Neutral Citation Number: [2016] EWHC 2782 (Admin)

Case No: CO/1461/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/16

Before :

MR JUSTICE HICKINBOTTOM

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Between :

THE QUEEN ON THE APPLICATION OF
(1) ATHOS SOLAR GmbH
(2) SOLAR FRONTIER EUROPE GmbH
(3) LAKE ENERGY LIMITED
(4) SUN4NET LIMITED

Claimants

- and -

THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Defendant

- -
- -

Simon Murray (instructed by **Prospect Law Limited**) for the **Third Claimant**
Jennifer Thelen (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 1 November 2016

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Approved Judgment

Mr Justice Hickinbottom :

1. This claim concerns the consultation response of the Secretary of State for Energy and Climate Change published on 17 December 2015 entitled "Government response to consultation on changes to financial support for solar PV: Controlling spending on solar PV projects of 5MW and below within the Renewables Obligation" ("the December 2015 Consultation Response"). The consultation sought views on, amongst other things, the Secretary of State's proposal that, in the context of the withdrawal of Government subsidies from new small-scale solar photovoltaic ("PV") schemes, the evidence required to establish eligibility for grace periods, designed to protect projects not on stream by the cut-off date but in respect of which significant financial commitments had been made, should include evidence of the submission of a planning application on or before 22 July 2015, the date on which the consultation was launched. The December 2015 Consultation Response purported to clarify that requirement as being the submission of a *valid* planning application. In this claim, it is said that that was not clarification but, in substance, a change in the requirements; and the Secretary of State's decision to insist on that requirement was unlawful.

2. On 18 July 2016, Langstaff J refused permission to proceed with the claim, and I have before me now a renewed application.

3. Two preliminary points as to the parties. First, from July 2016, the functions of the Secretary of State for Energy and Climate Change were transferred to the Secretary of State for Business, Energy and Industrial Strategy, who is now the Defendant. Second, the Claimants are all members of the small-scale solar PV supply-chain. The First, Second and Fourth Claimants have formally discontinued their claim, leaving Lark Energy Limited ("Lark Energy") as the only extant Claimant. Simon Murray of Counsel has pressed the renewed application for permission to proceed on its behalf.

4. By section 1 of the Climate Change Act 2008, the Secretary of State is required to ensure that carbon emissions are reduced by at least 50% by 2050, using a baseline of 1990. In pursuit of that obligation, the Secretary of State put into place a number of subsidy schemes intended to support the generation of electricity by means of private-sector investment in renewable technology. From March 2011, those schemes operated under the umbrella of the Levy Control Framework ("LCF"), a policy issued by HM Treasury setting limits on the costs of the Secretary of State's levy-funded policies to ensure that the "fuel poverty, energy and climate change goals [are achieved] in a way that is consistent with economic recovery and minimising the impact on consumer bills."

5. One such scheme was the Renewables Obligation Scheme ("the RO Scheme", established by Order of the Secretary of State under section 32 of the Electricity Act 1989, which placed a "Renewables Obligation" ("RO") on UK electricity suppliers to source an increasing proportion of the electricity supplied from renewable sources. The scheme was administered by the Office of Gas and Electricity Markets, which issued Renewable Obligation Certificates ("ROCs") to generators who sold them to suppliers in return for a premium on the wholesale price of their electricity. Suppliers

who failed to demonstrate compliance with the certificates were required to pay a penalty. The Government has acknowledged an obligation to projects within the scheme until 2027.

6. There is a statutory obligation to consult (amongst others) electricity suppliers and generators of renewably sourced energy before making or closing an Order made under section 32 of the 1989 Act (see sections 32L and 32LB).

7. In December 2010, the Secretary of State issued a consultation document entitled "Electricity Market Reform", which proposed closing the RO Scheme to new solar PV projects, in favour of long term contracts in the form of a Feed-in Tariffs Scheme; but projects that were already accredited under the RO Scheme as at 31 March 2017 would continue to be supported at the rate of subsidy applicable as at that date. Grace periods were identified for projects that had commissioning dates on or close to 31 March 2017. Following consultation, those proposals were implemented in the Renewables Obligation Closure Order 2014 (SI 2014 No 2388).

8. However, on 13 May 2014, the Secretary of State published a further consultation paper entitled "Consultation on changes to financial support for solar PV", which proposed an earlier closure date for solar PV projects of more than 5MW, namely 1 April 2015, because large-scale solar PV was deploying at a much faster rate than expected, as a result of which there was a prospect that the annual limit on the overall costs of levy-funded policies would be exceeded. The proposals included a grace period to protect developers who had already made "a significant financial contribution to projects" (paragraph 23 of the consultation paper), and could provide specified evidence that they had satisfied that condition, including "relevant planning consents dated no later than 13 May 2014" (i.e. the date of the start of the consultation) (paragraph 33(b)). By requiring specific evidence, the Secretary of State effectively defined what she considered to be "a significant financial contribution" for these purposes.

9. The Secretary of State published her response to that consultation on 2 October 2014. In line with the proposals, she determined to close the RO Scheme to solar PV projects of over 5MW from 1 April 2015 with provisions for a grace period largely as proposed, but with some changes to the required evidence of significant financial commitment to a project, notably replacing the requirement for planning permission by 13 May 2014 with a requirement that a planning application must have been submitted by that date.

10. In taking those decisions in respect of large-scale projects, the Secretary of State indicated in her consultation response that she would continue to monitor the small-scale solar PV deployment pipeline; and, if that indicated that deployment was growing more rapidly than could be afforded, she would consider taking further measures to protect the LCF (paragraph 1.21). The decisions taken in that response concerning large-scale projects were implemented in the Renewables Obligation Closure (Amendment) Order 2015 (SI 2015 No 920).

11. The decision to close the RO Scheme to new large-scale projects in 2015 was the subject of a judicial review challenge in this court, in which Lark Energy was involved. Four grounds of challenge were raised, including the contentions that the closure as made was bad for retrospectivity and it frustrated the legitimate expectation of (amongst others) those in the supply chain such as Lark Energy. The claim was dismissed by Green J (R (Solar Century Holdings Limited) v Secretary of State for Energy and Climate Change [2014] EWHC 3677 (Admin)), whose judgment was upheld by the Court of Appeal ([2016] EWCA Civ 1177). Mr Murray appeared as Junior Counsel for the claimants/appellants in that case.

12. Following monitoring, it appeared to the Secretary of State that solar PV deployment through smaller scale projects was at a significantly higher rate than that expected in 2014. On 22 July 2015, she published a further consultation document entitled "Consultation on changes to financial support for solar PV" ("the July 2015 Consultation Document"), which proposed the early closure of the RO Scheme to new projects of below 5MW on 1 April 2016. She proposed to "offer grace periods equivalent to those offered when the RO was closed to new solar PV capacity above 5MW". The proposed grace period criteria incorporated a requirement for evidence of a "significant financial commitment", including:

> "Confirmation that a planning application had been received by the relevant planning authority in respect of the project no later than 22 July 2015 [i.e. the date of the start of the consultation] or a declaration that planning permission is not required."

Any project that fell within the grace period criteria was to have until March 2017 to be commissioned and linked to the grid.

13. As a result of the publication this response, that day (22 July 2015), a considerable number of applications for planning permission were received by planning authorities for small-scale solar PV projects. Many of these applications were incomplete, with information that did not comply with the requirements for such applications as set out in the various Development Management Procedure Orders and which was insufficient to enable the authority to determine the application (see, e.g., paragraph 9 of the statement of Tom Luff dated 24 May 2016: Mr Luff was, at the relevant time, the Head of the Renewables Programme Team at the Department of Energy and Climate Change). On the evidence before me, it seems that developers considered that they "were left with little choice" but to lodge applications for planning permission, even if they were not ready with complete applications, because of the deadline proposed and because many of the projects would not be financially viable without the RO subsidy (see, e.g., paragraph 21 of the statement of Jonathan Green dated 16 March 2016: Mr Green is the Claimants' solicitor).

14. The Secretary of State published her response to the consultation on 17 December 2015, in which she announced her decision to close the RO Scheme to new solar PV generating stations of 5MW or below from 1 April 2016, with grace periods "in line

with those provided for solar PV projects above 5MW" (paragraph 13). She explained (at paragraphs 70 and 74):

> "70. Indeterminate responses focused on the planning evidence and in particular clarity on when a planning application is received after local planning authorities experienced a number of invalid/incomplete applications being submitted on 22 July following the publication of the consultation document. Clarity was also sought on what constituted the date of receipt of a planning application which is subsequently modified following discussion with the local planning authority.
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> …
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> **Post-consultation decision**
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> 74. Evidence from the consultation suggests that a number of invalid or incomplete planning applications were made on 22 July 2015 following publication of the consultation document. The Government has therefore decided to clarify that the requirement is for evidence of a valid planning application as set out in the planning legislation across Great Britain…."

15. By way of explanation, the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015 No 595), the Town and Country Planning (Development Management Procedure) (Wales) 2012 Order (SI 2012 No 801: W110), and the Town and Country Planning (Development Management Procedure) (Scotland) Order 2013 (SI 2013 No 155) set out the requirements for a planning applications throughout the United Kingdom. The Orders are materially similar, for the purposes of this claim. By way of example, I shall refer to the Order that applies in England ("the DMPO"). Part 3 of the Order sets out the general requirements for planning permission applications, which are mandatory (see, e.g., article 7: "… an application for planning permission must…").

16. A "valid application" is defined in article 34(4) as one which complies with the various statutory requirements, which include the payment of a fee and requirements imposed generally by local planning authorities. Where an application fails to comply with those requirements, it is "invalid", unless the applicant has served a notice on the relevant authority that, in relation to the application, it has made a request for particulars or evidence that is unreasonable, in which event the application is described as "non-validated" (articles 11(6), 12(1), 34(5) and 34(6)).

17. Where an application is invalid, the authority is under no obligation even to acknowledge it (see article 11(2)), yet alone determine it. What happens in practice, is that an authority will usually acknowledge an application before examining it to determine whether it is valid or not; and the relevant acknowledgment form (which is

prescribed by schedule 1 to the Order) caters for that very circumstance. Where such an acknowledgment is sent, the authority is required to notify the applicant that the application is invalid, once they have considered it and come to the view that it is invalid (article 11(5)).

18. The validity of a planning application is therefore a well-recognised planning concept.

19. The amended RO Scheme closure dates for small scale solar PV projects were effectively implemented on 24 March 2016, by the Renewables Obligation Closure Etc (Amendment) Order 2016 (SI 2016 No 457).

20. Lark Energy challenges the decision of the Secretary of State to impose the condition that, for the grace period provisions to any small-scale solar PV project, there should been an evidenced *valid* planning application on or before 22 July 2015. It relies upon five grounds set out in its original claim, as expanded in its response to the Secretary of State's Summary Grounds, its Renewal Notice, the statement of Michael Joe Temple (Lark Energy's Planning and Project Manager) dated 25 October 2016, and by Mr Murray in his skeleton argument and oral submissions today. I shall deal with the grounds in turn.

21. First, it is submitted that the Secretary of State erred in failing to reconsult upon the grace period provisions, which were modified from those in the consultation by the restriction of planning applications made on or before 22 July 2015 to those which were, in the event, valid. It is said that, in respect of restricting the criterion to evidence of a *valid* planning application, the December 2015 Consultation Response represented a "material change to announced and previously enacted policy with a clear, obvious and significant effect" (paragraph 99 of the Claimant's Statement of Facts and Grounds). The changes were significant, and certainly had a significant effect upon Lark Energy and other developers who had lodged planning applications that were incomplete and thus not valid by that date for projects which, without the subsidy granted by the RO Scheme, would not be financially viable. As a result, they have made a significant financial commitment towards those projects which has been lost.

22. I do not consider that this ground has any force.

23. I am unpersuaded that an invalid planning application is, as a matter of law, properly called a planning application at all; and that, therefore, there was no material difference between the proposal upon which the consultation was made and the Secretary of State's final decision which is challenged: the Secretary of State did not err in law by making explicit that which was already implicit.

24. In his recent statement to which I have already referred, Mr Temple says that "at the time of submission a planning application is neither valid not invalid", the question of whether of validity being decided by the Local Planning Authority (paragraph 5). However, that is not evidence, but a legal submission; and, with respect to Mr

Temple, it is a submission of no legal force. "Validity" here is a legal status. The Development Management Procedure Orders effectively define "validity" in terms of compliance with the relevant statutory requirements, including those in the Orders themselves. An application is "valid" if it complies with those requirements. It is "invalid" if it does not. A validity decision by a planning authority does not change or impose a status on an application; it merely declares what it (the authority) considers its existing status to be. If it is wrong, then there is a procedure whereby it can be appealed. The analysis engaged by Mr Temple – that a planning application is neither valid or invalid until the planning authority makes a "validity decision" – is simply wrong.

25. Before me today, Mr Murray has sought to support that analysis by reference to article 11(6)(b) of the DMPO, which defines "invalid application" in this way:

> "an application is invalid if it is not a valid application within the meaning of article 34(4) or it is not a non-validated application within the meaning of article 34(5)."

As I have described (see paragraph 16 above), article 34(5) defines "non-validated application" in terms of an application in respect of which the applicant has served a notice on the relevant authority under article 12(1)(b) that, in relation to the application, it has made a request for particulars or evidence under article 12(1)(a) that is unreasonable.

26. Mr Murray submits that the Secretary of State erred in the December 2015 Consultation Response by proceeding on the basis that an application is either "valid" or "invalid". There is, he said, a *tertium quid*, namely a "non-validated application". By "clarifying" that "application" meant "valid application", she therefore excluded more than "invalid" applications.

27. However, I do not consider that the existence of "non-validated applications" assists the Claimant's cause. As its heading ("Validity disputes") indicates, article 12(1) is concerned with disputes as to whether an application, as it stands, is or is not valid, an authority not being able to make an otherwise valid application into one that is invalid by making an unreasonable request for particulars or evidence. In my view, it does not undermine the dichotomy between valid applications (those that comply with the relevant statutory requirements) and invalid applications (ones that do not) inherent in the scheme.

28. Lark Energy had two projects for which, at the time of the 22 July 2015 cut-off date, planning applications had been lodged that were incomplete and therefore invalid. Details of these are provided by Mr Temple in his statement of 25 October 2016.

    i) The first in time was a project at Bilsthorpe, Nottinghamshire, in respect of which an application form, module layout and location plan were lodged with the relevant local planning authority on 7 July 2015; but the rest of the application (eleven documents, including several vital planning statements and

assessments) was not lodged until 12 August 2015. The application was validated on the basis of the documents then lodged.

ii) The other was a project at Rolleston-on-Dove, Derbyshire, in respect of which the application form and four other documents were lodged on 22 July 2015; but the rest of the application (seven documents, again including those that were crucial in planning terms) was not lodged until 24 August 2016. Again, that application was validated on the basis of the documents then lodged.

29. As Mr Murray conceded in debate, given the commercial advantage of progressing projects as quickly as possible in any event, it can properly be assumed that the applications for planning permission for such projects would be lodged as soon as they were complete and ready to lodge. It can therefore safely be assumed that the applications in respect of these two projects were not sufficiently advanced by 22 July 2015 to make complete (and, therefore, valid) applications. To have allowed these projects to fall within the grace period would therefore not have been in accordance with the policy intention of the Secretary of State. What happened here is that, on 22 July 2015, developers put in planning applications which they knew – or should have known – were incomplete and invalid, with a view to defeating, not complying with, the Secretary of State's tolerably clear policy. I shall return to this topic when I deal with Ground 2.

30. Mr Murray submits that, as a result of the July 2015 Consultation Document, Lark Energy "modified its market behaviour", i.e. it continued to prepare, and spend money on, the project that it had which was the subject of a pre-22 July 2015 invalid planning application. However, in my judgment, that was, at its highest, Lark Energy taking steps at its own commercial risk. Those who operate in a commercial sphere do so knowing that Government policy affecting their business may change – and may change so as to adversely affect their commercial interests. Again, this is a matter to which I shall return when I deal with Ground 2.

31. For those reasons, I do not consider that the December 2015 Consultation response was different from the July 2015 Consultation Document; and there was nothing material upon which the Secretary of State could consult.

32. However, even if, contrary to my view, the Secretary of State's decision did amount to a change from the proposal upon which the consultation proceeded as Mr Murray submitted, that does not mean that she was bound to reconsult. I do not accept Mr Murray's submission that Lark Energy (and others in the same position) were "obliged to act upon the policy as announced on 22 July 2015". It is not true to say that the December 2015 Consultation Response was a "material change to announced and previously enacted policy". The consultation document did not "announce" or "enact" a policy. It set out a proposed, preferred policy option upon which the Secretary of State was consulting not implemented, policy. There is a substantial difference.

33. It is inherent in the nature of consultation that the decision-maker who performs it will take into account comments submitted in response to it; indeed, the decision-maker errs if he or she does not do so. Consequently, the proposal may be clarified, or changed, as during the consultation process. It is well-established that there is no requirement to reconsult merely because a decision-maker's views have changed as a result of further evidence provided in the original consultation (see, e.g., R (Smith) v East Kent Hospital NHS Trust [2002] EWHC 2640 (Admin) at [57]): the need to reconsult only arises where there is a fundamental change that would make it conspicuously unfair to proceed with further consultation (see, e.g., Smith at [45]; and R (Bucks County Council) v Secretary of State for Transport [2013] EWHC 481 (Admin) at [386], approved in HS2 Action Alliance v Secretary of State for Transport [2013] EWCA Civ 920 at [102]). The change here – if any change there had been – was unarguably not fundamental or significant, when seen in the context of the policy as a whole; and was not of such a nature as to require the Secretary of State to reconsult upon it because, for her not to have done so, would have rendered the procedure conspicuously unfair. Lark Energy and other developers had every reasonable opportunity to comment upon the scope of the grace period criteria; and, in my judgment, given that a number of local authority consultees raised concern about the status of invalid planning applications as a result of the "gold rush", it was open to the Secretary of State to proceed on the basis that only valid applications counted, even if that were a change in stance, without the expense, delay and inconvenience involved in reconsulting.

34. For those reasons, I do not consider the first ground to be arguable.

35. Second, it is submitted that the imposition of the condition was irrational, as it was not consistent with the stated aims of the Secretary of State, namely to protect projects in which significant investment has been made and to safeguard the LCF. The Impact Assessment set out the aims of the Secretary of State's policy to be to "limit projected spending under the Renewables Obligation, while not harming projects that have already made significant financial commitments. This is to limit the impact on the LCF of significantly greater solar deployment than previously anticipated".

36. However, as I have indicated, it is inherent in the nature of consultation that the decision-maker will take into account responses to the consultation. Here, the responses from several planning authorities indicated that there had been a "gold rush" of planning applications on 22 July 2015, many in an incomplete state. As a result of that evidence, it was open to the Secretary of State to clarify the grace period criteria, or indeed to change them, to ensure that her policy was properly understood and implemented. I do not accept Mr Murray's submission that the difference between a valid and invalid planning application "is an administrative distinction that was not material in the circumstances". It was the Secretary of State's policy to define "significant financial commitment" in terms of the progress that the planning process had reached in respect of a particular project, i.e. that the matter had reached the stage when a properly constituted planning application had been made. It was clearly open to her to define the relevant criteria in that way. To do so was not

arguably irrational or arbitrary. That is so, even if the policy meant some actual or perceived harshness to a developer whose project fell just the wrong side of the line, the line itself of course defining grace provisions designed to ameliorate the harshness of a hard red line cut-off date. It would have undermined that policy to have allowed a project that was not at a stage where a valid planning application could be made to have benefited from the grace period provisions by submitting an incomplete application.

37. The Secretary of State was required to consult upon her proposal; and Lark Energy was entitled to make whatever representations it thought fit to make. Before me, Mr Murray sought to rely upon data showing the benefits of allowing the relevant projects to proceed – but the Secretary of State she was not required to explain with mathematical precision why, as a matter of policy, she considered that the RO Scheme to small-scale projects should be closed in the time scale she had determined. The steps required adequately to protect the LCF were quintessentially a matter of judgment for the Secretary of State, whose task it was to balance the adverse impacts of early closure against its benefits. The argument made – that the decision so adversely affected Lark Energy and other suppliers that it was disproportionate to the point of common law irrationality or perversity – simply has no force.

38. The third and fourth grounds can conveniently be dealt with together. It is submitted that the Secretary of State engendered in Lark Energy a legitimate expectation that the proposals in the 22 July 2015 consultation would be implemented unchanged, and/or that they would be implemented without any retrospective adverse effects for Lark Energy and other suppliers in its position.

39. To some extent, these have been developed as consequences of the first and second grounds. In so far as they are, I have dealt with those grounds, and need not say anything further about them. I shall deal with these additional grounds only in so far as they add anything of substance as discrete grounds.

40. In refusing permission on the papers, Langstaff J said that the retrospectivity ground could not survive the reasoning of Floyd LJ giving the judgment of the Court of Appeal in Solar Century, particularly at [67]-[75]. I agree. In particular, I specifically and respectfully agree with the observation of Floyd LJ at [71], that the changes effected to close the RO Scheme to new large-scale generators with effect from 1 April 2015 were not at all retrospective, as that term is used in public law.

41. In any event, insofar as they have an element of retrospectivity, the argument that they were unlawful cannot, in my view, survive the analysis of Green J at first instance in Solar Century at [100] and following. He explains why the grace periods in respect of closing the scheme to larger scale projects were not less than "fair" (and therefore not unlawful) by analogy to R (Homespun Holdings Limited, Friends of the Earth and Solar Century Holding Limited) v Secretary of State for Energy and Climate Change [2011] EWHC 3575 (Admin), upon which Mr Murray relies before me.

42. So far as retrospectivity is concerned, Mr Murray has been unable to distinguish this case from Solar Century.

43. In my view, the legitimate expectation ground also runs aground on the analysis of Floyd LJ in Solar Century, especially at [49]-[60]. As Laws LJ emphasised in Bhatt Murphy v Independent Assessor [2008] EWCA Civ 755 at [43], it is well-established that the Government is entitled to change or reformulate its policy on any matter when rational grounds exist for it doing so, unless it would amount to an abuse of power by reason of the manner in which it previously conducted itself, e.g. if it has given a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured. There is nothing here that could possibly have amounted to such an assurance to Lark Energy that invalid planning applications would satisfy the relevant grace period criterion.

44. Neither of these two grounds is arguable.

45. Fifth and finally, relying on the judgment of Coulson J in Breyer Group PLC and Others v Department for Energy and Climate Change [2014] EWHC 2257 (QB) at [84]-[86], it is submitted that the relevant decision constitutes an unlawful interference with Lark Energy's rights under article 1 of the First Protocol to the European Convention on Human Rights ("A1P1"), particularly their rights in contracts, goodwill, share value, and the right to accreditation. Paragraph 112 of the Claimants' Statement of Facts and Grounds promises details of the manner in which Lark Energy's rights have been infringed "in due course", but none has been forthcoming.

46. I do not see that this adds anything of substance to the other grounds of claim. In so far as it does, I do not consider the ground has any substance, Lark Energy in effect bearing the commercial risk of the Secretary of State lawfully changing her policy at a time when Lark Energy had committed resources to a project, any possible adverse effect of Lark Energy's human rights being clearly proportionate to the public interest in the policy aims. There is no arguable breach of A1P1 here.

47. Consequently, for the reasons I have given, like Langstaff J – and, essentially, for the reasons he more succinctly gave – I do not consider any of the Claimant's grounds to be arguable; and I refuse permission to proceed with this claim on its merits.

48. In the circumstances, it is unnecessary for me to consider the Secretary of State's submission that, irrespective of merit, this claim has not been brought promptly, and should be refused on grounds of delay alone.