Case No: C1/2011/2878

Neutral Citation Number: [2013] EWCA Civ 70

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE QUEENS BENCH DIVISION

(Administrative Court and Divisional Court)

Mr Justice Lindblom

[2011] EWHC 1873 (Admin)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 13/02/2013

**Before:**

THE PRESIDENT OF THE FAMILY DIVISION

THE CHANCELLOR

and

LORD JUSTICE SULLIVAN

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**Between:**

|  |  |  |
| --- | --- | --- |
|  | **The Gas and Electricity Markets Authority** | Appellant |
|  | **- and -** |  |
|  | **Infinis PLC & Infinis (Re-Gen) Limited**  **-and-**  **The Non-Fossil Purchasing Agency Limited** | Respondents  Interested Party |

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**Thomas Sharpe QC** and **Michael d’Arcy** (instructed by Michael Knight

and Omolade Barker) for the **Appellant**

**Michael Fordham QC and Tristan Jones** (instructed byWragge & Co LLP) for the **Respondent**

Hearing dates: 28th & 29th November 2012

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Judgment

**Lord Justice Sullivan:**

**Introduction**

1. This is an appeal against the Order dated 6th September 2011 of Lindblom J quashing the decision of The Gas and Electricity Markets Authority (“the Authority”) that Infinis PLC and Infinis (Re-Gen) Limited (“Infinis”) were not entitled to accreditation for Renewables Obligation Certificates (“ROCs”) under the Renewables Obligation Order 2006 (“the 2006 Order”) and the Renewables Obligation Order 2009 (“the 2009 Order”) in respect of their Candles and Welbeck electricity generating stations. The judge ordered the Authority to grant accreditation from 28th January 2009 for Candles and 24th March 2009 for Welbeck and to issue ROCs due to Infinis in the period running from those dates to March 2011, and awarded Infinis the sum of £94,393.62 by way of just satisfaction under Article 1 of the First Protocol to the European Convention on Human Rights in respect of the monetary value of the ROCs which should have been issued earlier.
2. Although the Authority did not challenge the judge’s account of the factual background and the legislative history and framework which are set out in detail in paragraphs 4-47 of the judgment, [2011] EWHC 1873 (Admin), it produced in addition to its original Skeleton Argument in support of its grounds of appeal a 48 page “Supplementary Skeleton Argument” containing no less than 147 paragraphs. This is a case in which it is important not to lose sight of the wood for the trees.

**ROCs**

1. It is common ground that Candles and Welbeck, which are both generating stations fuelled by landfill gas, are entitled to be accredited, and thus to receive ROCs under the 2006 and 2009 Orders unless they fall within the exclusion provisions that are contained within article 6(3) and (4) of the 2006 Order and article 21(1) and (2) of the 2009 Order, respectively. Although the exclusion provisions in the two Orders are differently worded, it is common ground that their effect is the same. In paragraph 53 of its Supplementary Skeleton Argument the Authority confirmed that:

“It is not in dispute that if the Candles and Welbeck generating facilities were eligible for accreditation under the [2006 Order] then they are also eligible under the [2009 Order].”

1. The starting point, therefore, is article 6(3) and (4) of the 2006 Order:

“(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.

1. Where this paragraph applies, a generating station –
   * + - 1. which is situated at the location; and
         2. which is owned or operated by a person who is a 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.”

Article 2(1) of the 2006 Order defines “qualifying arrangement”.

“qualifying arrangement” means ….. 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).”

1. In the 2009 Order article 21(1) and (2) 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.

1. 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 –
   * + - 1. is situated wholly or partly at the location; and
         2. 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.”

Article 2(1) of the 2009 Order defines “NFFO arrangement” as follows:

“NFFO arrangement means 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).”

**RPPAs**

1. The Replacement Power Purchase Agreements (“RPPAs”) for Candles and Welbeck are in materially identical terms. Both were replacements of arrangements which had originally been made pursuant to a Non-Fossil Fuel Order, the Electricity (Non-Fossil Fuel Sources) (England and Wales) Order 1998 (“NFFO No. 5”). The material parts of the RPPA are set out in the judgment below. For present purposes, the following provisions of the RPPA are of critical importance:

“**2.2** **Conditions to commencement of the Contract Term**

Where the Generation Start Date has not occurred prior to the date of this Agreement, the commencement of the Contract Term is conditional on the following conditions precedent:

* 1. to the extent that the same have not been obtained, the grant upon terms not giving rise to the Seller’s right to terminate this Agreement under paragraph (C) of clause 15.1 of planning permission and all necessary consents (including any necessary wayleave 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;
  2. 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;
  3. where the Facility is not operational (to the standards specified for Commissioning) at the date of this Agreement, the Commissioning of the Facility;
  4. [Condition deleted]
  5. [Condition deleted]
  6. The seller and the Local Distributor entering into the Connection Agreement and the Connection Agreement coming into force save only for the fulfilment of one or more of the Conditions;
  7. The Seller holding a licence granted under Part 1 of the Act 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 under the Act from holding such a licence;
  8. The Buyer being reasonably satisfied, at the date of the Commissioning of the Facility or, if later, the date of the satisfaction of the latest to be satisfied of the other Conditions, that the Seller has complied with the provisions of clause 4.3 and clauses 8.4 to 8.8 (as the case may be) and that the planned subsequent operation of the Facility will not involve a breach of any of the provisions of this Agreement.
  9. **Dates for fulfilling Conditions**

If:

* 1. Condition (B) of clause 2.1 has not been satisfied by the date eight weeks after the final date for the production of evidence pursuant to the New Order; or
  2. 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.

* 1. **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 the Agreement the Seller shall use Reasonable Endeavours to procure the fulfilment of Conditions (A), (C), (F), (G) and (H) in clause 2.2.

1. **OPERATION OF THE FACILITY AND CONTRACTED**

**CAPACITY**

* 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.

* 1. **Making Contracted Capacity available**

Subject to the provisions of clause 3.4, the Seller hereby undertakes to make the Contracted Capacity available for the Contract Term to the Buyer.

* 1. **Prudent Operating Practice**

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:

1. 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
2. (without prejudice to its obligations in clause 4 and subject to clause 3.4) the Contracted Capacity is made available.
   1. **Force Majeure**

If the Seller is prevented for any period of time during the Contract Term from making available the Contracted Capacity by reason of Force Majeure, the Seller shall not be in breach of its obligations under this Agreement for so long as and to the extent that such circumstances shall subsist, and provided that the Seller continues to use Reasonable Endeavours in accordance with clause 3.3.

* 1. **Installation of Facility**

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. Subject to clause 5.1, if the Facility is not so installed for reasons of Force Majeure and, if in the reasonable opinion of the Buyer, such change results in a material increase in the installed capacity of the Facility the Buyer shall be entitled to require that Relevant Metered Output shall be calculated on a Half-Hourly basis.

**3**.**6 No Encumbrance or Sale**

The Seller hereby undertakes that it shall not, without the previous consent of the Buyer (not to be unreasonably withheld), sell (other than by way of a sale and lease back arrangement) or create or agree to create or permit to subsist any Encumbrance over any title to or interest in the Facility other than Encumbrances arising by operation of law or otherwise created or arising in the ordinary course of business which shall include without limitation any Encumbrances created to secure project financing of the Facility or business finance in connection with the Facility.”

* 1. **No Interest in facility**

The Buyer shall have no rights or powers or liabilities regarding the operation, maintenance or repair of the Facility other than as expressly provided by this Agreement. Nothing in this Agreement is intended to create, or shall create, in favour of the Buyer any legal or beneficial interest in the Facility or in any property of the Seller of any nature whatsoever.

**3.8.** …….

**3.9.** …….”

1. Clause 1.1 of the RPPA contains the following material definitions:

“Commissioning” - means 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.

“Facility” – means the generating station particulars of which are set out in schedule 3 of the Original NFFO Contract.” [It is common ground that this should be a reference to schedule 2 of the Original NFFO Contract]

“Reasonable Endeavours” – means, 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.

“Contract Term” – means the period from the Effective Date until the earliest to occur of:

1. the expiration of the period specified in paragraph 6 of schedule 2 of the Original NFFO Contract;
2. the expiration of the period specified in the Renewables NFFO 5 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; and
3. the date of termination of the Contract Term pursuant to clause 15.

“Effective Date” – means the later of:

the date upon which all of the Conditions in clause 2.1 are fulfilled; and

where the Generation Start Date has not occurred prior to the date of this Agreement, the date upon which all of the Conditions in clause 2.2 are fulfilled.”

Clause 1.2 deals with interpretation. Paragraph (K) states that the headings are inserted for convenience only and are to be ignored for the purposes of construction.

**The principal issue**

1. There is no dispute that clause 2.3 in both RPPAs was triggered. 2.3(A) had been satisfied, but 2.3 (B) had not. The Generation Start date had not occurred prior to the dates of the agreements and, although extensions of time were agreed, the conditions contained in clause 2.2 had not been satisfied. Neither Facility was commissioned by the later dates agreed for the purpose of clause 2.3. It is therefore common ground that, except for clauses 2.4, 16, 17, 18 and 20, the RPPAs for Candles and Welbeck are, and were at the dates when Infinis applied for accreditation, of no force and effect.
2. The principal issue between the parties is a very narrow one. Infinis accepts that the RPPAs were a “qualifying arrangement” for the purposes of the 2006 Order and an “NFFO arrangement” for the purposes of the 2009 Order, but it contends that once clause 2.3 was triggered and the RPPAs were, according to their own terms, of “no force and effect”, there was no longer” an extant qualifying arrangement [which] provides for the building of a generating station”.

**Discussion**

1. In his submissions in reply on behalf of the Authority, Mr. Sharpe QC accepted that the exclusion provisions in articles 6(3) and 6(4) and 21(1) and (2) applied only if the “qualifying arrangement” or “NFFO arrangement” contained a subsisting agreement to build a generating station. He submitted that this obligation was imposed by clause 2.4, which was one of the clauses which continued to have force and effect, and which required Infinis to use Reasonable Endeavours to procure the fulfilment of, inter alia, condition (C) (the Commissioning of the Facility) in clause 2.2. The other preserved clauses, 16, 17, 18 and 20, are concerned with Limitation of Liability, Confidentiality and Announcements, Arbitration, and a number of Miscellaneous Provisions, respectively. It is not suggested that they impose an obligation to build a generating station, nor is it suggested that that obligation exists because of the obligation under clause 2.4 to use reasonable endeavours to procure the fulfilment of any of the Conditions other than Condition (C) in clause 2.2.
2. It is a curious feature of the RPPAs that they do not contain an express obligation which provides for “the building” of the Facility. Mr. Sharpe submitted that such an obligation must be implied: an obligation to use Reasonable Endeavours to Commission a Facility necessarily encompasses an obligation to build the Facility. The Facility cannot be commissioned without first having been built. This submission might have had some force if the RPPAs had contained no other provision for the building of the Facility. However, clause 3.5 (see paragraph 6 above) requires the use of Reasonable Endeavours to install the Facility in accordance with the particulars in schedule 2 of the Original NFFO Contract, and it is not one of the excepted clauses in clause 2.3. The obligation in clause 3.5 is no longer of any force and effect.
3. Mr. Sharpe submitted that clause 3.5 was not the term of the RPPAs that required the Facility to be built. His submission is summarised in paragraph 91 of the Appellant’s Supplementary Skeleton Argument:

“As the heading to clause 3 states, clause 3 makes provisions relating to the operation of the facility during the Contract Term. It is clear from the content of the clause 3 provisions that they relate to operation of the facility during the Contract Term [ie post Commissioning], and not to the period prior to the Contract Term when the facility must be built.”

1. This submission ignores the ordinary and natural meaning of the word “install”; paragraph (K) of clause 1.2 of the RPPAs (paragraph 7 above) which makes it clear that the heading “Operation of the Facility and Contracted Capacity” is for convenience only and is to be ignored for the purposes of construction; and the fact that when clause 3 wishes to refer to the operation (as opposed to the installation) of the Facility it does so: see clause 3.3 which prescribes how the Facility is to be operated during the Contract Term, and clause 3.7 which refers to the “operation, maintenance or repair of the Facility”. Clause 3 is not confined to the operation of the Facility after it has been Commissioned. The obligation to avoid the Facility being encumbranced and the exclusion of the Buyer’s rights regarding the operation maintenance or repair of the Facility are applicable pre as well as post – Commissioning.
2. In the context of a clause which deals with both installation and operation there is no reason to give the obligation to use Reasonable Endeavours to install the Facility anything other than its ordinary and natural meaning. The Facility could not be operated unless it had first been installed. Commissioning would follow installation and operation. The definition of “Commissioning” (see paragraph 7 above) makes it clear that Commissioning is the final process by which it is demonstrated that the Facility is not merely capable of operation, but capable of commercial operation. Condition (C) in paragraph 2.2 envisages that there may be a period when the Facility is operating but is not operational to the standards specified for Commissioning.
3. When clause 3.5 refers to the installation of the Facility, it is not simply concerned with the installation of plant and equipment within a building that might be described as a “generating station”. The Authority’s submission that the obligation to use Reasonable Endeavours to procure the Commissioning of the Facility is the term in the qualifying arrangement which “provides for the building of a generating station”, is based on the premise that the “Facility” as defined in Schedule 2 to the Original NFFO Contract (which is annexed as Schedule 2 to the RPPA) is a “generating station” for the purpose of the 2006 and 2009 Orders. In an agreement dealing with the provision of energy from renewable sources a distinction between the building – the generating station – and the equipment installed within it – would not necessarily be appropriate. In the RPPAs the “Facility” as defined in Schedule 2 is the “generating station” for the purpose of the 2006 and 2009 Orders. The RPPAs contain two separate and distinct obligations: to use Reasonable Endeavours to (a) install a generating station (clause 3.5), and (b) Commission it (clause 2.4). Since the agreement expressly provided that the first obligation was to be of no force and effect after a certain date, there is simply no basis upon which its existence could be impliedly continued as part of the remaining obligation. Clause 2.3 preserved some of the terms of the RPPAs, but the terms that remained, in particular clause 2.4, did not provide for the building of a generating station.

**Statutory context**

1. Mr. Sharpe submitted that the judge had failed to appreciate the statutory background to which the RPPAs gave effect, in particular the imperative to “secure” non-fossil fuel capacity. We were provided with a lengthy explanation of the statutory background which, I readily accept, forms a most important part of the factual matrix within which the provisions of the RPPAs must be interpreted. However, I do not accept that there is anything in the statutory background which casts doubt on the conclusion in paragraph 15 (above).
2. The relevant provisions are set out in paragraphs 26-30 of Lindblom J’s judgment. The obligation on the public electricity suppliers under section 32 of the Electricity Act 1989 (“the 1989 Act”) and the NFFOs, including NFFO No. 5, made thereunder, was to make arrangements which secured that an aggregate amount of generating capacity from non-fossil fuel generating stations would be available to them for the period specified in the NFFOs, and to produce evidence to (what is now) Ofgem that they had done so. Having made arrangements they were under a continuing obligation not to prevent, by any act or omission, the arrangements from securing the aggregate amount of generating capacity. Article 4 of NFFO No. 5 reduced the required aggregate amount of generating capacity in two circumstances. Paragraph (1) provided:

“4(1) Where –

* + - * 1. 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) (whether the requirement is described in the terms of that Schedule or in terms to the like effect); and
        2. 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 as was then due, or had previously been due on or prior to such date, under those arrangements to have been satisfied…”

In those circumstances the aggregate amount of generating capacity was reduced by the amount of capacity “whose availability is at that time conditional upon the satisfaction of such requirement or requirements…..” for so long as the requirement was not satisfied. The conditions precedent mentioned in Schedule 2 to the Order are, in substance, the same as the conditions precedent in clause 2.2 of the RPPAs. Paragraph (2) of Article 4 provided:

“(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) (whether the event is described in the terms of that Schedule or in terms to the like effect): 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,

the specified period shall forthwith terminate and, in relation to any day during any subsequent specified period ascertained in accordance with paragraph (3) below, this Order shall have effect as if the relevant aggregate amount specified in relation to that subsequent period were the amount specified in relation to that supplier for the period which includes that day in the Table in question in Schedule 1, less an amount equal to the sum of any capacity which has ceased to be available at that time by reason of the occurrence of any such event or events and any capacity whose availability is at that time conditional upon the satisfaction of any such requirement or requirements as are referred to in paragraph (1) above, but subject to the proviso contained in that paragraph.”

1. Section 62 of the Utilities Act 2000 replaced the NFFO regime with the “renewables obligation” regime, but section 67 gave the Secretary of State power to make provision by statutory instrument for the preservation of arrangements made under the NFFO regime. The Electricity from Non-Fossil Fuel Sources Saving Arrangements Order 2000 (“the 2000 Order”) was made under the power conferred by section 67. It required the successor companies to produce evidence to Ofgem that they had made arrangements (or amendments to previously existing arrangements) to secure that the nominated person (the Non-Fossil Purchasing Agency Limited “the NFPA”) would comply with the requirements set out in article 4(1), namely:

“(1) The Requirements are that –

* + - * 1. 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;
        2. 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;
        3. 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.”

Article 4(2) of the 2000 Order provides:

“(2) The amount of generating capacity required by article 4(1)(b) to be available to the nominated person shall be reduced in the same manner that article 4 of the NFFO 4 Order reduced the amount of generating capacity required to be made available to public electricity suppliers by the Order, but the reduction in generating capacity provided for in this paragraph shall be calculated by reference to any adapted conditions instead of by reference to the conditions precedent and termination events set out in Schedules 2 and 3 to the NFFO 4 Order. ”

It is common ground that the references to the NFFO 4 Order should be to the NFFO 5 Order.

1. The reliance placed by the Authority on the statutory scheme as an aid to interpreting the provisions of the RPPAs boiled down to article 4(1) and (2) of NFFO 5, as applied by article 4(2) of the 2000 Order. It was submitted that paragraphs (1) and (2) of article 4 of NFFO No.5 prescribed the only two circumstances in which the amount of generating capacity required by article 4(1)(b) of the 2000 Order to be available to the NFPA could be reduced. Paragraph (1) provided for a temporary reduction while conditions precedent were not satisfied, while paragraph (2) provided for a permanent reduction in the event of a terminating event. Clause 15.3 of the RPPAs made it clear that the Agreement or the “Contract Term” could be terminated only under clause 15.1 or 15.2.
2. Mr. Sharpe submitted that in the context of an agreement made pursuant to this statutory framework there was no scope for an agreement which “lapsed” under clause 2.3, but did not terminate under clause 15. Article 4(1) could not operate so as to reduce the required generating capacity for an indefinite period. The difficulty with that submission is that Mr. Sharpe accepted in his reply that article 4(1)(a) in NFFO No.5 did not apply to the circumstances in the present case where, because the conditions precedent in clause 2.2 had not been satisfied by the agreed later date under clause 2.3, those parts of the RPPA that remained in force (clauses 2.4, 16, 17, 18 and 20) were not arrangements which “provide that the availability to a public electricity supplier of some or all of the capacity of a non-fossil fuel station is conditional upon the satisfaction of any of the [conditions precedent] mentioned in Schedule 2”. By the end of the hearing it was common ground that the submission of Mr. Fordham QC on behalf of Infinis, that article 4(1)(a) was limited to the period prior to the commencement of the Contractual Term, while satisfaction of the conditions precedent in clause 2.2 within the time prescribed by clause 2.3 was still possible, was correct. It was also common ground that article 4(2) of NFFO No.5 has no application because the RPPAs have not been terminated under clause 15.
3. The end result is that the generating capacity that Candles and Welbeck were expected to secure for the NFPA under clause 3.1 and 3.2 of the RPPAs will not be available to the NFPA, but the amount of generating capacity required by article 4(1)(b) of the 2000 Order to be available to the NFPA will not have been reduced under article 4(1) or (2) of NFFO No.5. At first sight this might appear to create a problem for the NFPA, but the NFPA’s obligation under article 4(1)(a) of the 2000 Order is to have made by the commencement of the order period the “new arrangements” which replaced the original NFFO arrangements. Paragraph (b) of article 4(1) of the 2000 Order prescribes what had to be secured by the new arrangements. There is no dispute that article 4(1) has been complied with: the new arrangements, including the RPPAs in the present case, were made by the commencement of the order and they met the requirements in article 4(1)(b). If, for any reason, it turns out that some part of the generating capacity that was secured by the new arrangements does not become available to the NFPA that does not mean that the NFPA is in breach of article 4. Mr. Sharpe submitted that there was a continuing obligation to maintain the availability of the aggregate amount of generating capacity required by article 4(1)(b) of the 2000 Order, but article 4 does not impose an obligation to secure replacement capacity in such circumstances, it merely imposes an obligation not to frustrate the arrangements that have been made: see article 4(1)(c).

**Conclusion on the principal issue**

1. In summary the combined effect of article 4 of the 2000 Order and article 4 of NFFO No.5, while part of the statutory context within which the RPPAs must be construed, does not cast doubt on the conclusion that the surviving parts of the RPPAs in this case are not arrangements which provide for the building of a generating station. This conclusion does not conflict with the overarching purpose of the 1989 and 2000 Acts: that the generation of electricity from non-fossil fuel sources should be encouraged. While Infinis is not bound to make the electricity generated by Candles and Welbeck available to the NFPA under clauses 3.1 and 3.2 of the RPPAs, it is free to, and does, sell the electricity to other buyers.

**Article 1 of the First Protocol to the ECHR**

1. Before the judge the Authority accepted that if its decision to refuse accreditation was unlawful its consequence was to deny Infinis a pecuniary benefit to which it was statutorily entitled and it would follow that there had been a breach of Infinis’ right to property under article 1 of the first Protocol: see paragraph 103 of the judgment.
2. Before us the Authority withdrew that concession and submitted that, even if its decision to refuse accreditation was unlawful, there had been no breach of article 1 because Infinis’ claim to be accredited was not sufficiently established to amount to a “possession” for the purposes of article 1. A large number of decisions of the ECtHR were cited, and it was submitted that, as the ECtHR’s decision in *Kopecky v Slovakia* (2005) 41 EHRR 43, had made clear, an arguable claim or genuine dispute could not, without more, constitute a legitimate expectation protected by article 1. For there to be such a legitimate expectation there would need to be either settled case law or a judicial declaration recognising the validity of claim, and prior to the judgment of Lindblom J there was no such decision.
3. In my judgment, the concession made by the Authority before the judge was correct. In *Kopecky* the ECtHR considered the line of cases in which it had found that applicants did not have a “legitimate expectation” because it could not be said that they had a currently enforceable claim that was sufficiently established. The Court said that

“There was a difference…. between a mere hope of restitution, however understandable that hope may be, and a “legitimate expectation”, which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision” (emphasis added)

The short answer to the many authorities cited in the Authority’s Supplementary Skeleton Argument is that Infinis’ legitimate expectation is founded on a legal provision: the right to accreditation under a statutory scheme. It is not necessary to establish a legitimate expectation for the purpose of article 1 that there should be both a legal provision giving the applicant an entitlement to some pecuniary benefit and a legal act such as a judicial decision confirming that entitlement. A legal provision or a legal act such as a judicial decision will suffice.

**Just Satisfaction**

1. The judge correctly stated that, applying the Strasbourg jurisprudence, the basic principle when deciding whether to award damages and the amount of any award is restitutio in integrum: see paragraph 105 of the judgment. The Authority submitted that this was an “oversimplification” which failed to distinguish between the role that compensation plays in human rights cases and in cases of breaches of statutory duty. Paragraph 56 of the Court’s judgment in *Anufrijeva v Southwark LBC* [2004] QB 1124 was cited in support of this proposition.
2. In the present case Infinis has been wrongly deprived of a pecuniary benefit to which it was entitled by statute. The amount of the “lost” benefit can readily be calculated. In these circumstances restitutio in integrum is manifestly appropriate. The Authority’s submissions do not take sufficient account of paragraph 59 of *Anufrijeva*:

“The fundamental principle underlying the award of compensation is that the court should achieve what it describes as restitution 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 awards 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 EHRR 601” and *Smith and Grady v Untied Kingdom* (2000) 31 EHRR 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.” (emphasis added)

The authorities principally relied on by the Authority were not dealing with readily calculable pecuniary loss, but with breaches of Convention rights which were not capable of being computed in terms of financial loss. There is no dispute that the breach of Infinis’ Convention rights caused it significant pecuniary loss and that that pecuniary loss was capable of being assessed. The judge was entitled to conclude that there was no good reason for departing from the usual approach to the assessment of such a loss.

**Conclusion**

1. I would dismiss the Authority’s appeal.

**The Chancellor**

1. I agree.

**The President of the Family Division**

30. I also agree.