Neutral Citation Number: [2012] EWCA Civ 28

Case No: C1/2012/0023

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
The Honourable Mr Justice Mitting
CO/10734, 11055, 11091/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2012

Before:

LORD JUSTICE LLOYD
LORD JUSTICE MOSES
and
LORD JUSTICE RICHARDS

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Between:

The Secretary of State for Energy and Climate Change	**Appellant**
- and -	
Friends of the Earth and Others	**Respondent**

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Mr Jonathan Swift QC, Mr Paul Nicholls and Mr James Cornwell (instructed by **The Treasury Solicitor**) for the **Appellant**
Mr Sam Grodzinski QC (instructed by **Asserson Law Offices**) for the **Respondent HomeSun Holdings Ltd, Mr Richard Drabble QC** and **Mr Duncan Sinclair** (instructed in house) for the **Respondent Friends of the Earth, Mr Edmund Robb** (instructed by **Prospect Law**) for the **Respondent Solar Century Holdings Ltd** and for **three interested parties,** and **Mr James Burton** for the **remaining interested parties**

Hearing date: Friday 13th January, 2012

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Judgment

Lord Justice Moses:

1. In April 2010 a scheme, known as the FIT Scheme, was introduced to enable electricity supply companies to make payments to small-scale producers of low-carbon electricity. The purpose of the scheme was to encourage members of the public and the community to become involved in the low-carbon generation of electricity by specified types of technology. The system of Feed-in Tariffs (FITs) is designed to provide support and to encourage small-scale low-carbon generators. The sources of such generation were, for example, biomass, wind and solar photovoltaic (solar PV).

2. The Feed-in Tariff comprises two elements, only one of which is relevant to this appeal. The first is a "generation tariff", that is payment for the amount of electricity produced by the small-scale low-carbon generator, even if that electricity is used by the person who generated it. This application for permission (to be followed by an appeal, if granted, which I shall refer to as the appeal) concerns the generation tariff. The second element is "the export tariff" when payment is made for the amount of electricity exported into the grid. That tariff is not relevant to this appeal.

3. The electricity supply companies pay the Feed-in Tariff to generators of small-scale low-carbon electricity accredited by the Gas and Electricity Markets Authority (the Authority). But the cost of the Feed-in Tariff is passed on to all electricity consumers. It triggers raised prices and is, effectively, a subsidy paid by consumers. Such subsidy is controlled by HM Treasury and for that reason there is a budget for the FIT Scheme.

4. At the time the 2010 FIT scheme was initiated the cost of installation of solar PV equipment per unit of electricity generated was high compared with other low-carbon generation technologies. Accordingly, the tariff level was set at a higher level than for other technologies to provide an incentive to generators by such means. The Secretary of State expected a return of about 5% from the installation of such systems. The return was expected to last 25 years, was, for some participants, tax-free, and fluctuated in accordance with the Retail Price Index.

5. By February 2011 the Secretary of State had become concerned that larger small-scale solar PV projects would take a disproportionate amount of the funding available. Accordingly, he announced a consultation in respect of solar projects with generating capacity of more than 50 kW. The consultation was fast-tracked and published on 18 March 2011, with a period for responses which closed on 6 May 2011. The consultation led to changes in the tariff rates in respect of large-scale solar installations with effect from 1 August 2011. I refer to this process of consultation because it led to changes in tariff rates relevant to larger small-scale producers and provides a useful contrast to the consultation with which this appeal is concerned.

6. This appeal is concerned with a consultation published on 31 October 2011. The adoption of solar PV by communities and the public had been unexpectedly successful. In the first 18 months of the FIT Scheme the take-up was almost double that which had been anticipated for the first 2 years. Solar PVs were the largest number of installations under the FIT Scheme. There had been a substantial increase in the months immediately before October 2011 with the rate of increase accelerating in the weeks leading up to publication of the proposals. The costs of installing solar

PV systems had fallen substantially, from about £13,000 to £9,000 for 4kW. In consequence, the tariffs available were providing higher rates of return than the 5-7% anticipated in the consultation document of 2009. The Secretary of State was concerned that solar PV generators would be over-compensated and the FIT Scheme budget would be breached, limiting the availability of funds to other technologies and future generators. In short, the tariffs for solar PVs were threatening the extent to which the FIT Scheme could be afforded.

7. I should emphasise, at this stage, that this appeal is not concerned with the merits of the Secretary of State's proposals. No one has sought to impugn the reasons behind these proposals. But it is the form of those proposals which has triggered these proceedings. There are two linked proposals, only one of which is the subject matter of these proceedings. The consultation period ended on 23 December 2011, the closing date for the receipt of representations. The consultation proposed a new and lower rate of tariff to be paid to solar PV generators which become eligible for payment from 1 April 2012. This proposal is not challenged.

8. The second, linked proposal is the subject matter, and the only subject matter, of this appeal. It is proposed that the tariff rate to be paid in respect of solar PV installations which become eligible for payment on or after 12 December 2011 should be reduced on 1 April 2012. The rate is fixed by reference to the year in which the installation becomes eligible, which at the time of this appeal is 1 April 2011 – 31 March 2012, (known as "FIT Year 2"). But the proposal is to vary and reduce that rate at the end of the current year, not merely in relation to installations becoming eligible after the modifications come into effect but also in respect of those which became eligible in the three and a half months before the modifications are brought into effect. It should be stressed that it is proposed that those installations which became eligible on or after 12 December 2011 will receive the higher FIT Year 2 tariff until the modification comes into effect on 1 April 2012, but thereafter they will receive the new lower rate.

9. The Secretary of State took the view that following publication of the consultation document on 31 October 2011, those who were committed to the installation of a solar PV would have sufficient time, 6 weeks, to complete the installation and satisfy the criteria for eligibility to receive payments. They would receive the higher FIT Year 2 rate of return without any reduction in the rate from 1 April 2012.

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.

11. An urgent hearing took place and Mitting J produced a judgment on 21 December 2011 which lost nothing in clarity by the speed with which it was produced. These proceedings are, in order to respond to the urgency, brought by way of an application for permission to appeal and an appeal against the decision of Mitting J. Mitting J

declared that the respondent's proposal that the April modifications should apply to installations becoming eligible on or after 12 December 2011 (the 12 December "reference date") was unlawful and that any new "reference date" could only lawfully take effect from a date on or after the proposed modifications came into effect.

12. Mitting J reached his conclusion on two linked bases: first, that the reference to a date earlier than the date on which the modification was proposed to come into effect was not calculated to further the statutory purpose of the Energy Act 2008 (the 2008 Act); second, that it was *ultra vires* the Secretary of State's powers to make a modification which had a significantly adverse impact on those proposing to install small-scale solar systems before the date on which the modification was made and came into effect.

13. It is important to underline the scope of this application for permission and appeal. The instant proceedings are concerned only with those who have installed or were contemplating installing solar PVs between 12 December 2011 and 1 April 2012. The proceedings are *not* concerned with the legality of introducing a lower rate of tariff for installations becoming eligible after the modifications come into effect. Moreover, these proceedings are not concerned with the legitimate expectation of those either committed to or contemplating installation prior to 1 April 2012. The Secretary of State has taken the view that that which prompted his concern was so urgent that it was necessary to avoid an even greater surge in installation of solar PVs up to the period the modifications come into force. There is much dispute as to whether the period of 6 weeks he has allowed for completion is realistic. Graphic evidence has been adduced as to the deleterious effect of the announcement.

14. But, as Mr Grodzinski QC, on behalf of HomeSun Holdings Ltd, Mr Drabble QC, on behalf of Friends of the Earth, and Mr Robb on behalf of Solar Century Holdings Ltd, accepted, these proceedings are only concerned with what he described as a "hard-edged question". The question is whether it was within the power conferred on the Secretary of State by the Energy Act 2008 to make a modification which reduced the tariff in respect of installations becoming eligible for payment prior to the coming into force of the modification. That is a question which depends upon the true construction of the 2008 Act and, as I shall explain, a proper analysis of the FIT Scheme made under it. It will already have become apparent that these proceedings have become, as so often happens, focussed on a somewhat different issue than appears to have been the main subject of debate before Mitting J. The arguments have turned, not on the extent to which changes in tariff rate undermine the purposes of the Act and the scheme made thereunder, but rather upon the *vires* of the Secretary of State.

15. The respondents submit that the modification proposed to take effect on 1 April 2012 will take away what they describe as "vested rights" in those whose solar PVs have become eligible for payment prior to 1 April 2012. They describe that effect as retrospective because it takes away the right to a tariff fixed from the time the installation became eligible for payment throughout a maximum period of 25 years, subject only to fluctuations in the RPI. The principle of a tariff rate fixed at the start of the period in which the installation becomes eligible and maintained throughout the period of eligibility lies, they say, at the heart of the scheme. The respondents contend that the Secretary of State has no power to introduce modifications with a retrospective effect. The Secretary of State denies that the proposals have such a

retrospective effect: the tariff rates are those which he determines from time to time, in the exercise of the power to modify arrangements for payments to those generating small-scale, low-carbon electricity conferred by s.41 of the 2008 Act.

16. I should record that the proposed modifications remain proposals. There was an issue before Mitting J as to whether a proposal put out for consultation was a proper subject of judicial review at all, but in the event neither side has sought in this appeal to contend that the fact that the Secretary of State has not yet reached a decision, still less laid the modifications before Parliament, should inhibit or prevent this court from reaching a decision on the substantive issues. Both sides require an urgent decision as to the lawfulness of the proposals in relation to installations becoming eligible from 12 December 2011 to 1 April 2012.

17. I turn then to analysis of the scheme and the section which conferred power on the Secretary of State to introduce and to modify the scheme. Ultimately, of course, the question turns on the true construction of the section conferring power to introduce what might loosely be described as the delegated legislation (although it is a congeries of legislation and licences made under the legislation). But the respondents' case depends, at the outset, upon a true understanding of the FIT Scheme. Unless the respondents are correct in their analysis of the Scheme they will be unable to demonstrate that the effect of the modifications is retrospective. They contend that from the time a solar PV installation becomes eligible, the generator is assured of a fixed rate of return, subject to RPI. The Secretary of State, on the other hand, contends for a power to vary tariffs even in respect of those installations becoming eligible prior to introduction of the change. In short, he contends that by virtue of the power conferred upon him in s.41 of the 2008 Act those who install small-scale low-carbon installations are entitled to such payments at such a rate as the Secretary of State from time to time introduces. He accepts that he may be inhibited by conventional standards imposed by public law but apart from such restrictions, he is free to introduce new and, if necessary, reduced rates as he determines necessary, subject to negative resolution by Parliament. This approach, contend the respondents, is entirely contrary to the FIT Scheme and, absent clear words in the empowering legislation, offends the rule of construction which prohibits the introduction of legislation and delegated legislation which has retrospective effect.

18. The starting point, essential to the respondents' case, is whether the scheme does provide for a rate of tariff fixed for 25 years from the date of the small-scale low-carbon installation becoming eligible for payments. If the rate is not fixed and the scheme allows only for such payments as the Secretary of State from time to time determines, then no question of retrospection arises.

19. The Authority has power to grant a licence to supply electricity to premises, known as a "supply licence" (s.6(1)(d), Electricity Act 1989). Such licences contain standard conditions incorporated by s.8A(1). Section 41 of the Energy Act 2008 confers power on the Secretary of State to modify those standard conditions for the purpose of making arrangements for the administration of a scheme of financial incentives to encourage small-scale low-carbon generation of electricity (s.41(1)(b) and (2)(a)). Those provisions may include provision requiring the holder of a supply licence to make a payment to a small-scale low-carbon generator (s.41(3)(a)), provision specifying how a payment is to be calculated (s.41(3)(b)), provision for the level of payment to decrease year by year in accordance with a formula published or to be

published by the Secretary of State (s.41(3)(c)), and provision about the circumstances in which no payment or a reduced payment may be made to a small-scale low-carbon generator, (s.41(3)(d)). The power may be exercised generally or specifically and differently in different circumstances (s.41(7)(b)). Different provision may be made for different cases (s.41(8)(b)). The sources of energy and technologies which include solar power are specified (s.41(5)(g)). The terms of s.41 are set out in the Annex to this judgment.

20. The Explanatory Notes to the 2008 Act include the following:-

> "155. The purpose of a Feed-in Tariff system would be to incentivise households, businesses, and community groups to generate low-carbon electricity. This can be achieved by making a *fixed* payment for each kilowatt hour of electricity generated from an eligible low-scale carbon source, to be passed on to such a generator…we would expect this to encourage potential generators to make the necessary upfront capital investment in generating equipment, because they would have increased *certainty of the payback* from their investment." (my emphasis)

The Explanatory Note comments upon ss.(3)(c) explaining that it is intended to allow for:-

> "degression rates, where the Tariffs to be paid to *new* installations would decrease over time. These degression rates could be set in anticipation of technology improvement or cost reductions and may therefore differ for different technologies in different sizes of installation." (my emphasis)

21. Section 42(1) introduces a procedure for amending licence conditions. The Secretary of State is required to lay a draft of the modifications before Parliament before making them (s.42(3)). The negative resolution procedure is adopted and modifications only come into effect after 40 days.

22. The introduction of the FIT Scheme was made by the process of modification pursuant to s.41: this was a process introduced by amendment of the standard conditions under which licensees supply electricity to the public. The Scheme relies upon a combination of delegated legislation and modification to the standard conditions. The Feed-in Tariffs (Specified Maximum Capacity and Functions) Order 2010 (S.I. 2010 No. 678, "the 2010 Order") and the standard conditions are symbiotic. The terms in the 2010 Order refer to expressions used in Standard Licence Condition 33 of the electricity supply licence. Schedule A to Standard Condition 33 contains a dictionary of terms used both in the standard condition and in the Order. I have attempted to indicate such terms by the use of italics. I shall refer only to those provisions necessary to an analysis relevant to this appeal.

23. By Art. 4 the Authority is required to accredit an *eligible installation*. An eligible installation is defined in Schedule A to Standard Condition 33 as any plant, on a site, (for example fixed premises) which the owner (*the FIT generator*) uses or intends to

use for *small-scale low-carbon generation*, that is, a plant wholly or mainly relying upon an *eligible low-carbon energy source* which includes a solar PV source. The Authority, under Art. 4, is required to accredit an *eligible installation* if it has a declared net capacity of 50 KW or less (Art. 5(1)(b)), uses specified technology (5(2)(a)(i)), was commissioned after 15 July 2009 (Art. 5(2)(b)) and has been submitted for registration by an electricity supplier supplying electricity to at least 50,000 domestic customers (*a Mandatory FIT Licensee*) (Art. 5(2)(c)).

24. Under Art. 10 of the 2010 Order the Authority is required to assign a *Tariff Code* to each accredited FIT installation. The Tariff Code identifies the *FIT Year* in which *the eligibility date* falls. A *FIT Year* is a year commencing on 1 April and ending on 31 March and numbered sequentially from FIT Year 1, that is, 1 April 2010 to 31 March 2011, to FIT Year 11 (11 years being the maximum allowed under State Aid regulation). The *eligibility date* is identified. For example, it may be the date when tests to demonstrate capability of the installation were completed, or, if later, when a *FIT licensee* received a written request from a *FIT generator* for a Microgeneration (MCS) Certificate. Art. 10 imposes an obligation on the Authority to assign a Tariff Code in accordance with descriptions listed in a FIT Payment Rate Table. The table is set out at Annex 2 to Standard Condition 33, (Art. 10(1)(a)). The FIT Payment Rate Table at Annex 2 contains a list and a description of eligible installations including solar PV with a capacity of 4 kW or less. The Authority is also required to assign a Tariff Code to each accredited installation in accordance with the FIT Year in which the *eligibility date* for the FIT installation falls (Art.10(1)(b)).

25. The importance of the Tariff Code is that it identifies the reference points in accordance with which payment rates are set. The FIT Payment Rate Table at Annex 2 sets out a price per kilowatt hour in respect of each FIT Year from year 1 to year 11. Payment rates are set in accordance with those two reference points, the FIT Year in which the installation became eligible for payment of a Tariff and the description of the installation.

26. The maximum period, known as "*the eligibility period*", during which payments must be paid, is set by reference to the date when eligibility to receive payments commenced (see Annex 1 to Standard Condition 33). In the case of *eligible installations* commissioned on or after 1 April 2010, the maximum period in respect of solar PV installations is 25 years, commencing on the *eligibility date*.

27. Art. 17 of the 2010 Order imposes an obligation on the Authority to keep and maintain a central FIT Register. The contents of that Register are identified in Schedule 1 of the Order. They underline the importance of the two reference points, the FIT Year in which eligibility for payment commenced and the description of the installation in relation to each accredited and identified installation. The Register must record the Tariff Code, thus recording the FIT Year in which eligibility for payment commenced, a unique identifier assigned to installation, and the date of *the statement of FIT terms*, i.e., those terms and conditions agreed between the *FIT Licensee* and the owner of the eligible installation.

28. The obligation to make payment is to be found in Standard Condition 33 "Feed-in Tariffs". That condition imposes obligations on *Mandatory FIT Licensees*, those licensees supplying electricity to at least 50,000 customers. They are required to comply with the provisions of Part I of Schedule A to Standard Condition 33. By

Condition 33.4 they are required to make *FIT Payments* to *FIT Generators* in accordance with the provisions of Schedule A. A *FIT Payment* is a sum paid to the *FIT Generator* by a *FIT Licensee* for the electricity generated by an accredited FIT installation in any period, "calculated by reference to the *Generation Tariff* and *Generator Meter Readings*" (part of the definition contained within Schedule A of *Fit Payment* and *Generation Payment*).

29. The *Generation Tariff* means:-

> "The payment rate per kilowatt hour of electricity generated by an accredited FIT installation as set out in the FIT Payment Rate Table at Annex 2." (my underlining)

30. The obligation on a *Mandatory FIT Licensee* to make *FIT Payments* is triggered in the circumstances identified in Part I of Schedule A. The licensee is, subject to the terms of the Scheme, obliged to accept a request for *FIT Payments* (2.1), but only in accordance with those generation readings to which the licensee has had access or has received (3.1). The time for payment and the period during which payment must be made must be specified (3.2). *FIT Payments* are calculated from the date the installation becomes eligible for payment; they must be paid after the date of agreement of the Statement of Terms, not less than quarterly. But they can only be paid in respect of solar PV generation during the *eligibility period* of a maximum of 25 years (3.2.3).

31. The rates are fixed in accordance with the definition I have already identified of *General Tariff* and under Clause 3.3. The payments are fixed by reference to the FIT Year in which the installation became eligible for payment. Clause 3.3 also imposes an obligation to adjust those fixed figures in accordance with an increase or decrease in RPI. Clause 3.3 (prior to amendment in July 2011) read:-

> "The Mandatory FIT Licensee shall make FIT Payments in accordance with the Tariff Code and other information recorded in the Central FIT Register at the rates set out in the FIT Payment Rate Table at Annex 2 in respect of FIT Year 1. For all following FIT Years, Mandatory FIT Licensees shall make FIT Payments at the rates set out in the FIT Payment rates table, which shall be published each FIT Year by the Authority, and which shall comprise the figures in the FIT Payment Rate Table at Annex 2 adjusted by the percentage increase or decrease in the Retail Price Index over the 12 month period ending on 31 December of the previous year."

32. The reference to publication of the FIT Payment Rates Table and adjustment to that Table in accordance with the RPI is echoed in the Authority's obligation, imposed by Art. 13 of the 2010 Order, to publish those rates by 1 March immediately before the beginning of each FIT Year.

33. Following the fast-track consultation in February 2011 and changes introduced in SI 2011/1655 coming into force on 1 August 2011, Art. 13 was amended with effect from 1 August 2011. Prior to amendment it read:-

> "On or before 1 March immediately before the beginning of each FIT Year (except FIT Year 1), the Authority must publish the FIT Payment Rate Table applicable for that FIT Year in accordance with Clause 3.3 of Part I of Schedule A to Standard Licence Condition 33."

34. The Explanatory Note to the clause in its unmodified form referred only to the obligation to adjust those rates in accordance with RPI. The amended Clause 13 reads:-

> "On or before 1 March immediately before the beginning of each FIT Year (except FIT Year 1), the Authority must publish, in accordance with Clause 3.3 of Part I of Schedule A to Standard Licence Condition 33, the FIT Payment Rate Table which is to apply for that FIT Year (subject to the Secretary of State substituting a new FIT Payment Rate Table in Schedule A to Standard Licence Condition 33)."

The Explanatory Note to that amendment refers to the change as a "minor change to functions of the Authority relating to…the annual publication of a Table of FIT Payment Rates adjusted for inflation".

35. The amendments to Art. 13 were accompanied by modifications to Clause 3.3 in Schedule A to Standard Condition 33 and the addition of a new clause at 3.4. It is of importance to recall that these modifications were proposed following consultation, were laid before Parliament in accordance with s.42, and signed by the Minister on 21 July 2011. The modifications to Clause 3.3 increased the rates payable in respect of installations which had or were to become eligible in FIT Year 2 (between 1 April 2011 and 31 March 2012). For solar PV installations of 4 kW capacity or less, the rates were increased in line with inflation (as, somewhat curiously, they were for FIT Year 1). Thus, whereas in respect of such installation becoming eligible in FIT Year 2 the Table had provided for 41.3p per kW hour, the modified Table provided for 43.3p. Such an increase was an increase in line with inflation.

36. For solar PV installations with a greater capacity, rates up to the time the modification came into effect were increased. But, with effect from 1 August 2011, for installations which became eligible *after* that date, the rate was reduced, thus the rate was split between those installations (with a capacity greater than 50 kW) becoming eligible for payment before 1 August 2011 and those becoming eligible on or after 1 August 2011. It should be noted that there was no question of reducing the rate in respect of those installations becoming eligible for payment before that modification came into effect, i.e., before 1 August 2011. The principle that a rate is fixed from the time the installation becomes eligible was maintained.

37. For FIT Years following FIT Year 2, a new Clause 3.4 provides for amendments to the FIT Payment Rate Table at Annex 2, should the Secretary of State so decide, coupled with an obligation to publish the figures in the new FIT Payment Rate Table, adjusted by fluctuations to the RPI. It should be noted that whilst 3.4 admits of the possibility of amendment by way of reduction for Tariff Rates, there is no suggestion that any reduction would adversely affect installations becoming eligible for payment before any amendment under Clause 3.4 came into effect.

38. The modified Annex 2 contains notes which form part of the modification. The relevant notes read:-

> "1. The FIT Payment Rate for an Eligible Installation of a description specified in the first column of the table is, subject to Note, 2, the rate specified in the corresponding entry in the column for the FIT Year in which the installation's Eligibility Date falls. All FIT payment rates in the table are pence per kilowatt hour at 2011/12 values.
>
> 2. FIT payments in respect of FIT Year 3 and subsequent FIT Years are subject to adjustment under clause 3 as a result of changes in the Retail Price Index.
>
> 3. For Eligible Installations with an Eligibility Date in FIT Year 2, the payment rates in this table supersede those in the table previously published by the Authority under clause 3 on 25th February 2011."

39. The following features of the Scheme emerge from the terms of the 2010 Order, Standard Condition 33 and its Annexes:-

i) The rates of FIT Payment which the Licensee is required to pay a Generator are shown in Annex 2 to Schedule A of Standard Condition 33, the FIT Payment Rate Table;

ii) the rate is fixed by reference to the year in which a specified installation became eligible for payment;

iii) there is no reference, either within the Order, or Schedule A to Standard Condition 33, to any adjustment of that fixed rate other than in accordance with the fluctuations of RPI;

iv) the only reference to any substitution to the published rates is in respect of years following FIT Year 2, after the modifications introduced on 21 July 2011. Moreover, there is no suggestion that the power to substitute in Clause 3.4 will or can be exercised in any way which would reduce the rate payable in respect of installations which became eligible in FIT Years prior to the substitution coming into effect. Were that the case, Annex 2 to the modification at Notes 1 and 2 would be positively misleading. It is of note that the rate introduced by the modification of 21 July 2011 increased the rate payable in respect of solar PV installation at a capacity of 4 kW or less, in line with inflation;

v) the period during which payments at the published rate are to be paid by a Licensee, on request from the Generator, starts with the date the installation became eligible and lasts for a maximum period of 25 years.

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.

43. I have concluded that the delegated legislation proposed in the consultation of 31 October 2011 would have retrospective effect in respect of any installation becoming eligible for payment prior to the modification coming into effect, as proposed on 1 April 2012. Such legislation would only be valid if the empowering provision contained in s.41 of the 2008 Act authorises such an effect. Just as there is a presumption against retrospective operation in the construction of statutes, so there is a presumption in relation to the construction of a statute delegating legislative powers. Indeed, the authors of *de Smith's Judicial Review* 6th Edition suggest that the presumption is even stronger in relation to the powers conferred by delegated legislation (5-040, in reliance upon *Newcastle Breweries v The King* [1921] KB 854 at 865). Absent a clear provision conferring power to make retrospective delegated legislation, the assumption of such a power offends the legality principle.

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].

47. The Secretary of State contends that there is no unfairness in a modification which reduces a tariff rate, in respect of an installation eligible prior to the modification coming into effect, from 1 April 2012, i.e., after the proposed modification is brought into effect. The consultation ended on 31 October 2011. Anyone seeking to install a solar PV after 12 December 2011 would be warned and could expect his rate of return to be reduced as of 1 April 2012. The rate is maintained at the 2011-2012 FIT Year 2 rate until then. Whilst there may be dispute as to whether the 6 week period was long enough to install and obtain eligibility, at least such intended generators would know where they stood. Any other provision would create even more of a surge in installation, defeating the purpose of achieving a more realistic return of between 5-7% in the light of the reduced cost of installation.

48. The Secretary of State's defence fails to have proper regard to the nature of the rights conferred by the Scheme in the FIT year in which an installation becomes eligible. An owner of an installation is entitled to payment at a rate fixed by reference to and from the year in which the installation became eligible. He is entitled to that fixed rate throughout the period of generation from the moment of commencement up to the maximum specified. On incurring capital expenditure in the purchase and installation of a solar PV, an owner acquired, under the scheme, a right to a rate of return fixed for 25 years, subject to fluctuations of RPI. The proposed modification has retroactive effect. If it comes into force on 1 April 2012 it takes away that pre-

existing right to 25 years of payments at 43.3p per kilowatt hour and substitutes for it a right to that sum only for a few months and thereafter at the lower rate proposed of 21p per kilowatt hour. The power asserted by the Secretary of State is a power to vary the rate *after* an installation has achieved eligibility and thus after the rate has been fixed for 25 years, subject only to RPI. That is a retrospective alteration of the scheme which confers what, *pace* Lord Rodger, may be described as a vested right to a fixed rate.

49. The effect of the warning in the proposals, on which the Secretary of State relies, cannot, in my view, alter the nature of the powers conferred by s.41. Either s.41 confers a power retrospectively to alter fixed rates of return or it does not. The warning cannot enlarge the power conferred by s.41. The Secretary of State cannot arrogate to himself the power to introduce delegated legislation with retrospective effect merely by announcing an intention to introduce such legislation. Either there is statutory authority or there is not. The warning makes no difference.

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. It is contended that such a power of modification exists within the context of the express statutory purpose of establishing or making arrangements for the administration of a scheme of financial incentives to encourage small-scale low-carbon generation (s.41(2)(a)). Whilst it is true that the section contemplates provision specifying how a payment is to be calculated, that it may be decreased and that provision may be made as to the circumstances in which no payment or reduced payment may be made, it is notable that s.41 makes no reference whatever to the power to decrease the rate of return, other than in accordance with a formula.

51. It is not impossible but it would be curious to contemplate a statutory provision which envisages a scheme for financial incentives to capital investment to encourage small-scale electricity generation in which the return could be varied once the capital expenditure had been incurred. It is in that context that the presumption against retrospective operation is so important. Were there to be a power to introduce, by modification, such a scheme one would expect it to be clearly shown. On the contrary, there is no reference to that possibility. The references in the section specifying how a payment is to be calculated, to the decrease by a formula and to circumstances in which no payment or a reduced payment is to be made, would be positively misleading if there exists a wide, general power to vary rates after expenditure on installation has occurred. The Explanatory Notes (at 155) show that the author took a fundamentally different view of the power for which the Secretary of State now contends in their reference to a fixed payment and the certainty of return from the up-front capital investment.

52. In those circumstances, I conclude that there was no power contained within s.41 to introduce a modification which reduced a rate fixed by reference to an installation becoming eligible prior to the modification. To do so would be to take away an existing entitlement without statutory authority.

53. The respondents were, naturally, anxious to draw to the court's attention numerous statements in consultation documents and otherwise in which the Government has

asserted that, even when the FIT Scheme is reviewed, existing projects would receive the same level of support throughout their participation in the Scheme. It was suggested that such statements were an aid to construction of the Statute. I disagree, but only recall those numerous statements as affording some comfort that the Government understood the scheme to operate in the way I have analysed it.

54. It will be apparent that the basis upon which I reject the Secretary of State's assertion of power to make the modification he proposes is different from that on which Mitting J relied. I do not base my decision on the basis that changes by reference to a date earlier than 1 April 2012 are not calculated to further the statutory purpose. It is unnecessary to expand on my reasons for rejecting that approach. As I have already indicated, I can well understand why the Secretary of State would seek to prevent a surge in small solar PV systems prior to the introduction of a modification which reduces the Tariff rate. I am not sure it would be open to a court to say that that is not calculated to further the statutory purpose. But that is not the question. The question is whether the Secretary of State has power to do so. In my view, he plainly has no such power. Mitting J's second reason was expressed as follows:-

> "The whole tenor of the Scheme is prospective. I cannot discern in it a clear Parliamentary intention to permit the Secretary of State to make a modification which has a significant adverse impact on those proposing to install small-scale assistance before the date on which the modification is made and comes into effect."

55. The quest, in my view, is to identify a clear Parliamentary intention to take away an existing entitlement to a fixed rate of return for capital investment incurred by a small-scale low-carbon generator. The question, I respectfully suggest, is not whether the proposed modification may have a significant adverse impact on those proposing to install small solar systems once the proposal was announced, but rather whether Parliament conferred a power to make a modification with such a retrospective effect. It did not. In these circumstances, it is not necessary to rule on the arguments concerning abuse of power raised in the Respondents' Notice. In the light of the terms of Mitting J's conclusion, I would grant permission. But I would refuse this appeal.

Appendix

56. **41. Power to amend licence conditions etc: feed-in tariffs**

(1) The Secretary of State may modify—

(a) a condition of a particular licence under section 6(1)(c) or (d) of the Electricity Act 1989 (distribution and supply licences);

(b) the standard conditions incorporated in licences under those provisions by virtue of section 8A of that Act;

(c) a document maintained in accordance with the conditions of licences under section 6(1) of that Act, or an agreement that gives effect to a document so maintained.

(2) The Secretary of State may exercise the power in subsection (1) for the purpose only of—

(a) establishing, or making arrangements for the administration of, a scheme of financial incentives to encourage small-scale low-carbon generation of electricity;

(b) requiring or enabling the holder of a distribution licence to make arrangements for the distribution of electricity generated by small-scale low-carbon generation;

(c) requiring the holder of a licence to make arrangements related to the matters mentioned in paragraph (a) or (b).

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

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

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

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

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

(e) provision about the circumstances in which a payment may be recovered from a small-scale low-carbon generator;

(f) a requirement for the holder of a supply licence or distribution licence to pay a levy to the Authority at specified times;

(g) provision specifying how a levy under paragraph (f) is to be calculated (which may require specified matters to be determined by the Authority or the Secretary of State);

(h) provision conferring an entitlement on the holder of a supply licence or distribution licence to receive a payment from the Authority.

(7) The power conferred by subsection (1)—

(a) may be exercised generally, only in relation to specified cases or subject to exceptions (including provision for a case to be excepted only so long as specified conditions are satisfied);

(b) may be exercised differently in different cases or circumstances;

(c) includes a power to make incidental, supplemental, consequential or transitional modifications.

(8) Provision included in a licence by virtue of that power—

(a) need not relate to the activities authorised by the licence;

(b) may make different provision for different cases.

Lord Justice Richards:

57. I agree.

Lord Justice Lloyd:

58. I also agree.