicative scenarios of deployment of renewable technologies in 2020, suggesting around 2.4GW to 4GW of solar could be deployed to the end of 2020, within the LCF budget. In the consultation document in May 2014, figures from Ofgem and industry projections suggest that solar

> deployment could be between 2.8GW and 6.3GW by 2017. DECC's projections since then, based on the Renewable Energy Planning Database, Solarbuzz and other sources, including industry commentary and information from network operators, have increased to between 6.6GW and 10GW by 2017, in the absence of changes to the RO."

36. The impact assessment (under a "Do Nothing" option) also quantified the consumer and business impact of the continuation of the RO scheme until 2017 as against a counterfactual of early closure in March 2015:

> "4.6. DECC's prices and bills analysis suggests that the impact of this option on average household electricity bills could be an increase in the range of £2 (0.4%) to around £5 (around 0.8%) per household per annum from 2016/17 (central estimate of around £3 (0.5%) per household per annum) compared to the Final Delivery Plan scenario one. The impact on business electricity bills is estimated to be similar in percentage terms, from around 0.6% to 1.5%, with a central estimate of around 1%.
>
> 4.7. The potential for rapid deployment of solar PV under the RO, risks even greater increases in estimated spend against the LCF in future. This option would not provide effective control of spending under the LCF and is therefore not recommended".

37. The ultimate conclusion which compared and contrasted the Do Nothing option (i.e. preservation of the status quo with the RO scheme to be closed in March 2017) as against the early closure option was as follows:

> "5.2. In conclusion, it is preferable to take action under the RO to remain within the LCF by limiting spend (and therefore deployment) of large scale solar PV compared to the Do Nothing option. This option has a positive net present value and helps to control costs to consumers and maintain the diverse generation mix set out in the EMR Final Delivery Plan".

C. Issue I: Whether the purpose(s) behind the introduction of sections 32LA and 32LB EA 1989 includes the preservation of a 2017 end date and therefore whether any exercise of the power in those sections which closed the scheme before 2017 was unlawful and *ultra vires*?

(i) The issue

38. The Claimant's first submission concerns the right of the Secretary of State to exercise the power in sections 32LA and 32LB EA 1989 to curtail the period of operation of the RO scheme from 2017 to 2015. It is not necessary to examine in any detail the actual statutory language. Mr Fordham QC, on behalf of the Claimants, accepted that on its face the statutory provisions were broad enough to empower this curtailment. However, he submitted that in the light of the proper "*purpose*" of the

provisions, any such curtailment would be outside of the permitted purpose or mischief and therefore *ultra vires* the statutory power. Mr Fordham QC explained that the pre-legislative material evinced a clear and unequivocal explanation of the statutory amendment as including the preservation of investor confidence through the retention of the scheme until 2017. This, he submitted, was a clear statutory purpose that therefore served to define and limit the manner in which the power could subsequently be exercised.

39. Mr Robert Palmer, for the Secretary of State, did not agree with Mr Fordham that sections 32LA and 32LB included as a purpose the continuation of the RO scheme until 2017. He submitted that the "*purposes*" of the statutory amendments were narrow and technical and had nothing to do with the duration of the RO scheme. He submitted that issues relevant to the duration of the scheme were "*policy*" matters which were entirely consistent with the statutory purposes. He acknowledged and accepted that until early 2014 the Government had clearly expressed policy support for a 2017 closure date as being consistent with the important need to preserve investor confidence and market stability. But, he submitted, policy could be changed; it was mutable and the exercise of the statutory power in a manner which reflected a change of policy was lawful in all respects. He pointed to the evidence which explained the change of policy, namely the substantial and unanticipated uptake in demand for ROCs and a consequential increase in levy expenditure. He pointed out that the overarching policy set out in the LCF justified the reigning in of expenditure on large-scale solar PVs and hence the decision to close the RO scheme earlier than expected for large-scale solar PV generation. For good and coherent reasons, he submitted, policy changed.

(ii) The relevant legal principles

40. I start by considering the relevant legal principles in order to: (i) establish the guiding principles; and, (ii) identify how a court must analyse what a statutory purpose actually is and in what sources it may be found. The most frequently cited authority in this area is *Padfield v Minister of Agriculture, Fisheries & Food* [1968] AC 997 where the House of Lords was concerned with the exercise of a power under the Agricultural Marketing Act 1958 pursuant to which the Minister had a discretion, which upon the face of the statutory language was unlimited, to refer certain complaints to a committee of investigation. The House of Lords held that where a decision of the Minister appeared to the court to frustrate the policy of the Act, the court was entitled to interfere. An academic articulation of the policy, which received the endorsement of the House of Lords subsequently (see *Chetnik* below), was that of Professor Sir William Wade QC in the 1982 edition of Administrative Law pp 355-366. Sir William had observed "*...that there are legal limits to every power is axiomatic*". Following a recitation of authority he stated:

> "The common theme of all of the passages quoted is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is confirmed as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion,

> the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering act".

41. That statement of principle was endorsed by Lord Bridge in *R v Tower Hamlets LBC ex parte Chetnik Developments Ltd* [1998] 1 AC 858 ("*Chetnik*"). In that case the issue concerned the recovery of moneys paid to a local authority under a mistake of law which, in the particular circumstances of the case, focused upon the scope and effect of section 9(1) of the General Rate Act 1967. The public authority in receipt of the money allegedly paid pursuant to a mistake of law refused to refund the same giving as its reasons the scheme and intent of the Act. At first instance, the application for a refund was dismissed but the Court of Appeal permitted the appeal upon the basis that the defendant authority had failed to have regard to the purposes of section 9(1) and that none of the reasons given was a valid reason capable of justifying a refusal to make a refund. The House of Lords dismissed the appeal of the authority. The principle laid down in *Padfield* and articulated by Professor Sir William Wade QC was relied upon as expressing the law. At page [873G] Lord Bridge stated:

> "Thus, before deciding whether a discretion has been exercised for good or bad reasons, the court must first construe the enactment by which the discretion is conferred. Some statutory discretions may be so wide that they can, for practical purposes, only be challenged if shown to have been exercised irrationally or in bad faith. But if the purpose which the discretion is intended to serve is clear, the discretion can only be validly exercised for reasons relevant to the achievement of that purpose".

42. Lord Bridge continued, in order to identify the relevant purpose, to examine the statutory language to see if it was possible to "*articulate the apparent principle underlying the section more precisely*" (page [873H]). He also examined case law relating to the rule that moneys paid under a mistake of law were irrecoverable and the exceptions to that principle. No recourse was had to pre-legislative material such as White Papers, Explanatory Notes or statements by Ministers in Parliament. Ultimately, the exercise was based upon the statutory language and underlying case law and it was this that enabled Lord Bridge to discern "*...the broader consideration that Parliament must have intended rating authorities to act in the same high principled way expected by the court of its own officers and not retain rates paid under a mistake of law...*" (page [877D]). In his concurring opinion Lord Goff (at page [882F]) also concluded that it was of "*assistance to those considering the exercise of the discretion*" to pay regard to the general principles of the law of restitution in their search for guidance as to the exercise of the power. Though he added the important proviso that one always had to bear: "*...in mind that those principles may be modified, expressly or impliedly, by the terms of the statute*".

43. The judgment of the House of Lords in *Chetnik* is of some assistance to the present case in so far as it is accepted, in this case, that as a matter of literal interpretation sections 32LA and 32LB EA 1989 are wide enough to encompass the early closure of

the RO scheme. There is a little case law on the underlying subject matter of early closure in the context of the principle of legitimate expectation to which I will return later (see at paragraphs [94ff] below).

44. In *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 ("*Westminster City Council*") an issue arose as to the exercise of a power under the National Assistance Act 1948 to refuse to pay for accommodation to be provided to a Kurdish woman who had been suffering from spinal myeloma and who claimed political asylum upon her discharge from hospital as an inpatient. The case was determined on relatively narrow grounds. However, Lord Steyn took the opportunity to address the extent to which Explanatory Notes could be relevant to determine the proper interpretation of a statute. Lord Steyn observed that the text of such notes was prepared by the Government Department responsible for the legislation. They did not form part of the Bill nor were endorsed by Parliament and could not be amended by Parliament. Such notes were intended to be neutral in political tone and their aim was to explain the effect of the text but not to justify it. The purpose was to help the reader "*get his bearings and to ease the task of assimilating the law*" (paragraph [4]). Lord Steyn proceeded to observe that the procedure had the imprimatur of the House of Commons Select Committee on Modernisation and the House of Lords Procedure Committee. He stated (paragraph [5]) that the question was whether in aid of the interpretation of a statute a court could take account of Explanatory Notes and if so to what extent. His analysis was primarily concerned with the interpretation of statutes but is broad enough to encompass the identification of the purpose or mischief pursuant to which an enactment was made and which, therefore, might govern the scope of the exercise of the power. Lord Steyn stated:

> "5. The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen".

45. Lord Steyn was thus of the view that Explanatory Notes were admissible to assist a Court in construing a measure. He stated further in paragraph [5]:

> "Again, there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates. Applied to the subject under consideration the result is as follows. In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have".

46. Further, in the same paragraph [5] he gave guidance as to the evidential weight to be attached to Explanatory Notes relative to other guides such as reports of the Law Commission or advisory committees and Government Green or White Papers:

> "Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government Green or White Papers and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-Parliamentary aids which in principle are already treated as admissible…".

47. However, and importantly, Lord Steyn identified the limits which necessarily attached to admissible Explanatory Notes. They provide guidance to a court and might be informative and valuable but, ultimately, they reflect the views of the Government of the day and not, therefore, inevitably, the will of Parliament:

> "6. If exceptionally there is found in Explanatory Notes a clear assurance by the Executive to Parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the Executive in proceedings in which the Executive places a contrary intention before a court. This reflects the actual decision in *Pepper v Hart* [1993] AC 593. What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted".

48. This caveat is important in that it emphasises that pre-legislative material is no more than a guide to the court. If, therefore, the language of the enactment is clear and unequivocal and inconsistent with the pre-legislative material, then a court cannot assume that Parliament necessarily intended to translate into statutory form the will of the Executive.

49. Shortly following, in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at page [695] ("*Quintavalle*"), Lord Bingham identified as relevant the "context" of the Statute as a whole and, more especially, the "*...historical context of the situation which led to its enactment*". He articulated the principle in a way which focused upon the task of discerning what the purpose of the statute was:

> "The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to every particular provision which gives rise to difficulty…Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a

> whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment".

50. In *R v Z (AG for NI's Reference)* [2005] UKHL 35 ("*R v Z*") Lord Bingham, stated of his observations in *Quintavalle* (ibid) that "*…the interpretation of a statute is a far from academic exercise*" (paragraph [17]). He said that in the present case "*…the historical context seems to me to be of fundamental, and in the end, conclusive importance*" (paragraph [17]). Lord Carswell also cited *Quintavalle* as authority for the proposition that "*historical context*" could be of "*prime importance*" when construing the mischief towards which a statute was directed (see paragraph [46]). He then went on to articulate an important point about discerning the will of Parliament when the pre-legislative material was inconsistent with the statutory language:

> "If the words of a statutory provision, when construed in a literalist fashion, produce a meaning which is manifestly contrary to the intention which one may readily impute to Parliament, when having regard to the historical context and the mischief, then it is not merely legitimate but desirable that they should be construed in the light of the purpose of the legislature in enacting the provision: cf *Karpavicius v The Queen* [2003] 1 WLR 169, 175-176 paras 15-16, *per* Lord Steyn".

51. Finally, in *R (Bradley) v Secretary of State for Work & Pensions* [2008] EWCA Civ 36 ("*Bradley*") the Court of Appeal (*per* Sir John Chadwick) stated that to the extent that Ministerial statements made during the passage of legislation threw light on the purpose or the mischief for which the legislation was introduced they were admissible (see paragraph [43]).

52. I now set out below a summary of the principles, in so far as these are of assistance to a resolution of the present case:

    i) When construing an enactment, including the exercise of power under an enactment, it is relevant to identify the intention or purpose of the measure, i.e. the mischief to which it is directed.

    ii) In all cases (save with regard to consolidating enactments) the purpose or mischief may be identified by the posing of questions (cf Lord Bingham in *Quintavalle*) such as: If the legislation has changed, what has changed? If there is a problem which had to be resolved, what was the problem? If there was a blemish in the legislation, what was that blemish? If there was an improvement which was sought to be achieved, what was that improvement?

    iii) To identify the purpose or mischief and to answer these questions it is permissible to examine Explanatory Notes, White and Green Papers, Ministerial statements (*Bradley*) and Law Commission Reports, all of which may be admissible forms of evidence.

    iv) However, not all such admissible sources are of equal weight. Those sources (such as Explanatory Notes) whose "*shape*" was closely connected to the "*shape of the proposed legislation*" may be more informative as guides

(*Westminster City Council*) than other sources which are more remote from the final language selected by Parliament.

v) In addition, a court may draw inferences from the statutory words actually used in the scheme of the legislation as a whole and from any case law on the underlying subject matter and a court might ask whether it may be inferred that Parliament intended to act consistently with the standard set out in case law (*Chetnik*).

vi) Material that is admissible will reflect the views of their authors. And the views of authors, including the Government of the day, do not necessarily reflect the will of Parliament (*Westminster City Council*). If there is an inconsistency between the statutory language and the pre-legislative, admissible, material it cannot, without more, therefore be assumed that the statutory purpose must reflect the purpose set out in pre-existing admissible material.

vii) However, if there is a collision between a literal interpretation of an enactment and the contextual material with the consequence that the literal interpretation "*is manifestly contrary to the intention which one may readily impute to Parliament, when having regard to the historical context and the mischief…*", then the enactment should be construed in the light of the purpose as evident from the historical context and mischief (*R v Z per* Lord Carswell).

(iii) Relevant and admissible sources of evidence in the present case

53. I turn now to consider the relevant admissible evidence in the present case. Mr Fordham QC, for the Claimants, referred me to evidence which quite plainly shows that whilst it intended to modify the RO scheme to take account of the introduction of CfDs it was always the intention of the Government, until early in 2014, to maintain the RO scheme until March 2017. Mr Palmer did not question this. His case is that the policy changed. Nonetheless, Mr Fordham QC says that the evidence reflects a stated and fixed purpose, not mere transient policy. He relies specifically upon the circumstances in which the statements were uttered as sufficient to translate them into a fixed and immutable purpose which fettered the exercise of the broad discretion otherwise conferred by sections 32LA and 32LB EA 1989. In the text below in order to test this proposition I trace and comment upon the way in which the Government's statements as to the closure date evolved.

54. In December 2010 DECC issued a consultation which presaged the subsequent White Paper of July 2011. The document recognises the need for a balance to be struck between the need of industry for certainty, and, securing "*the best possible deal for consumers*" (page [9]). It states at page [11]:

> "In the transition to the measures, Government will seek to minimise uncertainty and delays to planned investments by establishing appropriate grandfathering arrangements. Feed-in-tariffs could be generally introduced from 2013 once legislation has been passed, but accreditation under RO could also continue until 2017 to minimise the risk of disruption for developers. More details regarding the transition and

> implementation of the arrangements for these policies are set out in the annex to this document and the Government will set out the approach it will take, in full, in the White Paper".

The document posed 38 questions. Question 36 was in the following terms:

> "We propose that accreditation under the RO would remain open until 31 March 2017. The Government's ambition to introduce the new feed-in-tariff for low-carbon in 2013/14 (subject to Parliamentary time). Which of these options do you favour?
>
> • All new renewable electricity capacity accrediting before 1 April 2017 accredits under the RO;
>
> • All new electricity capacity accrediting after the introduction of the low-carbon support mechanism but before 1 April 2017 should have a choice between accrediting under the RO or the new mechanism".

55. In July 2011 DECC issued the White Paper ("*Planning our Electric Future – A White Paper for secure and affordable low-carbon*"). Once again there is no dispute but that whilst it moved towards CfDs the Government was clear in its intention to maintain the RO scheme until 2017: See, for example, paragraphs [8.7] and Annex D. Nonetheless, it is clear that these were still "*proposed arrangements*" (paragraph [8.6]).

56. In December 2012 DECC issued a review of RO banding. It suffices to record that the assumption underpinning this review was that the RO scheme would close in March 2017. In July 2013 a fresh consultation was issued entitled "*Consultation on the Transition from the Renewables Obligation to Contracts for Difference*" and, yet again, it is clear that the Government was, at this point, intent on maintaining the RO scheme until 2017. It is relevant to point out that the LCF was published in March 2011, before the July 2011 White Paper and the December 2012 Banding review. Nothing in these latter documents resiles from the LCF.

57. To implement its then stated policy of introducing CfDs and phasing out the RO schemes the Government needed to introduce legislation. The Claimants in the present case rely upon statements made by Baroness Verma made on 4th November 2013 in the House of Lords. The Secretary of State had announced (in the July 2011 White Paper) an intention to close the RO scheme to all new entrants in 2017. To achieve this, the Minister intended to use the power then contained in section 32C(1) EA 1989. An Energy Bill was introduced into the House of Commons in 2012 omitting any <u>new</u> power to make a "*Renewables Obligation Closure Order*". However, doubts thereafter arose as to (a) whether that statutory provision could in practice properly be used to close the RO scheme to <u>*all*</u> new entrants and (b) whether it could extend <u>beyond</u> England and Wales to include Scotland. A Government amendment to the Bill was therefore introduced in the House of Lords to insert what subsequently became sections 32LA and 32LB EA 1989. These contain broad powers to close the RO. Baroness Verma for the Government explained that the introduction of the provisions was to address the lack of clarity as to the extent of existing power

to close the RO scheme to new capacity and the ability simultaneously to extend the effect of the closure to Scotland:

> "My Lords, Amendment 66 provides the Government with the power to close the Renewables Obligation to new capacity. As noble Lords know, this closure is planned for 31 March 2017 as part of the transition to contracts for difference. We have previously considered that the Renewables Obligation could be closed using existing powers within the Electricity Act 1989. However, we have now concluded that a specific power in this Bill will put the closure arrangements on a more reliable and transparent legislative basis.
>
> To ensure that consumers and industry have confidence that closure will take place consistently across the UK, the amendment provides the power for the Secretary of State to close the RO in England, Scotland and Wales. It enables the Northern Ireland Executive to make similar provision for the Northern Ireland Renewables Obligation. To give industry early certainty on the way in which Government proposes to use this power, we intend to publish this week detailed proposals on RO grace periods for those projects that are delayed due to circumstances beyond their control. These proposals will include a 12-month grace period for projects subject to current investment decisions, giving developers making such decisions this winter substantial reassurance that their investments are not at undue risk from the RO closure date".

58. This statement refers to two different enactments. First, the statutory amendment to the EA to address the two possible limitations in the pre-existing provision. But secondly "*proposals*" for the RO grace periods. It is plain that so far as the statutory amendments were concerned their purpose was to address the two technical problems described. There is no reference to the statutory purposes being to <u>continue</u> the RO scheme until 2017. Though it is also correct to say that the extant policy was to close the RO scheme in 2017.

59. The Claimant also relies upon a response by Baroness Verma, later in the same debate, to a request for an assurance from Baroness Worthington that in the detailed arrangements that were set out in the proposed regulations to close the RO scheme the Government would not prescribe a date until they were certain when the CfDs would come into operation. As to this, Baroness Verma assured Baroness Worthington that the Government was "*mindful of all the concerns that she had raised*". She explained that the RO scheme closure date of March 2017 was chosen in order to allow for a period of parallel running between RO and CfD. In this answer, Baroness Verma was referring to the proposed regulation, not the purpose behind the statutory amendment and her words do not amount to an assurance. It will be apparent that I do not accept that Ministerial Statements support the Claimant's case on statutory purpose.

60. I turn now to the Explanatory Notes to accompany the Energy Act 2013 which received Royal Ascent on 18th December 2013. Mr Fordham QC relied upon

paragraph [33] which refers to the transitional arrangements. But this does no more than record the historical fact that in the White Paper of July 2011 there was a proposal that the transitional phase would end on 31st March 2017 after which the RO scheme would be closed to new generating capacity. At its highest the reference in the Explanatory Note shows that this policy remained as of December 2013, a proposition which is not in dispute in this case. This is not an assurance or other statement to the effect that that proposal would necessarily be followed through with irrespective of changed circumstances. More valuable in understanding the purpose behind the statutory amendments is paragraph [282] which is in the following terms:

> "282. *Sub section (1)* inserts new sections 32LA and 32LB to the Electricity Act 1989 to confer a power on the Secretary of State to make a Renewables Obligation Closure Order. The closure order will prevent Renewables Obligation Certificates from being issued under any Renewables Obligation Order (whether made by the Secretary of State or by the Scottish Ministers) in respect of electricity generated after a specified date (section 32LA(2)). Different closure dates may be specified for different cases or circumstances (section 32LA(3))".

This description is consistent with the purpose behind the statutory amendment being limited to the two specific technical issues already identified. There is no reference to a purpose of the statutory amendment being the continuation of the RO scheme until March 2017.

(iv) Conclusion

61. The answer to this issue is evident from focusing upon one or more of the four issues postulated by Lord Bingham in *Quintavalle* and which can be used to frame relevant questions to pose: see paragraphs [49] and [52(ii)] above. By reference to the statutory history, and to the relevant White Papers, statements in Parliament by Ministers, and Explanatory Notes the answer to the question: Why were sections 32LA and 32LB introduced? – is: To address the two technical matters identified early on as to the extent of the ability to close RO schemes in their entirety, and, as to the geographical extent of the powers. Those two matters were specifically identified as the reasons why the new statutory powers were introduced. It is not possible, in my view, to discern as a mischief or purpose that the statutory amendments were designed to ensure the continuation of the RO scheme until 2017. Indeed it is hard to see why Parliament would need to enact any new measure to preserve in force a scheme until 2017, for which an existing power had already been exercised. A comparison of the EA 1989 both before and after the amendment makes the above conclusions clear. Statements of intent as to the closure date of the RO scheme were policy statements capable of change but were not the purpose or mischief behind the amendments.

62. In any event, standing back and examining the historical or broader context to the amendments, in this case the RO scheme sits under the umbrella of the LCF which acts as an all pervasive proviso or caveat to <u>any</u> exercise of the statutory power. The LCF pre-existed the proposed statutory amendments and continued in force during their passage through Parliament. At no point was it ever suggested that the LCF was to be disapplied to levy schemes. It was a given; an ever-present context. In the case

of the RO scheme the fact that it is demand led necessarily means that its impact upon expenditure and hence the overall policy in the LCF is unpredictable. It also means that until such time as the LCF is withdrawn or softened the Secretary of State, as sponsor of the statutory amendments, had to keep under review expenditure on all levy funded schemes. In this context the statement that the RO scheme would endure until 2017 in order to protect capital expenditure carried within it a systemic risk of change. If this were not so, it would assume that the Secretary of State in sponsoring the amendments acted in a manner which was inconsistent with a key Government policy that he was bound by, imposed upon him by HM Treasury. If the Claimants are correct it would imply that if (as occurred) demand increased unexpectedly with adverse consequences for expenditure then the Minister had already tied his hands and was unable to do what was required of him in order to bring expenditure under control. I conclude that this is pertinent historical context which is relevant in the process of identifying the statutory purpose or mischief behind sections 32LA and 32LB.

63. In these circumstances, I am unable to accept the Claimant's submission that the statutory purpose behind the amendments to the EA 1989 in any way served to fetter the power of the Minister to adopt RO closure schemes, including to curtail the duration of such schemes.

D. Issue II: Whether pre-legislative statements include an admissible and binding "*assurance*" that the scheme would not be closed prior to 2017?

64. I turn now to the second issue. Mr Fordham QC submitted that upon the basis of paragraph [6] of the judgment of Lord Steyn in *Westminster City Council* (set out at paragraph [47] above) an assurance had been given which was both admissible and, in effect, binding upon the Defendant. He submits that although this issue is linked to that of legitimate expectation it is nonetheless a discrete point. It does seem to me that, in reality, this point is another way of advancing the legitimate expectation point (addressed below) but it raises a discrete point of law so I will nonetheless address it as a separate point.

65. I am unable to accept the submission.

66. The statement of Lord Steyn does no more than create a category of case where statements made prior to legislation become admissible. Lord Steyn was at pains to point out that the mere fact that a clear assurance in an Explanatory Note could be read as an "assurance" could not, without more, be taken to reflect the will of Parliament. And this must be right. Although in many, if not most, instances the view of the Executive can be expected to be reflected in the subsequent enactment of Parliament this is not an *a fortiori* equation. Parliament is sovereign and its views are constitutionally discrete from those of the Executive. The gap can in some cases, however, be bridged as explained by Lord Carswell in *R v Z* (see at paragraph [50] above) to the effect that where there is a very clear pre-legislative statement which turns out to be inconsistent with the subsequent enactment the latter may be construed to mean the same as the former where this can properly be said to reflect the will of Parliament. In such a case the view of the Executive is not taking precedence over that of Parliament; it is simply that the earlier statement is said on analysis to be an accurate reflection of Parliament's will. At base this approach by the Court seeks to override infelicitous statutory language which the Court concludes is not a proper

reflection of Parliament's actual will and it is aided in this endeavour by reference to admissible pre-legislative material. I would make five observations about this approach. First, the pre-existing statements relied upon must be exceptionally clear and precise and amount to something which can be understood as an "assurance". Second, there can be no quick and easy assumption that Parliament necessarily intended to respect this assurance if in fact it uses language which is inconsistent with the assurance (as Mr Michael Fordham QC quite fairly accepted). Third, the Court must therefore be satisfied that the prior assurance does in fact and law accurately reflect Parliament's will. Fourth, in *Westminster City Council* Lord Steyn was concerned only with Explanatory Notes as a guide to interpretation, nothing else. However, it seems to me that the underlying principle can be applied both to (a) any form of pre-legislative material which in law is admissible; and (b) to the process of identifying the purpose of Parliament in an enactment. Fifth, there is a tension in this area with normal *Pepper v Hart* principles which militate against the admissibility of pre-legislative material as guides to interpretation and in the relevant cases the courts have sought to square the *Pepper v Hart* circle with some finely tuned analysis. All of this suggests that the circumstances in which a pre-legislative assurance will be treated as reflecting Parliament's when this is not apparent from the enactment (and even more so when it is inconsistent) may be exceptional.

67. I now apply those principles to the facts of the present case. First, I do not construe the Explanatory Notes as creating any form of assurance. I have set out my analysis of this at paragraph [60] above. Second, equally I do not construe the statement of the Minister in Parliament as creating any form of representation which could be elevated into an assurance of the sort that Lord Steyn was referring to (see paragraphs [57] – [59] above). And further as to the statements made in White Papers and consultation documents these would, on Lord Steyn's analysis, carry materially less weight than Explanatory Notes or a direct statement by a sponsoring Minister. But in any event these admittedly clear statements of intent were not and could not be construed as "assurances". They reflected the policy of the moment which whilst firm was always capable of reversal and the constraints in the LCF represented inescapable context.

68. For these reasons I do not accept that any prior statements can amount to assurances in the sense used in the case law which can serve to bind the Defendant.

E. Issue III: Whether the Claimants have a legitimate expectation that the RO scheme would not be closed prior to 2017 and whether, if such an expectation did exist, the Government has a sufficient policy justification for defeating that expectation

(i) The issue

69. I turn now to the third issues, the existence of a legitimate expectation.

70. Mr Fordham QC contended with clarity and considerable vigour, that the multiple representations made by the Government right up until early 2014 to the effect that the RO scheme would not be closed prior to 2017 amounted to clear and unambiguous representations which were sufficient in law to amount to a legitimate expectation which had to be protected. He submitted that none of the purported justifications for the change of policy were sufficient to warrant the frustration of that legitimate expectation and the belated attempt to prematurely close the RO scheme was an abuse of power. He based his case upon the existence of a substantive (not procedural)

legitimate expectation of the types recognised in *Ex P Coughlan* [2001] QB 213 and described by Lord Woolf MR at paragraph [57]:

> "(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy".

(ii) The relevant law

71. A characteristic of a protectable legitimate expectation is that it acquires a sufficient degree of certitude. In *Bhatt Murphy v Independent Assessor* [2008] EWCA Civ 755 Lord Justice Laws stated (*ibid* paragraph [43]) that it will constitute *"... a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured.* He also stated (paragraph [46]) that previous case law illustrated "*the pressing and focussed nature of the kind of assurance required if a substantive legitimate expectation is to be upheld and enforced*". Lord Templeman in *Preston* [1985] AC 835 at pages 866 – 867 referred to *"conduct ... equivalent to a breach of contract or breach of representations".* In *Ex p Baker* [1995] 1 AER 73 reference was made to a "*clear and unambiguous representation*".

72. When what is objected to is the abrogation of a policy or a change of policy the starting point is that once a policy is promulgated and said to be settled there needs to be a rational ground for terminating it: *Bhatt Murphy* paragraph [34] per Lord Justice Laws. But there is no presumption that policy cannot change; on the contrary it plainly can do so and frequently does. So the issue become whether there can be identified a representation of sufficient certitude that the policy will *not* be changed regardless of surrounding circumstances. As to this a representation that a policy will continue until a specified date is not the same as a promise that it will <u>never</u> be changed even if circumstances change. If it were otherwise then an intention to pursue a policy for a fixed period would become set in stone and permanently unyielding to changes in relevant circumstances however compelling they might be.

73. And even if a sufficiently certain promise or representation has been made that a policy will continue in force and not be changed until a fixed date there is <u>always</u> a balance still to be struck between the retention of that policy and the strength of the (*ex hypothesi*) rational grounds which have arisen and which now are said by the Government to necessitate a frustration of that prior representation or promise. The test laid down by the Courts is whether the change of policy and the concomitant thwarting of the prior expectation amount to an abuse of power.

> "41. There is first an overall point to be made. It is that both these types of legitimate expectation are concerned with exceptional situations (see Lord Templeman in *Preston* at 864; compare *ABCIFER* [2003] QB 1397 *per* Dyson LJ at paragraph 72). It is because their vindication is a long way distant from

> the archetype of public decision-making. Thus a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. Public authorities typically, and central government *par excellence*, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel. All this is involved in what Sedley LJ described (*BAPIO* [2007] EWCA Civ 1139 paragraph 43) as the entitlement of central government to formulate and re-formulate policy. This entitlement – in truth, a duty – is ordinarily repugnant to any requirement to bow to another's will, albeit in the name of a substantive legitimate expectation. It is repugnant also to an enforced obligation, in the name of a procedural legitimate expectation, to take into account and respond to the views of particular persons whom the decision-maker has not chosen to consult.
>
> 42. But the court will (subject to the overriding public interest) insist on such a requirement, and enforce such an obligation, where the decision-maker's proposed action would otherwise be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself. In the paradigm case of procedural expectations it will generally be unfair and abusive for the decision-maker to break its express promise or established practice of notice or consultation. In such a case the decision-maker's right and duty to formulate and re-formulate policy for itself and by its chosen procedures is not affronted, for it must itself have concluded that that interest is consistent with its proffered promise or practice. In other situations – the two kinds of legitimate expectation we are now considering – something no less concrete must be found. The cases demonstrate as much. What is fair or unfair is of course notoriously sensitive to factual nuance. In applying the discipline of authority, therefore, it is as well to bear in mind the observation of Sir Thomas Bingham MR as he then was in *Ex p Unilever* at 690f, that "[t]he categories of unfairness are not closed, and precedent should act as a guide not a cage".
>
> (*Bhatt Murphy (ibid)* paragraphs [41] and [42] *per* Laws LJ)

74. Subsequent cases have identified additional features that might be relevant to the assessment. In *Bhatt Murphy* Lord Justice Laws identified as a relevant consideration the size of the class of person asserting the expectation:

> "46. … I should add this. Though in theory there may be no limit to the number of beneficiaries of a promise for the purpose of such an expectation, in reality it is likely to be small, if the court is to make the expectation good. There are two reasons for this, and they march together. First, it is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class. As Lord Woolf MR said in *Ex p Coughlan* (paragraph 71):"
>
> > "May it be... that, when a promise is made to a category of individuals who have the same interest it is more likely to be considered to have binding effect than a promise which is made generally or to a diverse class, when the interests of those to whom the promise is made may differ or, indeed, may be in conflict?"
>
> The second reason is that the broader the class claiming the expectation's benefit, the more likely it is that a supervening public interest will be held to justify the change of position complained of. In *Ex p Begbie* I said this (1130G – 1131B):
>
> > "In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear… In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players… The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes."

75. A yet additional factor is the extent to which there is detrimental reliance upon the representation. In *R (Department of Education and Employment) ex parte Begbie* [2000] 1 WLR 1115 Lord Justice Peter Gibson concluded that whilst detrimental reliance was not an essential component of a legitimate expectation it would be "*very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation*" (page 1124B). It was said that detrimental reliance could be relevant (i) as part of the evidence establishing the existence or the extent of the expectation; and, (ii) to the decision of the authority whether to revoke the representation.

76. Finally, recognising that policy can change there is still a duty on the decision maker to weigh up the competing interests. There is no unfettered right to change policy

(even for good reason) without putting those good reasons into the melting pot with the other countervailing reasons favouring retention of the policy and forming a rounded assessment of where the balance lies: See *Ex P Coughlan* (ibid) at paragraph [89] - the authority must "*weigh the conflicting interests correctly*".

(iii) Analysis

77. How do these principles apply in the present case? I address this in two stages. First, the existence of the legitimate expectation; and secondly, the countervailing policy justification said by the Secretary of State to justify frustrating the expectation, if it exists.

(a) Legitimate expectation

78. In my view no legitimate expectation arose in this case. The reason why, in my judgment, there could never be an expectation in this case is that the LCF represented a systemic risk that all operators must be taken to have accepted when they sought support under the RO scheme. The risk was that if uptake for support led to increases in expenditure beyond the agreed HM Treasury limits then the scheme might (or even would) be curtailed in order to bring expenditure back under control. As such no operator could expect that the system would inevitably or necessarily last until 2017. Put another way, the highest that the legitimate expectation can be put is that the scheme would not be closed <u>absent</u> an increase in expenditure under the scheme which would put the Treasury cap at risk.

79. This is in my view clear from the LCF itself – analysed at paragraphs [11] – [14] and [62] above.

80. Furthermore, on 8th December 2011 DECC published a document ("*Control Framework for DECC levy-funded spending: Questions and Answers*") which addressed specifically what would happen if overall scheme expenditure exceeded the LCF cap and which explained that in such circumstances DECC would have to act (it could not tolerate such a state of affairs) and that action would be designed to bring spending back under control and it recognised that this action might involve amending the existing regulations.

> "Q. Under what circumstances will there be policy changes as a result of this framework and will industry be consulted on policy changes?
>
> Where a policy is forecast to overspend against the envelope, DECC will have to develop plans to bring spend back within the cap, taking into account impact on energy bills and progress towards our targets. How and how quickly these changes are implemented will depend on the various factors pertaining to the policy at the time; however, DECC will follow all required procedures such as statutory consultation and Parliamentary scrutiny".

81. And:

> "Q. What happens if DECC thinks spend might be on course to exceed its envelope?
>
> If we think that spend might be on course to exceeding its envelope (either in the short term or at some point in the future) we will consider making an adjustment to the policy, taking into account the impact on energy bills and progress towards our targets. Decisions on adjustments will be taken by Ministers at the appropriate time and will be judged on a case by case basis. A core principle through all of this is that the Government policy is to maintain support levels for those existing investments where we have said we would and not to make retrospective changes for these investments.
>
> If Ministers take a decision to adjust a policy DECC will follow statutory and other required procedures. "

82. In my view it is clear that any person seeking RO scheme support either knew, or must be taken to have known, that the continued currency of the scheme depended upon RO scheme expenditure not "*exceeding its envelope*". And any operator who wished to work out what the envelope referred to could easily have discovered that it meant the cap imposed by HM Treasury.

83. I need now to consider the qualification that the Government would maintain support levels for existing investments, which was described as a "*core principle*" (set out in paragraphs [11] – [14] above). I accept Mr Palmer's submission to the effect that this refers to the grandfathering of levels of support that already applied to an existing accredited investment. A person obtains "support levels" for existing investments when they are accredited, not before. It did *not* apply to investments made which, as yet, had attracted no support because they were yet to be accredited.

84. Further, and setting aside all questions of budgetary discipline, whilst there was no doubt that security and stability of the investment environment was a very important component of the Secretary State's policy, that policy was still multi-faceted and incorporated the striking of a balance between that objective and: the policy of encouraging other renewable technologies which implied ensuring the availability of funds to support a diverse range of schemes; the need to maintain sufficient funds to support the CfD regime which would replace the RO scheme; and, the objective of limiting and reducing consumers' bills. The Claimant's case assumes that the objective of securing a stable investment environment was an immutable one and operated to the exclusion of all else. However, once it is understood that the overall, guiding, policy contained a number of different objectives not all of which could be achieved simultaneously without mutual compromise, it is far easier to understand why operators of one particular type of renewable energy could not entertain an unshakably secure expectation that come what may their particular type of generation would under all circumstances be protected at the expense of other types of generation, consumers, and the public purse.

(b) Policy reasons for frustrating the expectation

85. In any event even if I am wrong in my conclusion that no legitimate expectation arose, on the facts of this case it seems to me that the Secretary of State was justified in frustrating such expectations and to do so was not an abuse of power. I can summarise my reasons for this quite shortly.

86. First, the countervailing public interest flows in large measure from the macro-economic imperative need for the Government to impose its austerity budgetary discipline across all spending departments, which of course includes DECC. If DECC could not pray in aid of a change in policy its requirement to adhere to HM Treasury rules then it is hard to see why any other Government department would feel constrained to remain within the budgetary thresholds and limits imposed upon it. The right of HM Treasury to impose and demand adherence to the LCF is not challenged in this case and, in my view, is a public interest consideration of the highest order. Accordingly, when there was a material change of circumstance and the LCF disciplines kicked in this was a powerful reason why DECC was entitled to alter its policy.

87. Secondly, adherence to the LCF is not just important from the perspective of budgetary discipline *across* Whitehall it is also important *within* DECC. DECC has to balance priorities within a limited budget. There will always be winners and losers amongst those whose activities fall within its remit. If more (unanticipated) money is spent on solar PV then less can be spent on other forms of energy generation, including renewables generation, or upon other objectives which may be equally, or possibly more, important. This in addition is a good and sufficient reason for DECC changing its policy.

88. Thirdly, there is the consumer and business element. In this case the October 2014 Impact Assessment quantified the global consumer and business dis-benefit and calculated a *per capita* cost. This is between £2-5 for consumers *per annum* and c. 1% *per annum* increase for businesses in electricity costs (see paragraph [36] above). I do not accept Mr Fordham QC's submission that sums of this order are to be treated as trivial. In my view the harm to a relatively small number of generators who suffer stranded investment is to be viewed in the context that their burden saves every consumer across the jurisdiction a small but certainly not trivial (in particular for numerous individuals on low income) sum of money and businesses from a not immaterial cost of fuel increase. At the very least I consider that this is a perfectly legitimate point for the Secretary State to feed into his mix of justifications for the policy change.

89. Fourthly, the Secretary of State did conduct an overall balancing exercise between the conflicting interests. He looked at costs and benefits in the round. He adopted a fair procedure and took into account the concerns of those likely to be adversely affected. He tailor made the rule changes on grace periods to draw what he assessed to be a reasonable dividing line between those whose pre-accreditation investments would be protected and those whose investments would not and hence he took account of detrimental reliance. He took account of the fact that there was an indeterminate class of persons who might be affected but that on the other side of the balancing exercise were large but difficult to define groups.

90. For all of these reasons I consider that <u>even if</u> there were a legitimate expectation which arose it was amply offset by the powerful public interest considerations on the other side of the equation and the frustration of that expectation is not, nor comes close to being, an abuse of power.

F. Issue IV: Whether the new scheme is retrospective and unlawful.

(i) The issue

91. I turn now to the fourth way in which the Claimants put their case. It is submitted that the grace periods whereby pipeline operators, who have yet to be accredited, may acquire continued support under the RO scheme if they meet certain conditions by a date, which has already passed, is unlawful. It offends the principle of non-retroactivity and is in any event unfair.

(ii) The relevant test in law: The sliding scale of fairness

92. Mr Palmer, for the Secretary of State, cited "Bennion on Statutory Interpretation – a Code" (6th ed.) where the authors distil the essential principle governing the law on retrospectivity to simple fairness: "*The essential idea of a legal system is that current law should govern current activities*" (page 291); and "*If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law*". Citing authority the authors conclude that the basis of the principle against retrospectivity is "*no more than simple fairness, which ought to be the basis of every legal rule"* (page 292). Code rule 97 entitled "Presumption against retrospective operation" is: "*Unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation*".

93. A somewhat quizzical rider, which in fact resonates on the facts of this case, is also posited (page 293): *"… some judges have suggested that the presumption does not apply in relation to an executive statement of policy as to the future exercise of statutory or prerogative powers"*. And then the following is stated:

> "It is important to grasp the true nature of objectionable retrospectivity, which is that the legal effect of an act or omission is retroactively altered by a later change in the law. However, the mere fact that a change is operative with regard to past events does not mean that it is objectionably retrospective. Changes relating to the past are objectionable only if they alter the legal nature of a past act or omission itself".

94. The central thesis – that fairness is the lodestar of analysis - is reflected in the judgment of the Court of Appeal in *Secretary of State for Energy and Climate Change v Friends of the Earth* [2012] EWCA Civ 28 where the Court upheld the earlier judgment of Mitting J (at [2011] EWHC 3573 (Admin)) who struck down a renewable energy scheme upon the basis that an adverse alteration to rates of return for those operators who had <u>already</u> been accredited and had relied upon the higher rate operative upon accreditation, was unlawful as offending the presumption against

retrospection. Both Mr Fordham QC and Mr Palmer relied upon the judgment of the Court of Appeal in this case in various ways.

95. Lord Justice Moses, in the Court of Appeal, identified that the reason why this was a case about retrospection was because it changed the rule for those who were already accredited under the scheme:

> "10. However, the proposal to apply the April 2012 reduced rate to installations becoming eligible before that date created consternation. Proceedings were launched by those involved in the supply and installation of small-scale solar PV installations, and by Friends of the Earth championing a large number of community organisations, such as social housing schemes, village halls and schools. Their concern stems from the fear that the Secretary of State asserts a power to modify the system they believed had been established, a system which fixed the rate of return for the generating life of the installation (subject to a maximum period). In its place they fear that the Secretary of State wishes to substitute a system which is capable of reducing the rate of return *even in respect of installations which have previously become eligible for payment*."
>
> (emphasis added)

96. He then explained why this was pivotal to resolution of the appeal:

> "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, subject to an adjustment in accordance with RPI. That the Scheme provides for a fixed rate of return during the period of generation is crucial to resolution of this appeal. Identification of the concept of a fixed rate does not depend upon any Explanatory Note, although those notes underline that concept. The fixed return to the owner assured by the Scheme was rightly described by Mr Grodzinski as analogous to the fixed rate of return on a Government bond.
>
> 41. The structure of the Scheme fixes the rate by reference to the year the installation became eligible for payment. It does not provide for a rate which may fluctuate according to the yearly decisions of the Secretary of State, irrespective of the year when the installation became eligible. 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. In accordance with the Scheme, as I have analysed it, an owner whose solar PV installation becomes eligible for FIT payments in FIT Year 2, is entitled to the rate identified in the FIT Payment Rate Table for a maximum period of 25 years. He is entitled to payment at that rate on request to the Licensee. That entitlement arises on the eligibility date. 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."

97. Having indentified that the scheme was retrospective Lord Justice Moses explained how the presumption against retroactivity operated, linking this to the principle of fairness:

> "44. In *Wilson v First County Trust Limited* (No. 2) [2004] 1 AC 816 [19] Lord Nicholls adopted the principle expressed by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712 at 724:-
>
> > "The true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."
>
> That underlying standard of fairness was invoked by Lord Rodger (196). He sought to steer the courts away from application of what he described as "the somewhat woolly label of 'vested' rights". [196]
>
> 45. Lord Rodger drew a distinction between the retroactive operation of legislation and prospective changes to existing rights. Retroactive changes change the law in relation to events which have taken place in the past [187]. Retrospective changes alter existing rights, but only in relation to the future. The presumption against altering vested rights in the future is

> weaker than in relation to retroactive change [195]. The proposed changes in respect of installations becoming eligible before the modifications come into effect do not neatly fall into either category. They are more akin to the category of prospective change. Nonetheless, anyone choosing to achieve eligibility in relation to installation between 12 December 2011 and 1 April 2012 gains a right to a fixed rate by reference to FIT Year 2 for 25 years.
>
> 46. Although it is weaker, there remains a presumption against the alteration of existing "vested rights", that is, those rights which, once acquired, fairness demands should not be altered. Such rights are described by Lord Herschell in *Abbott v Minister for Lands* [1895] AC 425 at 431, as those of which a beneficiary has availed himself before the law is changed [196]."

98. The importance to the outcome of the appeal of the fact that the Claimants were operators who had already received accreditation was laid out in paragraph [50]:

> "50. I should re-emphasise that there is plainly power by modification of the original modification to vary fixed rates in respect of installations which become eligible only after any modification comes into effect. But this case is concerned with a retrospective alteration to a fixed rate".

(iii) Application of the fairness test to the present case

99. How do these principles apply to the present case? The first task is to determine whether there is <u>any</u> element of retrospection in the case before me and then, secondly, I need to decide whether the manner in which the Government has acted is fair.

100. First, in my view there is *some* degree of retrospection; however, it sits at the least objectionable end of the scale. The present case is distinguishable from *Friends of the Earth*. Here the Claimants are companies who will suffer stranded investment if the Decision is implemented in its present form. They have embarked upon the road to accreditation but have <u>not</u> yet got there and the new conditions would leave them with projects that they have already invested in but which will not be sufficient to qualify for what the Secretary of State defines as "significant" investment. However, their position is, for these very reasons, not comparable to that of the Claimants in *Friends of the Earth* where the complainants were accredited and had a form of accrued right which was being undermined by the change in policy.

101. I accept however that this is not decisive against the Claimants. There is a degree of retrospection that applies to them in that when they embarked upon their present investments they thought they could plan the pace of expenditure in such a way that they would, in due course, become accredited before the 2017 closure date. I accept therefore, having read the Claimant's Witness Statements, that the change in the rules has exerted a retrospective impact which is more than *de minimis*.

102. I therefore have also to consider whether the grace periods are unfair. Mr Fordham put his case in two ways. First, by analogy with *Friends of the Earth*. But secondly, more broadly, upon the basis of fairness. He submitted in this latter respect that (even if not four square with *Friends of the Earth*) there was still an element of retrospection about the Decision since it changed the rules of the game after his clients had started to play it. He accepted that they had yet to achieve accreditation but said that this was not determinative. He submitted that his clients were unfairly denied a chance to comply with the rules in the way in which they would have done had the scheme remained in force. He added further that, in the circumstances of the case, the Decision was unfair in that it also made the date for compliance with the conditions for eligibility to the "grace" period a date which had already past. He placed particular reliance upon the fact that the Secretary of State conceded that his Decision would, inevitably, leave some operators who were in the process of seeking accreditation with stranded investments which were more than *de minimis.* He submitted that all operators should be given a chance to meet conditions for a period which runs into the future and in principle should equate to the day upon which the new Regulation (implementing the Decision) comes into force.

103. Mr Palmer, for the Secretary of State, rejected the submission that there was any element of retrospection, as that concept was understood in public law. He submitted that the Decision preserved the rights of those who were accredited (and hence avoided the vice in the scheme condemned by the Court in *Friends of the Earth).* His basic point in relation to the grace periods was simple: the Secretary of State had addressed his mind to the legitimate interests of "*pipeline*" operators; he had accepted that they were due some degree of protection; he had consulted over the conditions precedent for qualifying for "grace"; he had listened carefully to the criticisms made of the earlier proposed conditions and had taken on board many such criticisms. He had to draw the line somewhere in order to achieve a balance between preserving investments for pipeline operators but also protecting the financial viability of all of the other commitments that the Secretary of State had in other areas and that in the circumstance he had drawn the line fairly. Given all of these factors this was not (remotely) a case where the Court should interfere.

104. In my judgment this is a case where there is some (modest) element of retrospectivity and I hence need to apply a basic fairness or rationality test which takes into account the level of retrospection which applies. As to this there are three main points to make. First, the Defendant has addressed himself to all relevant considerations; it cannot be said that he has overlooked a relevant matter since he has explicitly identified the plight of pipeline investors and has sought to address their difficulties. Secondly, it also cannot be said that he has violated a procedural standard; he consulted on the conditions for the grace period and it can be seen that he took account of the criticisms made. Accordingly two of the normal routes for challenge do not arise. Thirdly, the Secretary of State has sound reasons for wishing to apply the rules in this fashion. I rely upon but do not repeat the policy matters set out in relation to legitimate expectations above at paragraphs [85] – [90].

105. In this context I am also unable to accept the two final strands of Mr Fordham QC's submission. First, I do not accept that a cut off point of May 2014 was unreasonable. This coincided with the date of the consultation. Had a further period of time been given for operators to prove compliance with the stated conditions then this would

have risked what counsel both referred to as the "*gold rush*" i.e. that many and various operators would rush to fulfil the criteria for accreditation before the new deadline. The Defendant addressed himself in the Decision explicitly to the likely cost of a gold rush (see Decision paragraph [1.35]) and computed that extending the grace period eligibility date into the future would add £110 – 120 million per annum to costs from 2016/17 onwards. If the Minister had proceeded down this route he would have had to give a period of time for compliance that was meaningful and not merely a fig leaf and accordingly the risk of a gold rush could not be ignored. Mr Fordham QC did not seriously demur from the proposition that the need to avoid the gold rush risk was a genuine concern. In my judgment the choice of the May 2014 deadline was within the legitimate discretion of the Minister to adopt.

106. Secondly, I do not accept that the threshold for protection should have been devised to protect *any* investment which was more than *de minimis*. I accept that it was within the Minsters legitimate discretion to draw a line and to identify what, in his view, was a "significant" investment. He adopted a fair procedure to arrive at this conclusion and there is no glaring illogicality or error in the conditions adopted. There might well be hard cases which fall on the wrong side of the line but this simply reflects the fact that resources are limited and in drawing the line where it has been drawn, and not at the *de minimis* threshold, resources will be freed up to the Secretary of State to allocate elsewhere.

107. In my judgment the grace periods are "*fair*" and the challenge upon the basis of retrospection fails.

G. Conclusion

108. The points which have arisen in this case are serious and are arguable. I therefore grant permission to apply for judicial review. However, for the reasons given, the application for judicial review is dismissed.