

Neutral Citation Number: [2011] EWHC 1873 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 August 2011

Before :

MR JUSTICE LINDBLOM

Between:

THE QUEEN

on the application of

- (1) INFINIS PLC**
(2) INFINIS (RE-GEN) LIMITED

Claimants

- and -

THE GAS AND ELECTRICITY MARKETS AUTHORITY

Defendant

-and-

THE NON-FOSSIL PURCHASING AGENCY LIMITED

Interested Party

Mr Michael Fordham QC and Tristan Jones (instructed by Wragge & Co) for the Claimants
Mr Thomas Sharpe QC and Michael d'Arcy (instructed by Michael Knight) for the Defendant

Hearing dates: 14 and 15 July 2011

Judgment

MR JUSTICE LINDBLÖM:

Introduction

1. Was it lawful for the defendant, the Gas and Electricity Markets Authority (“the Authority”), to decide, as it did on 30 March 2010, to refuse accreditation under article 21 of the Renewables Obligation Order 2009 (SI 2009/785) (“the 2009 Order”) and article 6(3) and (4) of the Renewables Obligation Order 2006 (SI 2006/1004) (“the 2006 Order”) for the Welbeck and Candles generating stations owned and operated respectively by the first claimant, Infinis Plc, and the second claimant, Infinis (Re-Gen) Limited? That is the main issue in this claim for judicial review. It turns on whether, for each site, there was at the relevant time an arrangement – known under article 21 of the 2009 Order as an “NFFO arrangement”, and under article 6(3) and (4) of the 2006 Order as an “extant qualifying arrangement” – providing for the building of a generating station which had not yet been commissioned at the time of the Authority’s decision. If such arrangements did exist, the Candles and Welbeck stations were “excluded” generating stations, no Renewables Obligation Certificate (“ROC”) could be issued for the electricity generated at them, and the Authority could not grant accreditation for them.
2. Put shortly, the rival contentions are these. The claimants argue that, in the case of either site, the Replacement Power Purchase Agreement (“RPPA”) entered into between its predecessors in title and the interested party, the Non-Fossil Purchasing Agency Limited (“the NFPA”) on 8 March 2001 had become “of no force and effect” by the time the Authority made its decision, and that no “NFFO arrangement” then subsisted. The Authority argues that each RPPA was, and continued to be, an “NFFO arrangement” under the 2009 Order. It is common ground that the RPPAs, while they had “force and effect”, would have been “NFFO arrangements”, having been entered into under the provisions of the Electricity (Non-Fossil Fuel Sources) (England and Wales) Order 1998 (“NFFO Order 5”); that, on 31 December 2008, apart from certain saved provisions, both RPPAs lapsed in accordance with their own terms; that, unless article 21 of the 2009 Order and article 6(3) and (4) of the 2006 Order applied after that date, the claimants were entitled in law to be accredited for the issuing of ROCs; and that such accreditation would be effective for Candles from the date of the application (28 January 2009) and for Welbeck from the date on which the station became operational (24 March 2009).
3. The claim was heard on 14 and 15 July 2011. On 25 July 2011 I indicated my decision to uphold the claim and to order relief. I now give my reasons for that decision.

Background

The legislative history

4. At least since the coming into force of the Electricity Act 1989 (“the 1989 Act”) domestic legislation has promoted the generation of electricity from renewable sources. Under the 1989 Act and statutory instruments made under it, public electricity suppliers were required to enter into arrangements to secure electricity from non-fossil fuel sources. The Order relevant to this claim is NFFO Order 5. The statutory scheme was changed by the Utilities Act 2000 (“the 2000 Act”) and subsequent statutory instruments. Under the new scheme, the general rule is that generating stations are awarded ROCs for generating electricity from renewable sources. Designated electricity suppliers are required to provide ROCs to the Authority, demonstrating that renewable electricity has been provided to customers. If they do not provide sufficient ROCs, they must pay a charge, known as the “Buyout Payment”. The relevant statutory instrument in force for the period 1 April 2007 to 31 March 2009 was the 2006 Order. The statutory instrument in force from 1 April 2009 is the 2009 Order. In the shift from mandatory supply arrangements (under the 1989 Act) to a scheme which envisaged the acquisition of ROCs from generators (under the 2000 Act), the arrangements made under the old NFFO Orders were capable of continued effect in modified form. The NFPA was required to enter into arrangements with generators which would replace the arrangements entered into under the NFFO Orders. The RPPAs with which this case is concerned were made with the NFPA as such replacement arrangements. Because the claimants’ applications for accreditation related to the periods both before and after 1 April 2009, they fell to be determined under both the 2006 Order and the 2009 Order. It is common ground that the effect of the exclusion provisions in the two Orders, though differently expressed, is the same.

The original arrangements for Welbeck and Candles

5. Welbeck and Candles are generating stations fuelled by landfill gas.
6. In September 1998 the then owners of Welbeck and Candles entered into arrangements with public electricity suppliers under the NFFO regime, pursuant to NFFO Order 5.

The new arrangements

7. Under the Electricity from Non-Fossil Fuel Sources Saving Arrangements Order 2000 (SI 2000/2727) (“the NFFO Saving Order 2000”), the benefit of the arrangements was transferred from the old public electricity suppliers to the NFPA by the RPPAs, which are in materially the same terms. The recitals to the RPPAs make plain the essential purpose of their provisions. Paragraph (A) in the recitals refers to the “Original NFFO Contract” in either case, “pursuant to which, with effect from the Commissioning of the Facility, the Buyer agreed to purchase the electricity generated by the Facility up to the Relevant Metered Output”.
8. The claimants acquired Welbeck and Candles in 2007. They became the “Seller” under the RPPAs. The NFPA was the “Buyer”.
9. As was required under the NFFO regime, the RPPAs secured that specified amounts of electricity were to be available to the “Buyer”. Clauses 3.1 and 3.2 provided:

“3.1 Entitlement to Contracted Capacity

The Seller confirms that it will be the operator of the Facility and hereby grants to the Buyer the sole and exclusive right for the Contract Term to the Contracted Capacity.

3.2 Making the Contracted Capacity Available

Subject to the provisions of clause 3.4 [which related to Force Majeure], the Seller hereby undertakes to make the Contracted Capacity available for the Contract Term to the Buyer.”

The “Contract Term” was defined in clause 1.1 as:

“the period from the Effective Date until the earliest to occur of:

(A) the expiration of the period specified in paragraph 6 of schedule 2 of the Original NFFO Contract [which was 15 years from the Effective Date];

(B) the expiration of the period specified in the Renewables NFFO5 Order in respect of electricity from generating stations in the same Technology Band as referred to in paragraph 7 of schedule 2 of the Original NFFO Contract [which was landfill gas]; and

(C) the date of termination of the Contract Term pursuant to clause 15.”

10. Clause 3.3, under the heading “Prudent Operating Practice”, stated:

“The Seller confirms that it will operate the Facility during the Contract Term in accordance with Prudent Operating Practice whilst using Reasonable Endeavours to ensure that:

(A) the Facility generates and delivers Energy to the Delivery Point in accordance with clause 5.1 whenever it is practicable that it should do so; and

(B) (without prejudice to its obligations in clause 4 and subject to clause 3.4) the Contracted Capacity is made available.”

11. Clauses 11, 12 and 13 of the RPPAs provided respectively for charges, terms of payment and the application of relevant levy payments. Clause 11.1 provided:

“Price for Relevant Metered Output

There shall be due from the Buyer to the Seller in respect of each Contract Billing Period the Premium Price for each kWh of Relevant Metered Output which shall be payable in accordance with the provisions of clauses 12 and 13. The Buyer shall not have any obligation to purchase Additional Metered Output from the Seller and the Seller shall have no obligation to sell Additional Metered Output to the Buyer.”

12. Under the heading “Installation of Facility” clause 3.5 of the RPPAs committed the Seller to using “Reasonable Endeavours” to install the “Facility”, in these terms:

“The Seller undertakes to use Reasonable Endeavours to install the Facility in accordance with the particulars specified in schedule 2 of the Original NFFO Contract and as may otherwise be specified in the Seller’s Information ...”

“Reasonable Endeavours” were defined, in clause 1.1, as meaning

“... notwithstanding Force Majeure, the taking by the person subject to the obligation of all of the reasonable steps in accordance with Prudent Operating Practice which a prudent and conscientious person having willingly undertaken the obligation would take to achieve the object of the obligation”.

Schedule 2, which was drawn from the NFFO contracts that were the precursors of the RPPAs, specified, in either case, the location of the generating station (in paragraph 1), the “Facility” which was to be installed (in paragraph 2) and the “Contracted Capacity” (in paragraph 3). In the Candles RPPA the “Facility” was described in this way (in paragraph 2.2 of Schedule 2):

“The Facility will comprise gas collection and compression equipment, together with power generation plant and associated transformer and switchgear. The power generation plant will comprise three spark ignition engines/alternator sets rated at 1,003kW at an assumed 50% methane content of landfill gas.”

In Annex B to the RPPAs there was a diagram showing what equipment the “Facility” was to comprise. This was to be the type of generating station referred to in advice published by the Authority in March 2009, “Renewables Obligation: Guidance for generators of over 50 kW”, in which Appendix 2, “Definition of a generating station for the purposes of the Renewables Obligation”, describes, in general terms, the “[components] of a generating station” and mentions factors to be taken into account when determining what “sets of equipment” for generating electricity “constitute a generating station”. Clause 3.6 of the RPPAs contained a covenant against “Encumbrance or Sale” of the “Facility”, by which the Seller undertook that it would not, without the Buyer’s consent, allow “any Encumbrance over any title to or interest in the Facility [etc.]”. Clause 3.7 provided, among other things, that the RPPA was not intended to create, in favour of the Buyer, “any legal or beneficial interest in the Facility ...”.

13. Under clause 2.2, where – as in this case – the “Generation Start Date” had not occurred prior to the date of the RPPA, the commencement of the “Contract Term” was to be conditional on six “conditions precedent”. Condition (A) is the granting of “planning permission and all necessary consents ..., easements and rights to enable the Facility to be constructed and operated in accordance with and as contemplated by the terms of this Agreement and the Connection Agreement”. Condition (B) is:

“to the extent that the same have not been obtained, the grant of planning permission and all necessary consents (including any necessary wayleave consents), easements and rights to enable the Local Distributor to comply with the Connection Agreement”.

The “Connection Agreement” was defined in clause 1.1 as

“... the agreement entered into by the Seller and the Local Distributor, providing for the connection of the Facility to the distribution system of the Local Distributor including the novation by the Local Distributor of any former connection agreement for the purposes of the Original NFFO Contract”.

Condition (C) in clause 2.2 is:

“where the Facility is not operational (to the standards specified for Commissioning) at the date of this Agreement, the Commissioning of the Facility”.

“Commissioning” was defined in clause 1.1 as

“... the satisfactory completion of such procedures and tests as from time to time constitute usual industry standards and practices to demonstrate that the Facility or the relevant part or Phase of it is capable of commercial operation for the purposes of this Agreement, and in particular to satisfy the reasonable requirements of the Local Distributor in that regard and to establish the Facility Operating Parameters of the Facility or the Phase as the case may be and “Commission” and “Commissioned” shall be construed accordingly.”.

There are no Conditions (D) and (E). Condition (F) is “the Seller and the Local Distributor entering into the Connection Agreement and the Connection Agreement coming into force ...”. Condition (G) is the Seller holding a licence “authorising it to generate electricity and to convey electricity from the place at which it is generated to the Delivery Point” or the Seller being exempt from the requirement to hold such a licence. Condition (H) is the Buyer being “reasonably satisfied ... that the planned subsequent operation of the Facility will not involve any breach of any of the provisions of this Agreement”.

14. Clause 2.3 provided for two situations in which, except for certain provisions (namely clauses 2.4, 16, 17, 18 and 20), and unless the parties agreed otherwise, the RPPA was to cease to be of “force and effect”. The relevant part of clause 2.3 for present purposes is this:

“Dates for fulfilling Conditions

If:

(a) ... ; or

(b) where the Generation Start Date has not occurred prior to the date of this Agreement, any of the Conditions contained in clause 2.2 has not been satisfied by the date two years after the Commissioning Nominated Date,

or in each case by reference to such later date as the Buyer and the Seller may agree, this Agreement (except clauses 2.4, 16, 17, 18 and 20) shall, unless the parties agree otherwise, be of no force and effect.”

15. Clauses 16, 17, 18 and 20 of the RPPAs relate, respectively, to limitation of liability, confidentiality and announcements, arbitration, and miscellaneous matters. Clause 17 contains mutual covenants for confidentiality, which, by virtue of clause 17.1, expressly apply both before and after “the expiration or termination of the Contract Term”. Clause 20.7 makes possible variation of the RPPA if it is “in writing and signed by or on behalf of both parties”.

16. Clause 2.4 provides:

“Endeavours to fulfil Conditions

Once Condition (B) of clause 2.1 shall have been fulfilled, and where the Generation Start Date has not occurred prior to the date of this Agreement the Seller shall use Reasonable Endeavours to procure the fulfilment of Conditions (A), (C), (F), (G), and (H) in clause 2.2.”

The NFPA has confirmed, in its solicitors’ letter to the Authority dated 18 April 2011, that on the information which had been provided to it up to July 2010, it did not consider that the claimants were or had been in breach of their obligation to use “Reasonable Endeavours” under clause 2.4.

17. Clause 15 of the RPPAs provided for termination. Clause 15.1 provided for termination by the Seller. The circumstances in which the Seller could terminate the contract included, under clause 15.1(C),

those where it had proved uneconomic to bring about the construction and operation of the facility. Clause 15.2 provided for termination of the “Contract Term” by the Buyer, in three sets of circumstances, including, at (A), the Seller ceasing to be authorised by a licence to generate electricity or ceasing to be exempt from holding such a licence, and, at (B), the Seller defaulting “in the performance of any of its material obligations under this Agreement” and, where the Buyer reasonably believed that the Seller’s default was capable of being remedied, if “such default continues unremedied at the expiry of 28 days ...”. Clause 15.3 provided that clause 15 was the only provision under which either of the parties could terminate either the “Agreement” or the “Contract Term”. Clause 15.4 provided for the “Survival of Rights on Termination”, so that the termination of the “Agreement” or the “Contract Term” was not to affect “any rights or obligations which may have accrued prior to such termination”, nor “continuing obligations of each of the parties hereunder”.

“Commissioning Nominated Dates”

18. The original “Commissioning Nominated Dates” under the RPPAs were 1 February 2000 for Welbeck and 1 April 2000 for Candles. A series of extensions were agreed between the parties, until 31 December 2008.
19. In a letter to the claimants dated 8 December 2008, the NFPA sought a further extension to the final date for the fulfilment of the conditions precedent. In a letter to the NFPA dated 22 December 2008 the claimants declined to agree to this extension.
20. Candles could not be brought into operation within the terms of the RPPA applying to it because there proved to be insufficient gas at the site to generate the amount of electricity which it had been expected to generate. It can generate only around 1 MW. The RPPA envisaged 3 MW. The conditions precedent under the RPPA were not met by the final agreed date, and have not been met since.
21. Welbeck suffered a series of delays. It came into operation in March 2009. The conditions precedent were not met by the final agreed date because no connection agreement was in place and the station was not operational to the standards specified in the RPPA.

The Authority’s decision

22. The Authority’s letter of 30 March 2010 stated that Candles and Welbeck were not capable of accreditation because they were “ineligible under the RO”. In recording the reasons for this decision the letter stated:

“Having carefully reviewed all the information provided, we consider that the Candles and Welbeck generating stations are subject to article 21 of the Renewables Obligation Order ...

In addition, we are not satisfied that sufficient evidence has been provided to demonstrate that article 20 of the RO Order does not apply. ...

In the correspondence supporting your application for accreditation ..., you stated the current NFFO contract with NFPA has lapsed and the surviving clauses, either individually or collectively do not constitute an existing NFFO arrangement. However, Clause 2.4 (Endeavours to fulfil conditions) does not appear to have been satisfied by Infinis, as verified by correspondence between NFPA and Infinis in letters of 8 December 2008 and 22 December 2008, in respect of Candles.

As we have received no supporting evidence from Infinis to demonstrate that NFPA is satisfied that reasonable endeavours were procured to satisfy conditions precedent, we have no option but to conclude that both Candles and Welbeck generating stations are not eligible to receive ROCs and hence cannot be granted accreditation under the RO.

NFFO contract issues

For clarification, NFPA consulted with us on the validity of consensual termination under the **current** NFFO contract arrangements. Ofgem, in its duty to ensure that the NFPA as agent to the Public Electricity Suppliers ... is discharging its obligations under the NFFO Saving

Arrangements, communicated its position on this matter. Please refer to our letter of 17 February 2010. It is for Infinis and NFPA, as parties to the contract to explore the validity of a variation under Clause 20.7.

...”.

23. There are two somewhat differing accounts of the events preceding the Authority’s decision.
24. The claimants’ account is set out in the first and second witness statements of Mr Steven Hardman, the first claimant’s Commercial Director, dated respectively 23 June 2010 and 4 February 2011. After the claimants applied for accreditation, for Candles on 28 January 2009 and for Welbeck on 11 February 2009, the Authority at first suggested that the claimants were in breach of contract because the facilities had not been commissioned by 31 December 2008; then that the Authority would obtain further information from the NFPA before deciding whether there was an “NFFO arrangement” in place; then that it was not for the Authority to decide what contractual obligations existed between the NFPA and the claimants; then that, despite the claimants and the NFPA having agreed to terminate the RPPAs, the Authority would not approve that approach; and then that it was a matter for the claimants and the NFPA to decide whether or not to agree to terminate the RPPAs. In its letter dated 17 February 2010 the Authority stated:

“... It is our understanding from correspondence between NFPA and Infinis dated 8 December 2008 and 22 December 2008, respectively ... that clause 2.4 (Endeavours to fulfil conditions) has not been satisfied, hence a NFFO arrangement continues to be in place. Please note that the non-fulfilment of any conditions precedent in clause 2 is a matter for the buyer (NFPA) and the seller (Infinis).

However, note that under the RO Order 2009, where there is a NFFO arrangement, if any condition precedent is unfulfilled the NFFO site is not eligible for RO accreditation unless developed by a non-linked/connected person to the NFFO agreement.”

On 24 February 2010, despite considering that the question of whether the “Reasonable Endeavours” obligation had been satisfied was irrelevant, the claimants wrote to the NFPA, inviting it to confirm that it was satisfied that the obligations under clause 2.4 of each RPPA had been satisfied, and, if not, why not. The NFPA replied on 3 March 2010, stating:

“... Whilst, as you will understand, we have not undertaken a detailed investigation, the information you have provided to us does not lead us to consider that you are in breach of your reasonable endeavours obligations.”

25. The Authority’s version of events is set out in the two witness statements of Mr Charles Hargreaves, the Head of Environmental Programmes in the Office of Gas and Electricity Markets, dated respectively 24 November 2010 and 8 June 2011. The Authority stresses the fact that the NFPA was a party to the discussions which took place. It says that it sought from the claimants and the NFPA a clear explanation of the contractual arrangements between them. It says that it took care to explore the possibility that there had been a “consensual termination” of the RPPAs. In its letter of 3 March 2010 the NFPA had noted the Authority’s view that a variation and consensual termination would not have been consistent with the NFPA’s duties under the NFFO Saving Order 2000. The Authority believed the Candles and Welbeck facilities were excluded generating stations under article 6(3) and (4) of the 2006 Order and article 21 of the 2009 Order. It was therefore obliged to refuse to accredit them.

The statutory framework

The NFFO regime

26. As originally enacted, section 32 of the 1989 Act provided:

“Electricity from non-fossil fuel sources:

(1) The Secretary of State may, after consultation with the Director and with the suppliers concerned, by order require each public electricity supplier in England and Wales or each such supplier in Scotland, before a day specified in the order, to make (in so far as he has not already done so) and produce evidence to the Director showing that he has made –

(a) such arrangements; or

(b) where a previous order under this subsection has had effect in relation to him, such additional arrangements,

as will secure the result mentioned in subsection (2) below.

(2) The result referred to in subsection (1) above is that, for a period specified in the order, there will be available to the public electricity supplier –

(a) from non-fossil fuel generating stations; or

(b) if the order so provides, from non-fossil fuel generating stations of any particular description,

an aggregate amount of generating capacity which is not less than that specified in relation to him in the order; and an order under subsection (1) above may make different provision for different suppliers.

...
(5) Subject to subsection (6) below, if throughout any period a public electricity supplier –

(a) is entitled under a contract to purchase, at any wattage specified in the contract, electricity generated by a particular non-fossil fuel generating station; or

(b) himself operates a non-fossil fuel generating station and, of the station's capacity, any wattage does not fall to be regarded, by virtue of paragraph (a) above, as available to any other person,

a generating capacity of that wattage shall be regarded for the purposes of this section as available to that supplier from that station for that period.

...”.

27. Article 3(1) of NFFO Order 5 provided:

“Each public electricity supplier in England and Wales shall before 1st November 1998 make, in so far as he has not already done so, and produce to [the Authority] evidence showing that he has made such additional arrangements as will secure that for each period shown in Tables A to F in Schedule 1 the aggregate amount of generating capacity available to him from non-fossil fuel generating stations of the description specified in relation to each particular Table and falling within the description of non-fossil fuel generating station specified in paragraph (2) below will not be less than the amount specified in that Table in relation to him for that period.”

Article 4 of NFFO Order 5 contained provisions for discounting, in two situations: first, under article 4(1), where:

“(a) any relevant arrangements provide that the availability to a public electricity supplier of some or all of the capacity of a non-fossil fuel generating station is conditional upon the satisfaction of any requirement mentioned in Schedule 2 (conditions precedent) ... ; and

(b) on the first day of any specified period, some or all of that capacity is not available to the supplier, by reason of any such requirement not being satisfied ...”;

and, secondly, under article 4(2), where:

“(a) any relevant arrangements provide that some or all of the generating capacity to be made available under those arrangements may reduce or cease to be available to a public electricity supplier following the occurrence of any such event as is mentioned in Schedule 3 (termination events) ... ; and

(b) some or all of that capacity is not available to the supplier, on a day during a specified period, because such an event has occurred,

...”.

Schedule 2 provided six conditions precedent, including the granting of planning permission and other necessary consents (conditions (a) and (b)), the coming into force of a connection agreement (condition (c)), the operator’s licence to generate and convey electricity (condition (d)), the operator’s participation, where required, in “the pooling and settlement agreement” (condition (e)), and the satisfactory completion of “the commissioning process”, as defined (condition (f)). Schedule 3 provided for three termination events. The first event was the operator ceasing to be appropriately licensed or exempted from having to hold a licence. The third was an order being made for the winding up of the operator. Event (2) was this:

“the operator defaulting in the performance of any of his material obligations under the relevant arrangements and in the case of a default which is, in the opinion of the relevant public electricity supplier (acting reasonably), capable of remedy continuing to be unremedied at the expiry of 28 days following the date on which the supplier shall have given notice thereof to the operator”.

28. Thus the legislation was clear in providing for the requisite “arrangements” to secure for the supplier the availability of generating capacity from non-fossil fuel generating stations.

The Renewables Order regime

29. The statutory scheme was amended by the 2000 Act. Section 62 of the 2000 Act replaced section 32 of the 1989 Act with a provision which enabled the Secretary of State to impose on designated electricity suppliers a “renewables obligation”. A renewables obligation would require the electricity supplier to produce evidence to the Authority showing that it, or another supplier, had supplied a specified amount of renewable electricity to customers. Sections 63, 64 and 65 of the 2000 Act introduced sections 32A, 32B and 32C into the 1989 Act. Section 32B provides for the Authority to issue ROCs, certifying that a generating station has generated from renewable sources the amount of electricity stated, and that it has been supplied to customers in Great Britain.

30. Section 67 of the 2000 Act provided that a statutory instrument may make provision for the survival, with modifications, of the arrangements entered into under the NFFO regime. The relevant statutory instrument is the NFFO Saving Order 2000. Under article 3(1) of the NFFO Saving Order 2000, public electricity suppliers (or their successors) were required to ensure that the nominated person (in practice, the NFPA) would comply with the requirements set out in article 4(1), namely:

“...

(a) the nominated person must by the commencement of the order period have made arrangements (“the new arrangements”) which replace (in so far as it is necessary to comply with this Order) the original arrangements but with the nominated person replacing the relevant public electricity supplier as contracting party to those arrangements in each case;

(b) subject to paragraph (2) below, the new arrangements must secure that there is available to the nominated person from the non-fossil fuel generating stations described in NFFO Orders 3, 4 & 5 the aggregate amount of generating capacity which, immediately

before 1st October 2001, would have been required by those Orders to have been available to public electricity suppliers from that date until the end of the order period, had the Electricity from Non-Fossil Fuel Sources Saving Arrangements Order 2000 not been made;

(c) having entered into the new arrangements, the nominated person must not by any act or omission of his prevent those arrangements made by him from securing the result mentioned in sub-paragraph (b) above;

...

(e) the new arrangements must be on terms such that generators who are party to them are in substantially the same economic position as regards matters relating to contract price, indexation and term under those new arrangements as they had been in as party to the original arrangements;

...”.

The 2006 Order

31. Under section 32 of the 1989 Act (as amended by section 62 of the 2000 Act), a series of Orders have imposed renewables obligations on designated electricity suppliers. The first Order relevant to this case is the 2006 Order, which (as amended) was in force from 1 April 2007 to 31 March 2009.

32. Article 15(1) of the 2006 Order provided:

“Where each of the relevant criteria in article 16 has been met (having regard as necessary to the requirements in article 17), the Authority shall issue ROCs in accordance with the procedure set out in article 18, in relation to a generating station in respect of each month of each obligation period in which electricity has been generated by the generating station from eligible renewable sources (whether or not for the whole of that month)...”

Under article 15(2) of the 2006 Order, the basic rule was that ROCs were to be issued to the operator of the generating station which generated the renewable electricity. However, under article 15(3) and (4), for electricity generated under a “qualifying arrangement”, ROCs were to be issued instead to the electricity suppliers which purchased the electricity. In article 2(1) a “qualifying arrangement” was defined as:

“... an arrangement which was originally made pursuant to a Non-Fossil Fuel Order (and includes any replacement of such an arrangement where that replacement was made pursuant to an order made under section 67 of the Utilities Act 2000)”.

Under articles 15(1) and 16(2), ROCs were to be issued only for a generating station which had been granted accreditation by the Authority. “Accreditation” was defined in article 2(1) as meaning:

“... accreditation as a generating station capable of generating electricity from eligible renewable sources.”

Under article 5(1), electricity was not to be considered to have been generated from an eligible renewable source if it has been generated by an excluded generating station.

33. Article 6 of the 2006 Order, under the heading “Eligible renewable sources: qualifying arrangement” provided that generating stations were to be excluded in certain circumstances where there were or had been “qualifying arrangements” under the NFFO regime. Article 6(1) and (2) provided:

“(1) Paragraph (2) applies where –

(a) a qualifying arrangement (“the applicable qualifying arrangement”) provided for the building of a generating station at a specified location (“the location”);

(b) the applicable qualifying arrangement was terminated due to the operator of the generating station to which it applied having committed an unremedied breach of it; and

(c) the last period in the tables contained in Schedule 1 to the Non-Fossil Fuel Order which relates to the applicable qualifying arrangement has not expired.

(2) Where this paragraph applies, a generating station –

(a) which is situated at the location; and

(b) to which the applicable qualifying arrangement applied at the time it was commissioned, or which is owned or operated by a person who was a party to the applicable qualifying arrangement (or who is a connected person or a linked person in relation to any such party),

shall be an excluded generating station.”

Article 6(3) and (4) of the 2006 Order provided:

“(3) Paragraph (4) applies where an extant qualifying arrangement (“the applicable qualifying arrangement”) provides for the building of a generating station (“the specified station”) at a specified location (“the location”) and the specified station has not been commissioned.

(4) Where this paragraph applies, a generating station –

(a) which is situated at the location; and

(b) which is owned or operated by a person who is party to the applicable qualifying arrangement (or is a connected person or a linked person in relation to any such party),

shall be an excluded generating station.”

A “qualifying arrangement” was defined in article 2(1) of the 2006 Order as:

“... an arrangement which was originally made pursuant to a Non-Fossil Fuel Order (and includes any replacement of such an arrangement where that replacement was made pursuant to an order made under section 67 of the Utilities Act 2000).”

“Commissioned” was defined in article 2(1) as:

“... the completion of a process of such procedures and tests as from time to time constitute usual industry standards and practices for commissioning a generating station in order to demonstrate that the generating station is capable of commercial operation.”

The 2009 Order

34. The 2009 Order came into force on 1 April 2009. Its provisions closely resemble those of the 2006 Order.

35. Under article 34(1) of the 2009 Order ROCs are to be issued to the operator of the generating station by which the electricity to which the ROC relates was generated. Under article 34(2), (3) and (4), however, where electricity is generated under an “NFFO arrangement”, ROCs are to be issued instead to the electricity suppliers which purchase it.

36. In article 2(1) an “NFFO arrangement” is defined as meaning:

“... an arrangement which was originally made pursuant to a Non-Fossil Fuel Order (and includes any replacement of such an arrangement where that replacement was made pursuant to an order made under section 67 of the Utilities Act 2000).”

37. Article 5(2) of the 2009 Order provides that, to discharge its “renewables obligation”, a supplier must, for the electricity it has supplied, provide ROCs to the Authority by the “specified day”. The “specified day” for a particular obligation period is 1 September immediately following it. An obligation period runs from 1 April of one year to 31 March of the next.
38. Article 36(2) requires that a generating station must be accredited before a ROC can be issued for the electricity which it produces. It provides:

“The electricity in respect of which a ROC is to be issued –

- (a) must be generated during a month in which the generating station generating it is accredited and any conditions to which the accreditation is subject are met;”

“Accreditation” is defined in article 2(1) of the 2009 Order as meaning:

“... accreditation of the station as one which is capable of generating electricity from renewable sources by the Authority or the Northern Ireland authority (and includes an accreditation granted before 1st April 2009).”

The granting of accreditation is governed by article 58. Article 58(2) provides:

“The Authority must not grant accreditation ... to a generating station under this article –
...

- (b) if, in its opinion, the station is unlikely to generate electricity in respect of which ROCs may be issued.”

Article 58(4) provides:

“Where a generating station has been commissioned, the Authority may, upon the application of its operator ... , grant the station accreditation.”

In article 2(1) of the 2009 Order “commissioned” is defined as meaning:

“... the completion of such procedures and tests in relation to that station as constitute, at the time they are undertaken, the usual industry standards and practices for commissioning that type of generating station in order to demonstrate that that generating station is capable of commercial operation”.

39. Articles 20 and 21 of the 2009 Order provide that ROCs shall not be issued in certain circumstances. Article 20, under the heading “Generating stations in respect of which a NFFO arrangement applied but was terminated”, relates to the position in which an unremedied breach of a NFFO arrangement has occurred. It provides:

“(1) This article applies where –

- (a) a NFFO arrangement (“the applicable NFFO arrangement”) provided for the building of a generating station at a specified location (“the location”);
- (b) the applicable NFFO arrangement was terminated due to the operator of the generating station to which it applied having committed an unremedied breach of it; and
- (c) the last period in the tables contained in Schedule 1 to the Non-Fossil Fuel Order which relates to the applicable NFFO arrangement has not expired.

(2) Subject to paragraph (3), where this article applies no ROCs are to be issued in respect of any electricity generated by a generating station –

- (a) which is situated wholly or partly at the location;
- (b) to which the applicable NFFO arrangement applied at the time it was commissioned; and
- (c) which is owned or operated by a person –
 - (i) who was a party to the applicable NFFO arrangement; or
 - (ii) who is a connected person or a linked person in relation to any such party.

(3) Paragraph (2) does not apply in relation to electricity generated by a generating station in a month in which all of the electricity generated by that station is sold pursuant to another NFFO arrangement.”

40. Article 21 of the 2009 Order, under the heading “Non-commissioned generating stations in respect of which a NFFO arrangement applies”, provides:

“

(1) This article applies where a NFFO arrangement (“the applicable NFFO arrangement”) provides for the building of a generating station (“the specified station”) at a specified location (“the location”) and the specified station has not been commissioned.

(2) Subject to paragraph (3), where this article applies no ROCs are to be issued in respect of any electricity generated by a generating station which –

- (a) is situated wholly or partly at the location; and
- (b) is owned or operated by a person who is a party to the applicable NFFO arrangement or who is a connected person or a linked person in relation to any such party.

(3) Paragraph (2) does not apply in relation to electricity generated by a generating station in a month in which all of the electricity generated by that station is sold pursuant to another NFFO arrangement.”

41. Article 61 of the 2009 Order provides that the 2006 Order will continue to apply to the issuing of ROCs for electricity generated before 1 April 2009.

Article 1 of the First Protocol to the European Convention on Human Rights

42. Under article 1 of the First Protocol to the European Convention on Human Rights, which enshrines the right to property, no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law.

43. Judicial remedies for breaches of Convention rights are discretionary. Under section 8(2) of the Human Rights Act 1998 (“the 1998 Act”) damages may be awarded only by a court which has power to award damages, or to award the payment of compensation, in civil proceedings. The test imposed by the 1998 Act for the award of damages is the test of necessity. Section 8(3) provides:

“No award of damages is to be made unless taking account of all the circumstances of the case, including –

- (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
- (b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.”

Clayton and Tomlinson (“The Law of Human Rights”, 2nd edition, 2009) observe (in paragraph 21.26) that the meaning of the requirement to take account of “the consequences of any decision” in section 8(3) “is not wholly clear”, but go on to say this:

“... Although it has been suggested that this factor would allow the court to take account of general policy issues such as floodgate arguments, the better view is that section 8(3) is unlikely to detract from the basic requirement for just satisfaction to the person in whose favour it is made: since this could otherwise not be reconciled with the fundamental principle of *restitutio in integrum*.”

44. When deciding whether an award of damages is necessary to afford just satisfaction for violations of a Convention right, the domestic court must look to the jurisprudence of the European Court of Human Rights. Section 8(4) of the Human Rights Act provides:

“In determining –

- (a) whether to award damages, or
- (b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under article 41 of the Convention.”

45. Giving the judgment of the Court of Appeal in *Anufrijeva v Southwark London Borough Council* [2004] QB 1124, Lord Woolf CJ said this:

“52 ... The remedy of damages generally plays a less prominent role in actions based on breaches of the articles of the Convention, than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages.

53 Where an infringement of an individual’s Human Rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance. ...”.

The court considered the Strasbourg jurisprudence, stating (in paragraphs 57 and 59):

“57 ... Our approach to awarding damages in this jurisdiction should be no less liberal than those applied at Strasbourg or one of the purposes of the HRA will be defeated and claimants will still be put to the expense of having to go to Strasbourg to obtain just satisfaction. The difficulty lies in identifying from the Strasbourg jurisprudence clear and coherent principles governing the law of damages.

...

59 ... [It] is possible to identify some basic principles the Court of Human Rights applies. The fundamental principle underlying the award of compensation is that the court should achieve what it describes as *restitutio in integrum*. The applicant should, in so far as this is possible, be placed in the same position as if his Convention rights had not been infringed. Where the breach of a Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded. The award of compensation to homosexuals, discharged from the armed forces, in breach of article 8, for loss of earnings and pension rights in *Lustig-Prean and Beckett v United Kingdom* (2000) 31 EHR 601 and *Smith and Grady v United Kingdom* (2000) 31 EHR 620 are good examples of this approach. The problem arises in relation to the consequences of the breach of a Convention right which are not capable of being computed in terms of financial loss.”

46. In *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, Lord Bingham of Cornhill (in paragraph 9 of his speech) approved the approach adopted by the Court of Appeal in *Anufrijeva*. He stressed (in paragraph 10) the importance of the “*restitutio in integrum*” principle and went on (in paragraph 19) to say this:

“... [The] 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Damages need not ordinarily be awarded to encourage high standards of compliance by member states, since they are already bound in international law to perform their duties under the Convention in good faith, although it may be different if there is felt to be a need to encourage compliance by individual officials or classes of official. ...”

47. The Strasbourg court will generally not award monetary compensation unless satisfied that the loss or damage complained of was demonstrably and directly caused by the violation (see *Kingsley v United Kingdom* 35 EHRR 177, at paragraph 40). Awards reflect the court’s assessment of a fair and equitable outcome to the case in hand. In determining whether damages should be awarded for a breach of a Convention right, the court will consider whether the breach was inadvertent or arose from a misunderstanding of the legal position, or, conversely, the result of a conscious decision to breach Convention rights (see Clayton and Tomlinson, paragraph 21.27). In several cases the court has awarded just satisfaction in a sum sufficient to compensate for a breach of article 1 of the First Protocol (see, for example, *Sporrong and Lonnroth v Sweden* [1985] 7 EHRR CD256, *Papamichalopoulos v Greece* [1996] 21 EHRR 439, *Scordino v Italy (No. 3)* [2009] 48 EHRR 9, *Pine Valley Developments Limited v Ireland* [1993] 16 EHRR 379) and *Basarba OOD v Bulgaria* (Application no. 77660/01, 20 January 2011). In *Basarba* the court held (in paragraph 19 of its judgment) that reparation should be aimed at putting the applicant in the position it would have been in had the violation not occurred. It was acknowledged (in paragraphs 20 and 26) that precisely calculating the sums necessary to make full reparation might be impossible, but an award could still be made. The amount which it is necessary to award by way of just satisfaction is to be determined by the court in the exercise of its discretion “having regard to what is equitable”.

Submissions for the claimants

48. For the claimants Mr Michael Fordham QC submitted that no extant “NFFO arrangements” for these two sites have existed since clause 2.3 was activated on 31 December 2008. Since that date there has been no agreement under which electricity generated by either facility was to be made available to the Buyer. An agreement whose provision for it to lapse comes into effect in this way does not satisfy the requirements of article 6(3) and (4) of the 2006 Order and article 21 of the 2009 Order. Once such a provision has taken effect – as in the present case, for both sites, it did – accreditation must be given and the operator is entitled to be issued with ROCs.
49. The concept of an “extant qualifying arrangement” for the purposes of the 2006 Order, and of an “NFFO arrangement” for the purposes of the 2009 Order, is clear. The statutory scheme required such arrangements to be agreements securing for one party the entitlement to receive from the other a specified amount of generation capacity from a facility on a particular site. Section 32 of the 1989 Act referred to arrangements securing the result of making generating capacity available to the supplier for the specified period. The same description of “arrangements” was used in the NFFO Orders (see, for example, article 3(1) of NFFO Order 5). The required replacement arrangements were of the same kind.
50. Mr Fordham contrasted the exclusion in article 6(3) and (4) of the 2006 Order and article 21 of the 2009 Order with that provided for in article 6(1) and (2) of the 2006 Order and article 20 of the 2009 Order. The article 20 exclusion plainly relates to a past arrangement, not a present one. The language used refers to an arrangement which “provided” for the building of a generating station at a specified location, and to an arrangement which “was terminated”. The article 21 exclusion, however, relates to a situation in which an “NFFO arrangement” exists. It refers to a situation in which a “NFFO arrangement applies”, and “provides” – not “provided” – for the building of a generating station. Similarly, the 2006 Order refers to an “extant qualifying arrangement”. It is misconceived to regard as “extant” an arrangement which is “of no force and effect”. The past act of two parties entering into an agreement which had provided for one of them to receive generation capacity from the other could not constitute an “NFFO arrangement” once the agreement itself became ineffective. This is what has happened in the present case. When the lapsing provisions in clause 2.3 were activated the RPPAs ceased to be “NFFO arrangements”. All of their provisions concerning the contracted capacity had gone. Their terms securing the sale and supply of electricity (clauses 3.1 and 3.2) were defunct. So was the term securing the operation of the facility and the delivery of energy from it (clause 3.3). So too

was the term providing for the installation of the facility itself (clause 3.5). Clause 2.3 was perfectly clear. It referred not merely to certain provisions falling away, but to the RPPA itself ceasing to be of “force and effect”. The provisions which did survive do not constitute an “NFFO arrangement”. The saved clauses, Mr Fordham submitted, were the equivalent in the case of a lapsed agreement to the provisions of clause 15.4 for the survival of certain rights on termination in the case of an agreement which had been terminated.

51. Mr Fordham pointed out that if there were an “NFFO arrangement” in existence, and if the Seller were now to proceed to commission the generating station, the Buyer would be entitled to the contracted capacity at the contracted price. Electricity would be sold under the “NFFO arrangement”, and the supplier purchasing that electricity would be issued with ROCs under article 34 of the 2009 Order. But there is simply no arrangement which has such effect.
52. Mr Fordham emphasized that the article 21 exclusion is not engaged by a breach of contract. It is not engaged if a party to an agreement fails to use reasonable endeavours to procure the fulfilment of conditions precedent to the commencement of the contract term. It is engaged only if there is an applicable “NFFO arrangement” and the specified generating station has not been commissioned. The generating station might not have been commissioned despite the Seller having used “Reasonable Endeavours” as required by clause 2.4 of the RPPAs. But that was immaterial for the purposes of article 21. Although the concern the Authority had expressed in its decision letter about whether clause 2.4 of the RPPAs had been satisfied was not well-founded, this was irrelevant. As the NFPA had acknowledged in its detailed grounds, “its opinion as to whether reasonable endeavours have been in the past, or continue to be, used by the Claimants in relation to the satisfaction of the conditions is not directly relevant to the application of Article 21”. Article 21 was not intended to penalize a party which was in breach of a requirement to use reasonable endeavours. In this instance the parties agreed a contractual period for commissioning. During that period they were contractually bound. If commissioning took place within the agreed period the Seller was obliged to supply the contracted capacity and the Buyer was obliged to purchase it at the contracted price. The period could be extended by agreement. But when the agreed deadline was passed, and unless the parties agreed otherwise, their arrangement, as they themselves had agreed, was to be “of no force and effect”. If, at the end of the contractually agreed period for the conditions precedent to be fulfilled, either of the parties did not wish to agree otherwise, their bilateral obligations as to the supply of electricity came to an end. No “NFFO arrangement” then subsisted. And at that stage, therefore, the preclusion of ROCs being issued for electricity generated from the site did not apply. There is nothing surprising or objectionable about this. No obligation, statutory or contractual, has been abandoned.
53. Mr Fordham illustrated his submissions with the history of the Candles site. The original Commissioning Nominated Date was 1 April 2000. The period originally agreed for fulfilling the conditions precedent was extended by agreement under clause 2.3. The operator was unable to commission the facility. The RPPA was extant and in force. Accreditation was rightly refused in April 2006.
54. Mr Fordham submitted that if the Authority’s interpretation of the exclusion in article 6(3) and (4) of the 2006 Order and article 21 of the 2009 Order were correct it would have very odd consequences. It would mean that the mere fact that a generating station had not been commissioned could be held against an operator, irrespective of any breach of contract. If, for example, the operator had not been able to secure the necessary planning permission for the contracted facility, the agreed deadline had passed and the lapsing provision had been activated, the Authority’s argument would seem to be that the article 21 exclusion would nevertheless apply. This would also be so if the Buyer was not prepared to agree to a further extension of the time for the fulfilment of conditions, which under the RPPAs it would be entitled to do. That, Mr Fordham submitted, could not be right.
55. The true position, said Mr Fordham, is simple. Article 21 does not apply where an “NFFO arrangement” no longer exists. Such an arrangement can lapse, and thus cease to be of “force and effect”. The exclusion in article 21 then has nothing on which it can bite. This plainly is so in the present case. The claimants were therefore entitled in law to have their generating stations accredited. The court should quash the Authority’s decision and grant a mandatory order requiring it to accredit the Candles and Welbeck stations from the relevant dates, namely 28 January 2009 for Candles and 24 March 2009 for Welbeck. The Authority should also be required to issue all ROCs due from the date of accreditation to 31 March 2011.

56. As to “just satisfaction”, Mr Fordham submitted that the Authority knew from the outset that it was depriving the claimants of a valuable economic benefit. It knew that the consequence of refusing to accredit the claimants’ generating stations and grant ROCs was that the claimants would suffer financial loss. It had nevertheless maintained its position, contending throughout that it had acted lawfully and in accordance with the statutory scheme. Although the Authority had also asserted that just satisfaction is a matter of discretion and that it ought not to be required to pay any, or any substantial, just satisfaction, it had not denied that if the claimants succeeded in demonstrating that its refusal to grant accreditation was unlawful, its conduct would constitute an interference with their right to property under article 1 of the First Protocol to the Human Rights Convention and would thus “be unlawful” under section 8 of the Human Rights Act 1998. The Authority’s claim to discretionary protection is misconceived. There was never any doubt about the amount of electricity capacity there was at the claimants’ sites, nor about the dates on which ROCs would have been available to them, nor about the price for which they could then have been sold. The case law on just satisfaction is clear. Where direct economic loss is caused to a claimant by a relevant unlawful act, the approach the court will take is to assess the value of that loss, with the aim of putting the claimant in the position it would have been in had it been treated lawfully (see the decision of the Court of Appeal in *Anufrijeva*, per Lord Woolf at paragraph 59). In the present case the damage clearly was caused by the violation. The claimants had suffered the following losses. For CP7, the compliance period running from April 2008 to March 2009, had the claimants’ application for accreditation been successful, they would have been issued with 1,791 ROCs, whose total value, calculated on an average sale price of £52.18 per ROC, would be £93,454.38. For CP8, the compliance period running from April 2009 to March 2010, the claimants are entitled to receive 52,776 ROCs, at an average price of £50.34, giving a loss of £2,656,743.84. This potential loss could still be mitigated before the extended deadline of 1 September 2011. The actual loss would fall to be assessed once it was known how much the claimants had been able to recover for the ROCs it should have received. As to CP9, the compliance period running from April 2010 to March 2011, if the Authority were now to provide accreditation and issue the ROCs to which the claimants are entitled, the claimants expect to be able to sell those ROCs by 1 September 2011. For this period, therefore, the claimants ask for a stay of the claim for just satisfaction, with liberty to apply.

Submissions for the Authority

57. On behalf of the Authority, Mr Thomas Sharpe QC rejected Mr Fordham’s contention that when clause 2.3 of the RPPAs took effect the “NFFO arrangements” had ceased to exist. The “lapse” of sale and payment terms did not prevent the RPPAs continuing to be “qualifying arrangements” under the 2006 Order or “NFFO arrangements” under the 2009 Order. The Authority’s interpretation of the statutory and contractual provisions did not lead to absurd consequences. It was the claimants who were advancing a new meaning of “qualifying arrangements” and “NFFO arrangements” which departed from the statutory definitions.
58. Clause 2.4 of the RPPAs was, said Mr Sharpe, the “central obligation” which the claimants had undertaken under the NFFO regime. It requires the claimants to use “Reasonable Endeavours” to bring about, among other things, the “Commissioning” of the facilities at Candles and Welbeck, which obviously and necessarily includes the building of the generating stations. This obligation continues to exist. It is not diminished by the fact that other terms of the RPPAs have become of no force and effect. By virtue of article 4(1)(b) of the NFFO Saving Order 2000, the NFPA is under a continuing obligation to secure the availability of electricity generated from renewable sources. Taken together, the legislation and the contractual provisions serve the purpose of the NFFO regime.
59. In the case of a Seller who, despite using reasonable endeavours, had failed to achieve the fulfilment of conditions precedent within the agreed deadline, there would remain an extant “NFFO arrangement”. With the consent of the Buyer, the Seller could revive the entirety of the contractual provisions by means of clause 20.7 and then vary the specified output or use the economic termination provisions of clause 15.1 to bring the “NFFO arrangement” to an end. As the Buyer, the NFPA could not refuse to co-operate. If it did, it might be failing to do what it could to realize the aggregate generating capacity which it has a duty to secure. Until termination took place, however, article 21 of the 2009 Order would apply, and the Seller would not be entitled to ROCs. Otherwise, an operator could simply abandon its obligations by not commissioning before the deadline, refusing to extend the deadline, and later seeking accreditation for the facility it had constructed on the site. To deny ROCs to such an operator,

unless economic termination had taken place, was consistent with the policy underlying the NFFO regime. It would provide an incentive for the operator to go to the NFPA and seek to vary their agreement. Article 21 of the 2009 Order was not intended to penalize those who were in breach of a requirement to use reasonable endeavours. But it was intended to prevent an operator who had a continuing obligation to commission a facility under the NFFO regime from ignoring that obligation and thus availing itself of ROCs.

60. Mr Sharpe submitted that the claimants could have done many things to procure the commissioning of the Candles and Welbeck facilities, or to bring to an end their obligations under the RPPAs. All of these were commercially sound and sensible options. If the claimants were now in difficulties, this was their own fault. Even now, however, it would be possible for them to agree to restore the totality of the arrangements under the Candles and Welbeck RPPAs, and terminate those arrangements, albeit that this would lead to a lower yield of ROCs than had been claimed in the present application.
61. Mr Sharpe said the RPPAs had not been terminated; as contracts made under NFFO Order 5, they remained in existence. The claimants had sought to attribute to the concept of “lapse” an intermediate meaning, so that a lapsed arrangement was neither in existence nor terminated. This, submitted Mr Sharpe, was wrong. Clause 15 of the RPPAs was the only means by which they could be terminated. An NFFO arrangement did not simply cease to exist after a certain time had gone by. If that were so, the contract which had been put in place to implement the NFFO regime could automatically fail to secure the commissioning of a facility with the specified capacity.
62. Therefore, submitted Mr Sharpe, the Authority was right to base its decision on article 21 of the 2009 Order. It had relied on article 20 of the 2009 Order as a fallback, for it was not convinced that the claimants had satisfied their obligations under clause 2.4 of the RPPAs. If the court were to hold that NFFO arrangements for the two sites had ceased to exist, article 20 of the 2009 Order (and articles 6(1) and (2) of the 2006 Order) would be relevant. If those arrangements had ceased to exist, they must have been terminated. If they had been terminated for an unremedied breach by the claimants, Article 20 of the 2009 Order would apply and the facilities in question would not be eligible for accreditation. The unremedied breach might be the claimants’ election, made plain in their letter of 22 December 2008, not to extend the deadline for fulfilment of the conditions precedent in clause 2.2. This might have been a breach of the claimants’ obligation under clause 2.4. The fact that the NFPA had said it did not consider the claimants were in breach of their obligation under clause 2.4 was irrelevant. The NFPA must have assumed that the “NFFO arrangements” still existed and, therefore, that there could have been no termination for breach. If it were now to learn that the “NFFO arrangements” had in fact been terminated it would have to consider whether termination had been brought about by the claimants’ breach.
63. Mr Sharpe submitted that article 6 of the 2006 Order and articles 20 and 21 of the 2009 Order were intended to prevent “manipulation” by electricity generators who sought to extricate themselves from “qualifying arrangements” and “NFFO arrangements” so they could gain the higher awards available under the Renewables Order regime. Such awards are, in the end, funded by consumers. The claimants were attempting to manipulate the system. If they were allowed to do that, other generators would be deprived of money they should have, and the cost to consumers would be increased. It would be wrong, and inconsistent with the policy informing the legislation, to allow the claimants to abandon their obligations under the RPPAs for Candles and Welbeck and to benefit from ROCs being issued to them in spite of the “anti-avoidance” provisions in article 6 of the 2006 Order and article 21 of the 2009 Order.
64. As to relief, Mr Sharpe submitted that, if the court decided that the “NFFO arrangements” for the Candles and Welbeck sites had been terminated, it would not be right for it to make a mandatory order requiring the Authority to accredit those facilities and issue ROCs. The proper order here would be one remitting the decision to the Authority for it to decide whether, on the facts, article 20 of the 2009 Order applied. If such an order were made, the question of damages would not arise. The claimants’ entitlement to ROCs would remain undetermined until the circumstances in which the “NFFO arrangements” had been terminated became clear.
65. In any event, Mr Sharpe submitted, there had been no breach of the claimants’ rights under article 1 of the First Protocol of the Human Rights Convention, or of any other Convention right. The Authority had acted at all times consistently with the relevant statutory requirements and in accordance with a

correct understanding of the contractual relationship between the claimants and the NFFO. If, however, the Authority had acted beyond its powers, the claimants did not say it had done so intentionally or in bad faith. So, submitted Mr Sharpe, the claim in the present case was effectively a claim for damages for an ultra vires act in the absence of any fault, such as negligence or misfeasance. It laid open a wide range of potential liability for the state. Mr Sharpe submitted that section 8 of the 1998 Act is directed at those situations, which will be rare, in which fundamental human rights have been infringed and where domestic law offers no relief or none that would be adequate. Section 8(3) of the 1998 Act requires the court, in considering whether to award damages, to take into account the wider consequences. If the court were to find the Authority strictly liable to the claimants in the present case a flood of similar claims might follow. For strict liability to attach to a decision-making body so that even in the absence of negligence or misfeasance it could be liable to pay large sums of damages was both undesirable and unnecessary. It should also be remembered, said Mr Sharpe, that if the Authority were required to pay compensation by way of just satisfaction to the claimants it was, in the end, electricity consumers who would have to bear that cost. Only where the relevant legislation required it should cost be imposed on electricity consumers. No such loss had been sustained in this case. If the question of just satisfaction did arise, the court should conclude that the claimants had brought the losses they had incurred upon themselves.

Submissions for the NFFO

66. The NFFO did not take an active part in the hearing, acknowledging this to be a dispute between the claimants and the Authority. However, in its detailed grounds it stated that it concurred with the claimants' view that article 20 of the 2009 Order was "not currently applicable" to the Candles and Welbeck sites; that it did not agree with the claimants' contention that an "NFFO arrangement" ceased to exist once the contractual conditions had not all been met by the extended deadline; but that it did agree with the claimants that its opinion on whether they had used reasonable endeavours to satisfy conditions, or now continued to do so, was not of direct relevance to the application of article 21.

Discussion

Article 21 of the 2009 Order

67. To resolve the main issue in this case it is necessary to begin by ascertaining the true meaning of article 6 of the 2006 Order and article 21 of the 2009 Order.
68. The exclusions in article 6(4) of the 2006 Order and in article 21(2) of the 2009 Order apply, respectively, to an "extant qualifying arrangement" and an "NFFO arrangement" providing for the building of a generating station at a specified location, when the specified station has not been commissioned. The meaning of an "extant qualifying arrangement" in article 6 of the 2006 Order and the meaning of an "NFFO arrangement" in article 21 of the 2009 Order are the same.
69. One must turn, therefore, to the definition of a "qualifying arrangement" in the 2006 Order and the definition of an "NFFO arrangement" in the 2009 Order. Article 2(1) of the 2006 Order defines a "qualifying arrangement" as being, save for exceptions which are of no relevance in the present case, "an arrangement which was originally made pursuant to a Non-Fossil Fuel Order", including "any replacement of such an arrangement where that replacement was made pursuant to an order made under section 67 of the Utilities Act 2000". The relevant part of the definition of an "NFFO arrangement" in article 2(1) of the 2009 Order is in identical terms.
70. What kind of "arrangement" is contemplated in those definitions? The answer is, I think, plain in the provisions of the statutory NFFO regime established under section 32 of the 1989 Act. Article 3(1) of NFFO Order 5 required public electricity suppliers in England and Wales to make arrangements to secure the availability to them of a specified aggregate amount of generating capacity from non fossil-fuel generating stations. The arrangements originally entered into for Welbeck and Candles were made under the provisions of NFFO Order 5. In my judgment, Mr Fordham was right to submit that the presence of terms for the sale and purchase of a given amount of generating capacity is a prerequisite for a "qualifying arrangement" under the 2006 Order and for an "NFFO arrangement" under the 2009 Order. As I understood Mr Sharpe to acknowledge on behalf of the Authority, a defining and indispensable attribute of an "NFFO arrangement" is that it is contractually effective to secure the

provision of generating capacity by one party to another. This quality is, I believe, essential to an “NFFO arrangement”.

71. The exclusions in article 6(4) of the 2006 Order and in article 21(2) of the 2009 Order are engaged by the existence of a relevant arrangement that provides for “the building of a generating station”. In my judgment, this requires there to be active and enforceable provision for the construction of a specified generating station, in an extant agreement which entitles one party to purchase from the other capacity generated in that facility.
72. An illustration of the exclusion being properly used is to be seen in the decision on the Candles site made by the Authority in April 2006. At that time, as Mr Fordham accepted on behalf of the claimants, the Candles RPPA was extant. It had “force and effect”. It conferred rights and obligations for the supply of electricity capacity. It was a live arrangement, to which the statutory exclusion therefore applied. Accreditation was rightly refused.
73. The exclusion for extant arrangements does not apply when the relevant contract term has run its course. This I understood to be agreed. The issue in the present case is whether the exclusion applies when, except for provisions which do not secure the supply of electricity capacity, an arrangement ceases to be of “force and effect” before the contract term has even begun.
74. Had those who drafted the 2009 Order intended to exclude from the ROCs scheme any generation of electricity from a specified facility at a specified location which had at any time been the subject of an “NFFO arrangement”, they could have done so. But they did not. Only two exclusions were made: in article 20, for generating stations “in respect of which a NFFO arrangement applied but was terminated”, and, in article 21, for non-commissioned generating stations “in respect of which a NFFO arrangement applies”. These exclusions match the discount provisions in NFFO Order 5. Termination for unremedied breach is addressed in article 20 of the 2009 Order, as it was in article 4(2)(a) of, and Schedule 3 to, NFFO Order 5. Equally, as Mr Fordham submitted, the situation in which capacity is not secured by a relevant arrangement because conditions precedent to its being secured have not been met is allowed for in article 21, as it was in article 4(1)(a) of, and Schedule 2 to, NFFO Order 5. Equivalent provisions were included in the RPPAs: in clause 15.2(B) for unremedied breach, and in clause 2.3 for the situation in which the commitment to generate and sell capacity would lapse if all of the conditions precedent had not been met in time.

The RPPAs

75. There is no dispute that at the time when the RPPAs for the Welbeck and Candles sites were entered into they had the necessary attributes of “qualifying arrangements” for the purposes of the 2006 Order and of “NFFO arrangements” for the purposes of the 2009 Order. Nor is there any dispute that, at least for as long as those agreements remained extant, they retained that status.
76. In each RPPA the Buyer’s entitlement to the “Contracted Capacity” was secured by clause 3.1. Subject to the “Force Majeure” provisions in clause 3.4, clause 3.2 contained the Seller’s undertaking “to make the Contracted Capacity available for the Contract Term to the Buyer”. By clause 3.3 the Seller committed itself to operating the “Facility” during the “Contract Term”. Under clauses 11, 12 and 13, the Buyer was to purchase the electricity at a contracted price.
77. Both RPPAs, it is agreed, provided for “the building of a generating station ... at a specified location”. Mr Sharpe submitted that they implicitly provided for the building of such a facility, this provision being, as he put it, subsumed into the Seller’s covenants relating to the commissioning of the generating station and its connection to the distribution system. Mr Fordham submitted that the installation of the “Facility” under clause 3.5, in accordance with the specification in Schedule 2, would constitute “the building of a generating station ...” for the purposes of article 21 of the 2009 Order. I prefer Mr Fordham’s submission. Whilst the RPPAs do not explicitly refer to the “building” of a generating station at the locations in question, it seems clear that this is what the parties had in mind when they inserted clause 3.5, “Installation of Facility”, and Schedule 2 specifying exactly what was to be installed. To adopt this understanding of clause 3.5 of the RPPAs in the context of the statutory scheme is not to strain too far the sense of the word “install”. One of its normal meanings is “Place (an apparatus, system, etc.) in position for service or use” (Shorter Oxford English Dictionary, sixth edition). This seems to fit the context well.

78. The arrangement which the parties to the RPPAs were prepared to agree allowed them to negotiate an extended deadline for the satisfaction of the conditions precedent to the “commencement of the Contract Term”. An extended deadline was agreed. When that deadline was reached the conditions in clause 2.2 had not all been met. Unless the parties agreed otherwise, and apart from the residual provisions referred to in clause 2.3, the RPPAs were then to be of “no force and effect”. The parties did not agree otherwise. Therefore, only the clauses which had deliberately been saved survived. These did not include clauses 3.1 and 3.2, clause 3.3, clause 3.5 and Schedule 2, or clauses 11, 12 and 13.
79. Why did the parties choose to retain some of the provisions of the RPPAs, preserving through clause 2.4 a residual obligation for the Seller to use “Reasonable Endeavours” to achieve five of the events prescribed in clause 2.2? I think the answer to this question, as Mr Fordham suggested, lies in commercial pragmatism. The parties wanted to hold on to the chance of a full contractual relationship between them being restored. Keeping the Seller to his commitment to use “Reasonable Endeavours” to bring about the events referred to in Conditions (A), (C), (F), (G) and (H) in clause 2.2 would, as Mr Fordham submitted, “support the scope for potential agreement”. What “Reasonable Endeavours” would entail now that the RPPA itself was “of no force and effect” would have to be judged accordingly. A new “NFFO arrangement” might have emerged. It might have been achieved through clause 20.7, which survived the RPPAs when they lapsed. But any new arrangement was for the parties to agree. Neither clause 20.7 nor any other surviving provision of the RPPAs compelled them to do so.

The effect of clause 2.3 of the RPPAs

80. In my judgment, both on a literal and on a purposive approach, when the RPPAs ceased to be of “force and effect” they ceased to be “extant qualifying arrangements” and “NFFO arrangements” within the statutory scheme.
81. By the agreed deadline of 31 December 2008 the conditions in clause 2.2 of the RPPAs had not all been satisfied. Under clause 2.3 it was the RPPAs themselves, as agreements made under the statutory scheme, which on that day and for that reason became “of no force and effect”. As Mr Fordham submitted, it makes no sense to regard an agreement which is of “no force and effect” as being extant.
82. Mr Fordham did not contend, and could not, that the contractual relationship between the parties thus ceased to exist in its entirety. Plainly it did not. Clauses 2.4, 16, 17, 18 and 20 survived. What Mr Fordham did say, however, was that upon the lapsing of all but those five residual provisions the parties’ relationship was reduced to a form which lacked the essential characteristics of an “extant qualifying arrangement” for the purposes of article 6 of the 2006 Order and of an “NFFO arrangement” for the purposes of article 21 of the 2009 Order. The provisions which survived under clause 2.3 did not constitute an “NFFO arrangement”.
83. I accept those submissions. Crucially, the residual provisions did not include any of the core terms in clause 3, relating to the sale and supply of the “Contracted Capacity” and the operation of the generating station. The entitlement of the Buyer to receive generating capacity from the Seller, which had been provided for in clause 3.1, was not preserved. Nor was the Seller’s obligation to make the capacity available to the Buyer for the “Contract Term”, which had been contained in clause 3.2. Nor was the Seller’s commitment to operating the “Facility”, in clause 3.3. In the absence of clauses 3.1 and 3.2 there was no longer any agreement for the sale and supply of a given quantity of electricity at a given price. Thus the survival of the “Reasonable Endeavours” obligation under clause 2.4 was ineffective to maintain the essential character and function of the RPPAs as “NFFO arrangements”. The relationship between the parties now lacked the ingredient which is of the essence of such an arrangement. The survival of the mechanism for variation in clause 20.7 did not preserve an arrangement which had ceased to be effective. At most it offered the prospect of a new and different arrangement subsequently being agreed.
84. In my judgment therefore, by the time the claimants made their applications for accreditation under the statutory scheme, there was no longer, for either of these two sites, an “extant qualifying arrangement” or an “NFFO arrangement” in existence. The statutory exclusions could not and did not apply, and the Authority’s decision to exclude was unlawful.

85. This analysis does not require any conclusion to be reached on the claimants' performance of their contractual duty, under clause 2.4 of the RPPAs, to use "Reasonable Endeavours" to "procure the fulfilment of Conditions (A), (C), (F), (G) and (H) in clause 2.2". I accept Mr Fordham's submission that the operation of the statutory exclusion in article 21 of the 2009 Order does not depend on the alleged or proven breach of such a covenant. It depends only on the existence of an "NFFO arrangement" and "the specified station" not having been commissioned. The Authority's reliance in its decision letter on its doubts about the claimants' performance under clause 2.4 was therefore misplaced.
86. When the RPPAs lapsed it was not only the Seller's obligation to supply capacity to the Buyer which ceased to be of effect. There was no longer any contractual commitment relating to the installation of the facility by which the capacity was to have been generated. Clause 3.5 had gone.
87. Mr Sharpe contended for a distinction between the concept of installing the "Facility", which is what clause 3.5 had dealt with, and the concept of building it, which was not the subject of any explicit provision in the RPPAs. He submitted that clause 3.5 had been concerned only with installing the operating equipment within the building. The construction of the building itself was, he suggested, another thing altogether, not explicitly provided for in the RPPAs but necessarily implicit in their provisions as to "Commissioning", in particular the obligation under clause 2.4 and Condition (C) in clause 2.2. "Commissioning" would come at the end of a process of construction, which would obviously have to involve the building of the generating station. It would be the culmination of that process. It must therefore be understood as including the construction of the "Facility".
88. Persuasive as those submissions might seem, I do not believe they are right.
89. In the first place, they do not sit well with the very precise definition of "Commissioning" in clause 1.1 of the RPPAs. "Commissioning" is defined there in terms of the completion of certain "procedures and tests ... to demonstrate that the Facility ... is capable of commercial operation for the purposes of this Agreement ...". I do not think this differs materially from the statutory definition of the word "commissioned", in article 2(1) of the 2009 Order. Whether or not it does, I do not believe the process of "Commissioning" as provided for in the RPPAs can be said to embrace the building of the "Facility" itself. It is plain from Condition (A) in clause 2.2 that the "Facility" was seen as being something which could be "constructed". Planning permission for such development was going to have to be sought and granted. The "Facility" was to be a structure comprising equipment for generating electricity, of the kind referred to in the advice published by the Authority in March 2009, "Renewables Obligation: Guidance for generators of over 50 kW". And, as is clear from clauses 3.6 and 3.7 of the RPPAs, the parties envisaged that real property rights in it would exist once it had been built.
90. Secondly, as I have said, I consider that the construction of the generating stations to which the RPPAs related was specifically and deliberately dealt with by the provisions of clause 3.5, "Installation of Facility", and the specification in Schedule 2.
91. Thirdly, however, if I were wrong about that and the requirement to build the "Facility" needed to be implied somewhere in the RPPAs, it would surely be into clause 3.5, not into Condition (C) in clause 2.2.
92. Fourthly, if the requirement in Condition (C) to use "Reasonable Endeavours" to procure the "Commissioning" of the "Facility" included using "Reasonable Endeavours" to build and "install" it, the particular obligation which the parties had spelt out in clause 3.5 would have been otiose. The only way to avoid this conclusion would be to read into the concept of "Commissioning" the idea of erecting a structure to house the operating equipment but not the idea of installing the equipment within it, which I think would be artificial.
93. And fifthly, although Condition (C) in clause 2.2 necessarily assumes that the generating station has been built, the same could also be said of the covenants relating to the entitlement of the Seller to the "Contracted Capacity" (in clause 3.1), the making available of the capacity to the Buyer (in clause 3.2) and the operation of the "Facility" (in clause 3.3). None of those provisions was saved by clause 2.4, and, in my view, none of them could sensibly be implied into Condition (C).

94. I cannot accept Mr Sharpe's argument that, after the RPPAs had become "of no force and effect" by the operation of clause 2.3, they remained, nonetheless, extant as "NFFO arrangements" because they had not been terminated under clause 15. Clearly, the RPPAs, when extant, were agreements to which the provisions relating to termination for "unremedied breach" in article 6(1) and (2) of the 2006 Order and article 20 of the 2009 Order could have applied. By virtue of clause 15.3 the only circumstances in which the RPPAs could have been terminated were provided for in clause 15. It does not follow from this, however, that it was only by termination under clause 15 that the RPPAs could cease to be extant. The provisions for the RPPAs ceasing to be effective, in clause 2.3, and those for termination, in clause 15, operated quite independently of each other. Neither would extinguish all of the RPPA's terms. Parallel to the saving of certain provisions by clause 2.4 was the survival of accrued rights and obligations on termination under clause 15.4. But in neither case would the RPPA itself be extant. Enduring contractual effects, such as the mutual covenant for confidentiality in clause 17.1, are not to be equated with an enduring "NFFO arrangement".
95. For the reasons I have given, I accept the interpretation of the statutory scheme and contractual provisions contended for on behalf of the claimants by Mr Fordham, and reject that put forward on behalf of the Authority by Mr Sharpe. I conclude therefore that the Authority's decision of 30 March 2010 was taken on an erroneous understanding of the relevant statutory provisions and was thus an unlawful decision. The statutory exclusion under article 6(3) and (4) of the 2006 Order and article 21 of the 2009 Order did not apply in this case, and the Authority was wrong to conclude that it did. The claimants were entitled in law to have their generating stations at Welbeck and Candles accredited in accordance with the statutory scheme.
96. This conclusion is not, however, sufficient to dispose of the main issue in the claim. It is also necessary to consider the Authority's argument on article 20.

Article 20

97. In dealing with that argument I shall assume that the doubts the Authority expressed in its letter of 30 March 2010 about the claimants' performance of their obligation under clause 2.4 were, as Mr Sharpe put it, "by way of a fallback", rather than a basis for the decision itself. In the course of argument Mr Sharpe made it clear that the Authority did not now rely on article 20 as a justification for its decision.
98. If my conclusion on article 21 is correct I do not believe article 20 could conceivably apply in this case. There was here no extant "NFFO arrangement" for the purposes of article 21, and no terminated "NFFO arrangement" for the purposes of article 20. But, in any event, a complete answer to Mr Sharpe's argument lies in Mr Fordham's submission that article 20 is concerned with the kind of situation envisaged in clause 15.2(B) of the RPPAs, namely the Seller's "unremedied" breach during "the Contract Term", and that, on the facts of this case, there has been no such breach. Paragraph (1)(b) of article 20 applies where "the applicable NFFO arrangement was terminated due to the operator of the generating station to which it applied having committed an unremedied breach of it". This corresponds to the provisions of clause 15.2(B). Paragraph (2)(b) of article 20 provides that ROCs are not to be issued for electricity generated by a generating station "to which the applicable NFFO arrangement applied at the time it was commissioned". In the light of those provisions, I cannot see how clause 15.2(B) of the RPPAs could have applied in the present case. The "Contract Term" did not begin in accordance with the terms the parties had agreed. If it had, termination would have required the Buyer to give notice to the Seller, and that was not done.
99. Even now there is no convincing allegation of breach. Mr Sharpe suggested that the claimants might have been in breach of their "Reasonable Endeavours" duty in clause 2.4 when, in their letter to the NFPA of 22 December 2008, they refused to extend the time for the fulfilment of the "conditions precedent" in clause 2.2. This, he said, was a "candidate breach". But this submission has gained no support from the NFPA. On the contrary, the NFPA has said unequivocally in its solicitors' letter of 18 April 2011 that it does not consider the claimants have been in breach of their obligation under clause 2.4.
100. I do not think it is necessary, or useful, to speculate about what the claimants might have done had they wanted to keep the RPPAs alive, or about what they might have done had they wanted to resurrect them. Mr Sharpe also suggested, hypothetically, that the claimants could have sought, under the variation provisions in clause 20.7, to revive some or all of the terms of the lapsed RPPAs. Had the

Seller's termination provisions in clause 15.1 been brought back to life in this way, the claimants could then have resorted to them. Economic termination, Mr Sharpe submitted, need not be an unduly complex or time-consuming exercise. All of this, I acknowledge, might be so. But the claimants were not obliged to act as Mr Sharpe said they could have done. It was not a breach of contract to opt not to do so. The claimants were entitled to take the course they did. To speak here of obligations being abandoned is in my view unreal.

101. I therefore see no reason to remit the decision to the Authority so that it could look again at the possibility of termination for unremedied breach.

Policy

102. Mr Sharpe focused on the policy underlying what he called the "anti-avoidance provisions" of articles 20 and 21 of the 2009 Order and article 6 of the 2006 Order. As the decision-maker charged with the task of dealing with applications for accreditation, the Authority is responsible for administering this part of the statutory scheme. An implicit objective of the policy, I accept, is that generators of electricity who have willingly undertaken the onus of "NFFO arrangements" should be not be discouraged from meeting their obligations under those arrangements by the prospect of the financial gains they can make through the issuing of ROCs. Otherwise, the cost to electricity consumers might be needlessly increased. I recognize the general objective of the Authority, under section 3A of the 1989 Act, to protect the interests of existing and future consumers. However, as Mr Fordham pointed out, if the claimants were entitled under the statutory scheme to the ROCs for which they applied, the electricity industry, and ultimately the electricity consumer, would have to bear the cost. There is nothing inimical to policy in that. The claimants have relied on provisions in the RPPAs whose effect was to prevent the "Contract Term" from beginning. Those provisions did not offend the NFFO legislation. And they do not offend the statutory provisions for the awarding of ROCs. Under both regimes parties entering into legal agreements were allowed a measure of contractual autonomy. Their freedom to contract as they wished was not absolute. But the statutory scheme did not rule out covenants such as those in clause 2 of the RPPAs in the present case, by which the parties left each other the right to decide which provisions of their contract, if any, should remain once the time for conditions to be met had gone by. The statutory scheme did not give the Authority the role of sanctioning such covenants, or of supervising the parties' conduct under them.

Article 1 of the First Protocol to the Human Rights Convention

103. Because, for the reasons I have given, I have concluded that the Authority's decision of 30 March 2010 was an unlawful decision and its consequence was to deny the claimants a pecuniary benefit to which they were statutorily entitled, it follows, in my judgment, that there has been a breach of the claimants' right to property under article 1 of the First Protocol of the European Convention on Human Rights. I accept the submissions Mr Fordham made to this effect. Indeed, the Authority did not deny that, if its decision was held to have been bad in law, those submissions would be sound.

Just satisfaction

104. As Mr Fordham submitted, the court is concerned here not with the exercise of an administrative discretion but with a statutory entitlement. The claimants were and are, he said, entitled under the statutory scheme to the benefits of accreditation. I agree.

105. Section 8(4) of the Human Rights Act 1998 requires the court, when determining whether to award damages and the amount of the award, to consider the principles apparent in the Strasbourg jurisprudence. The relevant principles, such as they are, may be seen, for example, in the decision of the European Court of Human Rights in *Basarba*. The basic principle is "restitutio in integrum" (see paragraphs 57 and 59 of the Court of Appeal's judgment in *Anufrijeva*).

106. Section 8(3) of the Human Rights Act requires the court to consider "(a) any other relief or remedy granted, or order made, in relation to the act in question ..." and "(b) the consequences of any decision ... in respect of that act ...". I do not believe the claimants would receive just satisfaction from quashing and mandatory orders alone. No claim in private law is available to them. If damages are not awarded they will not recover what is due to them under the relevant statutory provisions. Mr Sharpe submitted that there are, or may be, many cases similar to this in which damages are likely to be sought

by those who have been refused ROCs. This may be so. But it does not justify withholding an award of damages for just satisfaction in the present case. I have held the claimants' argument on accreditation to be well-founded. Though acting in good faith, the Authority misapplied the statutory scheme, and the claimants were unlawfully denied that to which they were statutorily entitled. Their rights under article 1 of the First Protocol were thus breached. Just satisfaction requires that damages be awarded to them. If this outcome is repeated in other cases still to come, the precedent is set only by an understanding of the relevant statutory and contractual provisions which, as a matter of law, I have concluded is right. That, in my judgment, would not be a good reason for departing from the principle of "restitutio in integrum".

107. In this instance, there will be no lasting imponderables. A clearly calculable loss has flowed directly from the Authority's unlawful decision. And there is, at least at this stage, no active dispute about the figures which the claimants have presented to the court in paragraphs 85 and 86 of Mr Fordham's skeleton argument, supported as they are by a Statement of Truth. For CP7, which ran from April 2008 to March 2009, the loss has already been computed; the total value of the now unsaleable ROCs for the two generating stations concerned is, according to the claimants, £93,454.38. Any remaining uncertainty about the precise figure could readily be resolved. For CP8 and CP9 the amounts due to the claimants will in due course become clear. For CP8, which ran from April 2009 to March 2010, the total loss contended for by the claimants, subject to mitigation, is £2,656,743.84. Again, there seems to be no dispute about the arithmetic. What the actual loss will eventually be, however, is not yet clear. Before the deadline of 1 September 2011 arrives the claimants will have the chance to reduce that loss. As they acknowledge, the Authority will have to be given credit for any reduction achieved. This will need to be considered at a further hearing after the deadline has passed. For CP9, which ran from April 2010 to March 2011, the claimants will have the opportunity to sell the applicable ROCs by 1 September 2011. The loss for this period may turn out to be nil. This element of the claim for just satisfaction ought accordingly to be stayed.

Conclusion

108. The claim therefore succeeds. The Authority's decision of 30 March 2010 will be quashed. Mandatory relief will be granted requiring the Authority to grant accreditation from 28 January 2009 for Candles and 24 March 2009 for Welbeck, and to issue all ROCs due to the claimants in the period running from those dates to 31 March 2011. Just satisfaction will be granted for CP7 and CP8, in sums to be assessed by the court, if not agreed, on the first available date after 1 November 2011. The claim for just satisfaction for CP9 will be stayed, with liberty to both parties to apply.