Neutral Citation Number: [2015] EWCA Civ 408

Case No: A2/2014/2909,2910,2911,2913

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr. Justice Coulson
2014 EWHC 2257 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 April 2015

Before :

LORD DYSON, MASTER OF THE ROLLS
LORD JUSTICE RICHARDS
and
LORD JUSTICE RYDER

- -

Between :

The Department for Energy and Climate Change	**Appellant**
- and -	
Breyer Group PLC and Others	**Respondents**

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- -

Michael Beloff QC and James Cornwell Hanif Mussa (instructed by **The Government Legal Department**) for the **Appellant**
Sam Grodzinski QC and Andrew Scott (instructed by **Asserson Law Offices**) for **Breyer Group PLC & others and for Homesun Holdings Limited & another, Patrick Lawrence QC and Can Yeginsu** (instructed by **Bhailok Fielding Solicitors) for Free Power for Schools LP and Touch Solar Ltd** for the **Respondents**

Hearing dates : 17-19 March 2015

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Approved Judgment

Master of the Rolls:

1. The claims made in this litigation relate to the Feed-in-Tariffs ("FIT") scheme which was introduced by the Department of Energy and Climate Change ("DECC") on 1 April 2010 pursuant to the Feed-in Tariffs (Specified Maximum Capacity and Functions) Order 2010 and under the Energy Act 2008 ("the 2008 Act"). The FIT scheme encourages low-carbon generation of electricity by specified types of technology, including solar photovoltaic ("solar PV"). The FIT, which is set by DECC, comprises two elements: (i) the "generation tariff" (calculated by reference to the number of kilowatt hours ("kWh") produced by an installation operated by a small-scale producer and which is set at different levels depending on the generation technology used and the size of the installation); and (ii) the "export tariff" (calculated by reference to the number of kWhs provided by a small-scale producer to the electricity supplier and which is set at the same value regardless of the technology and the size of the installation). This case is principally concerned with the generation tariff.

2. Solar PV traditionally had high installation and equipment costs as compared with other low-carbon generation technologies (although these costs have fallen sharply in recent years). For that reason, the tariff level for solar PV was originally set at a higher level than for other technologies when the FIT scheme was introduced.

3. A cardinal feature of the scheme as originally enacted was that once a solar PV installation was built and commissioned (typically on the roof of a building), the generation tariff was fixed for the whole of the "eligibility period" of 25 years, subject only to an indexation allowance for inflation.

4. The generation tariff, which was set out in Schedule A to Condition 33 of the Standard Conditions of Electricity Supply Licences, could only be amended (i) following a process of consultation and then a 40 day period of Parliamentary scrutiny of the proposed licence modification (section 42 of the 2008 Act); and (ii) in relation to new solar PV installations commissioned after the date that Parliament approved the modification.

5. DECC's originally stated intention was for the FIT rates to remain unchanged for new installations from the inception of the scheme in April 2010 until April 2012, so as to provide further certainty for investors in the initial years of the scheme. DECC said that it might conduct an early review of the scheme prior to April 2012, and reduce rates for new installations if there was an urgent need to do so. But it repeatedly gave assurances that it would not act retrospectively in bringing such changes into effect: see paras 9 to 11 of the judgment of Coulson J which is the subject of this appeal.

6. The history leading up to the implementation of the FIT scheme is described at paras 8 to 19 of the Agreed Facts which are set out in Appendix 1 of Coulson J's judgment. Prior to the introduction of the scheme, DECC published a Consultation Paper in July 2009. In February 2010, it published its Response. Among the features of DECC's proposals were that: (i) it was important to ensure value for money for the scheme as a whole; (ii) tariffs were to be set through consideration of technology costs and electricity generation expectations at different scales so as to deliver an approximate rate of return of 5-8% for well-sited installations (5% in the case of solar PV); (iii) tariffs that were available for new installations would "degress" each year (i.e. would

automatically reduce to reflect predicted technology cost reductions in order to ensure that new installations received the same approximate rates of return as installations already supported through FITs); (iv) once a generation tariff had been allocated to an installation, the tariff was to remain fixed (subject to changes to reflect inflation) for the life of the installation or the life of the tariff, whichever was the shorter. The need for reviews of the scheme had been identified from the outset: see paras 3.96-3.102 of the 2009 Consultation and paras 7 and 161-166 of the Response.

7. By December 2010, it had become clear that (i) the number of large installations was far greater than had been foreseen; (ii) the greater than expected development of solar PV installations was due, at least in part, to a greater than expected reduction in the costs of installation; (iii) one consequence of this was to increase the rate of return to figures above the 5-8% rate of return (5% for solar PV) on which the scheme was based (double digit returns were regularly reported for solar PV); and (iv) the increased number of solar PV projects raised the prospect that disproportionate amounts of funding would be taken by such schemes, potentially at the expense of other forms of low-carbon micro-generation technology.

8. On 7 February 2011, DECC announced a comprehensive review of the scheme. On 31 October 2011, it published a consultation document as part of the review. The document set out four proposals. The first was for a reduction in the generation tariff payable to the owners of small-scale solar PV generation installations. The rate was to be reduced from up to 43.3p per kWh to up to 21p per kWh. The second ("the Proposal") was:

> "[to] apply new generation tariffs from 1 April 2012 to all new solar PV installations with an eligibility date on or after an earlier 'reference date' which we propose should be 12 December 2011. Installations with an eligibility date before the reference date will not be affected and will continue to be eligible for the current generation tariffs. Installations with an eligibility date between the reference date and 1 April 2012 would be eligible for the current generation tariffs for electricity generated before 1 April 2012, but would move to the new generation tariffs for electricity generated on or after 1 April 2012."

9. In short, DECC proposed to bring forward from 1 April 2012 to 12 December 2011 the date by which installations had to be commissioned/registered in order to qualify for the original tariff rates for the life of the installation.

10. The Impact Assessment annexed to the consultation document identified the problems with the "do nothing" option (i.e. with only 9% degression taking effect in April 2012): new investors in solar PV would be able to benefit from rates of return well in excess of the 5% that the tariffs were intended to deliver. The Assessment stated at para 7:

> "This overcompensation compromises the value for money of the FITs scheme to the energy consumers who meet its costs through their bills. If uptake continues to increase as it has

> been doing, the affordability of the whole FIT scheme will quickly come under threat."

11. The Proposal was made on the basis that DECC expected that, if implemented, it would save approximately £1.6 billion.

12. The following facts are assumed to be true for the purpose of determining the preliminary issues which were ordered to be tried and with which this appeal is concerned:

> **"Assumed facts as to the purpose of the FIT Scheme and the later proposed modifications**
>
> …….
>
> 46. ……..The consultation was open-minded and genuine and the outcome was not predetermined.
>
> **Assumed facts as to the Defendant's knowledge and intention concerning the Proposal**
>
> 50. The Defendant knew that it was very likely that, and intended that, those operating businesses in the area of small-scale Solar PV electricity generation, including businesses such as those operated by the Claimants, would from the time the October 2011 Consultation was published, conduct their businesses on the assumption that the Proposal would come into effect as set out in that Consultation.
>
> 51. The Defendant knew that it was very likely that, and intended that, the publication of the Proposal would have an immediate effect on the actions of those involved in Solar PV installations such as the Claimants, in that the proposed tariff would be regarded by the vast majority of such businesses as economically unacceptable, with the consequence that they would be deterred from proceeding with Solar PV installations.
>
> **Assumed facts as to the impact of the Proposal**
>
> 52. The matters referred to above had an immediate and serious adverse impact on the Claimants' businesses, which impact was reasonably foreseeable. It was not economically viable for the Claimants to continue their businesses in relation to the installation of solar PV Systems, unless such Systems could be installed and commissioned by the reference date of 12 December 2011, which was 6 weeks from the publication of the Proposal; and that the majority of installations which had been planned and contracted for by the Claimants could not be completed and accredited in this timeframe."

13. The Proposal was challenged in judicial review proceedings. Mitting J held that, if implemented, it would be *ultra vires* section 41 of the 2008 Act and inconsistent with

the statutory purpose. On 25 January 2012, the Court of Appeal dismissed the Secretary of State's appeal (see *Secretary of State for Energy and Climate Change v Friends of the Earth* [2012] EWCA Civ 28). The court rejected Mitting J's analysis based on statutory purpose, but held that the Proposal, if implemented, would be *ultra vires* the Secretary of State's powers under section 41 because it would have retrospective effect in respect of any installation which became eligible for payment between 12 December 2011 and 1 April 2012.

14. DECC never implemented the Proposal. Instead, on 19 January 2012 pursuant to the powers conferred by section 41(1) of the 2008 Act, the Secretary of State laid before Parliament a licence modification ("the Modification") to take effect on 3 March 2012. This had the effect, as from 1 April 2012, of reducing the rate of generation tariff payable from up to 43.3p/kWh to up to 21p/kWh for solar PV installations with eligibility dates on or after 3 March 2012. The Modification has not been challenged in the courts.

15. There are now 19 claimants in these four claims: Breyer Group plc and 15 others in consolidated claims (HQ12X03560); Free Power for Schools LP (HQ12X04456); Touch Solar Ltd (HQ13X03998); and Homesun Holdings Ltd and another (HQ13X04457). Collectively, they claim approximately £195 million, with individual claims ranging from £233,000 to more than £27 million.

16. The claimants' complaint in these proceedings is that, by the time the courts ruled that the Proposal was unlawful, many of the installations that would otherwise have been completed by 1 April 2012 were abandoned as a direct result of the making of the Proposal. This caused them to suffer substantial losses in respect of which they seek damages against DECC for interference with their rights to peaceful enjoyment of their possessions under Article 1 of the First Protocol ("AIP1") of the European Convention on Human Rights ("the Convention"). A1P1 of the Convention provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions.
>
> No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

17. As Coulson J explained at para 31 of his judgment, some of the claimants are small-scale solar PV generators or nominated recipients under the FIT scheme; others engage in a variety of businesses connected in some way with solar PV generation. There are broadly three types of business:

> "(a) FIT-payment recipients: These companies procure, install and register solar PV systems for owner-occupiers with suitable premises. The occupier will receive the benefit of cheaper

> electricity but the claimant or its nominated subsidiary would be entitled to receive the FIT payments as nominated recipient, either on the basis of a contract between the claimant and the owner-occupier, or on the basis of 'block' contracts for a group of properties, between the claimant and a broker company with its own direct arrangement with the owner-occupier.
>
> (b) Fee recipients: These companies procure, install and register solar PV systems for owner-occupiers with suitable premises, whether on the basis of a contract between the claimant and the owner-occupier (pursuant to which a fee would be paid to the claimant), or a block contract with a third party nominated recipient, again on the basis of a fee. In addition, some claimant companies would find and prepare sites for a third party who would arrange for the installation of the solar PV system for which they would be paid a fee and would be entitled to an ongoing share of the profit from electricity sold to the grid.
>
> (c) Equipment suppliers: These companies supply solar PV equipment to other installation companies."

The preliminary issues

18. The judge set these out at para 34 of his judgment:

> "1. Whether the Claimants and/or any of them had possessions within the meaning of [A1P1] of the [Convention] consisting of:
>
> (a) an enforceable legitimate expectation, as described in the respective Particulars of Claim, concerning the timing of any changes to rates payable pursuant to the FIT Scheme and the manner in which the related review process would be conducted;
>
> and/or
>
> (b) the marketable goodwill in the Claimants' business, as described in the respective Particulars of Claim;
>
> and/or
>
> (c) the signed contracts or contracts which would, but for the Proposal, have been signed, agreeing:
>
> (i) That the FIT payments would be receivable by any of the Claimants, or their subsidiaries and/or their assignees.
>
> (ii) The consideration due to any of the Claimants, or their subsidiaries and/or their assignees, in respect of: (1) the installation of Solar PV equipment, (2) the commissioning of sites ready for installation of Solar PV equipment; (3) the

maintenance of the equipment; or (4) the supply of the equipment, as the case may be.

2. If the Claimants and/or any of them had such possessions within the meaning of A1P1:

(a) whether the Defendant interfered with any of these A1P1 possessions; and

(b) the nature of any such interference.

3. Whether any such interference was justified, as described in the Defences.

4. If not, whether the Claimants are entitled in principle to an award of damages, assessed by reference to their loss of profits caused by the Defendant's interference with their A1P1 possessions."

Summary of the judge's conclusions

19. The judge held that (i) the claimants had A1P1 possessions in so far as they had entered into contracts (he gave examples of such contracts at para 48) and/or they had marketable goodwill constituted by or referable to those contracts; (ii) the doctrine of legitimate expectation could not be invoked as a "trump card" if the claimants could not establish that they had possessions on the basis of contracts and/or marketable goodwill; (iii) the Proposal interfered with the claimants' possessions and on the assumed facts this interference caused the claimants to suffer loss; (iv) the interference was not justified since it was unlawful and/or it was disproportionate; and (v) the claimants were entitled in principle to an award of damages assessed by reference to the loss of profits caused by the interference with their possessions.

Issues arising on the appeal

20. DECC does not challenge the judge's decision on the possessions issue or on the legitimate expectation issue (summarised at para 19 (i) and (ii) above). It does, however, challenge the conclusions summarised at para 19 (iii) to (v). The claimants submit that the judge reached the right conclusion in relation to the issues summarised at para 19 (iii) to (v). But they cross-appeal in relation to the possessions issue on the ground that the judge took too narrow a view of the extent to which marketable goodwill was capable of being a "possession". They reserve their right to argue in a higher court that the judge was wrong to hold that the claimants did not have possessions by virtue of their legitimate expectations that they would receive the FIT payments in accordance with the scheme.

21. It is convenient to start with the possessions issue.

THE POSSESSIONS ISSUE

The judgment

22. The following is a summary of the judge's reasoning at paras 63 to 86 of his judgment. A possession within the meaning of A1P1 does not include a right to acquire possessions and a mere prospective loss of future income is not a possession.

This principle has been stated many times both in Strasbourg and our domestic jurisprudence to some of which I refer below.

23. The following principles can be extracted from the case law: (i) loss of future income is not a possession protected by A1P1; (ii) loss of marketable goodwill may be a possession protected by A1P1; (iii) a number of factors may point towards the loss being goodwill rather than the capacity to earn future profits: these include marketability and whether the accounts and arrangements of the claimant are organised in such a way as to allow for future cash flows to be capitalised; (iv) goodwill may be a possession if it has been built up in the past and has a present day value (as distinct from something which is only referable to events which may or may not happen in the future): and thus (v) if there is interference which causes a loss of marketable goodwill at the time of the interference, and if that can be capitalised, then it is *prima facie* protected by A1P1.

24. Where solar PV systems were installed and commissioned pursuant to contracts (and associated leases) between customers and installers, the contracts constituted marketable goodwill and were therefore possessions within the meaning of A1P1. The application of the principles was best demonstrated by reference to para 39 of Homesun's Statement of Case. Under the heading "Goodwill in Homesun's Business as at 31 October 2011" this identified five categories of potential or actual contracts as follows:

> "(i) 5,703 leases which had been requested and sent to customers following successful desktop and technical surveys. Of these, it is alleged that (based on existing conversion ratios), 3,415 would have led to installations of solar PV systems by the cut-off date.
>
> (ii) 1,774 leases had been signed by customers. Of these, it is alleged that (based on existing conversion ratios) 1,430 would have led to installations of solar PV systems by the cut-off date.
>
> (iii) 1,974 leases had been signed by customers and relevant HomeSun subsidiary company but the solar PV systems had not yet been installed and commissioned as defined in the 2010 S.I. Of these, it is alleged that (based on existing conversion ratios) 1,923 would have led to installations of solar PV systems by the cut-off date.
>
> (iv) 1,441 solar PV systems had been installed and commissioned as defined by the 2010 Order, following the associated leases having been signed by customers and relevant HomeSun subsidiary company. Applications to the relevant FIT licensees were subsequently made for all of these solar PV systems entitling HomeSun, through their subsidiaries, to the benefit of a FIT income stream at the 43.3p per kWh rate.
>
> (v) 2,539 solar PV systems had been installed and commissioned and an application had been made to the relevant FIT licensee as required by the 2010 Order which also entitled HomeSun, through their subsidiaries, to the benefit of a FIT income stream at the 43.3p per kWh rate."

25. The judge said that the contracts identified at (iv) and (v) constituted an element of Homesun's marketable goodwill, but they were not relevant to the claim made in these proceedings because the installations/contracts were unaffected by the Proposal. The contracts referred to in (iii) were *prima facie* an element of the marketable goodwill of Homesun's business. He said at para 78:

> "On the assumption that this goodwill could be capitalised, and therefore represented marketable goodwill at [the date of the Proposal] then it seems to me that this goodwill is prima facie protected as an asset, and therefore constitutes a possession under A1P1"

26. The possible future contracts identified in (i) were not a possession under A1P1: "they were much too speculative to represent an element of the marketable goodwill in the HomeSun business: they were a hope and no more" (para 79).

27. The leases in category (ii) were the most difficult to classify (para 80). Some of them might be capable of being treated as concluded contracts. But in general:

> "… to the extent these proposed contracts had not been concluded, and were therefore not legally binding, they had more in common with a claim for loss of future income than a claim for loss of marketable goodwill. Accordingly, I conclude that *prima facie* those potential future contracts do not give rise to a recoverable claim, although any issue of fact would have to be resolved at a later date."

The case law

28. I shall start with the Strasbourg jurisprudence. An early decision is *Van Marle v The Netherlands* (1986) 8 EHRR 483. This case concerned a complaint by accountants that their applications for registration as accountants were unfairly refused by the State. They alleged that their right to practise as accountants fell within A1P1. The ECtHR said:

> "41. The Court agrees with the Commission that the right relied upon by the applicants may be likened to the right of property embodied in Article 1 (P1-1): by dint of their own work, the applicants had built up a clientèle; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1 (P1-1). This provision was accordingly applicable in the present case.
>
> 42. The refusal to register the applicants as certified accountants radically affected the conditions of their professional activities and the scope of those activities was reduced. Their income fell, as did the value of their clientèle and, more generally, their business. Consequently, there was interference with their right to the peaceful enjoyment of their possessions."

29. Another early case is *Tre Traktorer AB v Sweden* (1991) 13 EHRR 309. The applicant restaurant owner had built up a value and goodwill in his restaurant business by reference to a licence to sell alcohol which had been granted by the state. The licence was revoked. The ECtHR held that the revocation of the licence interfered with the peaceful enjoyment of the applicant's possessions. The court said at para 51 that the withdrawal of the licence "had adverse effects on the goodwill and value of the restaurant".

30. In *Ian Edgar (Liverpool) Ltd* (2000) Appln No 37683/97, the applicant was engaged in the business of the distribution of firearms. It complained that the prohibition on handguns imposed by certain legislation amounted to an interference with the peaceful enjoyment of its possessions or a deprivation of its possessions without compensation. The court said:

> "The Court notes that the Commission has in the past held that goodwill may be an element in the valuation of a professional practice, but that future income itself is only a "possession" once it has been earned, or an enforceable claim to it exists (No. 10438/83, Batelaan and Huiges v. the Netherlands, Dec. 3.10.84, D.R. 41, p. 170). The Court considers that the same must apply in the case of a business engaged in commerce. In the present case, the applicant refers to the value of its business based upon the profits generated by the business as "goodwill". The Court considers that the applicant is complaining in substance of loss of future income in addition to loss of goodwill and a diminution in value of the company's assets. It concludes that the element of the complaint which is based upon the diminution in value of the business assessed by reference to future income, and which amounts in effect to a claim for loss of future income, falls outside the scope of Article 1 of Protocol No. 1."

31. In *Denimark Ltd v UK* (2000) 30 EHRR CD 144, the applicants operated businesses relating to the use of handguns. Their complaints were similar to those made in *Ian Edgar (Liverpool) Ltd.* The court repeated verbatim the passage from its judgment in *Ian Edgar (Liverpool) Ltd* which I have just set out.

32. The Strasbourg jurisprudence has been examined in our domestic case-law. For example, it was considered by Kenneth Parker QC sitting as a deputy High Court judge in *R (Nicholds) v Security Industry Authority* [2006] EWHC 1792 (Admin), [2007] 1 WLR 2067. The claimants had previously obtained permission to work as door supervisors. Each of them was refused a licence on the ground that they had committed a relevant criminal offence. They claimed *inter alia* that the refusal was an infringement of their A1P1 rights. The deputy judge addressed the question of whether the relevant permissions were "possessions" for the purpose of A1P1. He said:

> "71. I have two firm fixed points upon which to tackle the first question. First, the goodwill of a business, or part of a business, may constitute a "possession" under [A1P1]. Second, an expectation of future income is not a "possession." In *R*

(*Countryside Alliance*) *v Attorney General* [2006] UKHRR 73, these propositions were established by the Divisional Court (May and Moses LJJ), after an extensive review of Strasbourg case law (paragraphs 167-174). In the Court of Appeal [2007] QB 305, Sir Anthony Clarke MR, giving the judgment of the Court (Lord Justice Brooke and Lord Justice Buxton with him), upheld the conclusion of the Divisional Court on this matter in the following terms, at para 114:

> 'It is sufficient to say that we reject the breadth of the claims as to the loss of their "livelihood". Strasbourg case law, while stating that a professional man's clientele may form part of his possessions, as may the goodwill of a business, has very clearly ruled that any element of a claim that relates to loss of future income does not qualify in this respect, unless an enforceable claim to future income already exists. The Divisional Court set out the relevant Strasbourg case law in paras 170-172 of its judgment. We agree with their approach, including their unwillingness to follow the judgment of the Inner House of the Court of Session in *Adams v Scottish Ministers* [2004] SC 665, in so far as it may have suggested that the livelihood of a self-employed person occupies some middle position between marketable goodwill and future income'.

72. It seems to me that "goodwill" in this context is not being used in the technical accounting sense of the difference between the cost of an acquired entity and the aggregate of the fair values of that entity's identifiable assets and liabilities (see, for example, Financial Reporting Standard 10). Goodwill is there used to fill a gap in the balance sheet that would otherwise arise, may well be transient, is exclusively the result of acquisition and cannot be internally generated. It appears that "goodwill" is being used rather in the economic sense of the capitalised value of a business or part of a business as a going concern which, according to modern theory of corporate finance, is best understood as the expected free future cash flows of the business discounted to a present value at an appropriate after tax weighted average cost of funds (see Brealey and Myers, Principles of Corporate Finance, 7th edition, 2003 at sections 4.5 and 19.1). There is, of course, a connection with the accountancy concept of goodwill, which arises simply because the present value of net future cash flows on the economic model exceeds, or is thought to exceed, the aggregate of the fair values of the identifiable net assets that will be employed to generate those cash flows.

73. The business has a capital value or goodwill only if the entity can be, and is, organised in a way that allows future cash flows to be capitalised. So a group of plumbers can form a

> limited liability partnership or incorporate in a limited liability company, contract to supply their services to the entity so created and capitalise future cash flows (net of all costs, including labour) through the value of the partnership or company. Barristers cannot form partnerships or incorporate and have no way to capitalise future cash flows. However, temporary suspension from practice or disbarment would have the same economic impact on a barrister as would a trading suspension or prohibition on a company or partnership. The distinction between the situations seems to me to rest largely, if not wholly, on organisational factors. Nonetheless, it is clear on Strasbourg jurisprudence, now confirmed by high domestic authority, that A1P1 protects only "goodwill", as a form of asset with a monetary value, and does not protect an expected stream of future income which, for mainly organisational reasons, cannot be or is not capitalised. In other words, the Convention, differing perhaps in this respect from the law of the European Union, protects assets which have a monetary value, not economic interests as such."

33. The issue was also considered in some detail by the Court of Appeal in *R (Malik) v Waltham Forest NHS PCT* [2007] EWCA Civ 265, [2007] 1 WLR 2092 . The claimant, a general practitioner, was unlawfully suspended from its performance list by the defendant trust. He claimed that his suspension was in breach of A1P1. The court held that, while the assets of a business might include possessions in the form of clientele or goodwill, the mere prospect of future loss could not do so. The claimant's personal (and non-transferrable) right to practise in the NHS was not a "possession".

34. In reaching its conclusion, the court reviewed some of the Strasbourg jurisprudence. Auld LJ said that it had been established by the Court of Appeal in *Countryside Alliance* (after a careful review of the Strasbourg jurisprudence) that a future right to income was distinct from "some separate element of goodwill" (para 21). He was considering goodwill in the sense of "client base with its own inherent market value" (para 23). He referred to the "powerful analysis" of Mr Kenneth Parker QC in *Nicholds* and concluded at para 45:

> "The matter has, in any event, been put beyond doubt in my view by the ruling of this Court in *Countryside*, which binds us, upholding the reasoning of the Divisional Court that an individual's monetary loss, in the sense of loss of future livelihood, unless based on loss of some professional or business goodwill or other present legal entitlement, cannot constitute a possession attracting the protection of Article 1."

35. The analysis of Rix LJ was to much the same effect. At para 59, he said of the passage in *Denimark* to which I have referred:

> "In this passage, the court seems to be saying that, for the purpose of distinguishing between an existing possession (viz goodwill consisting in clientele) and a mere expectation of future income, a substantive rather than a formal test will be

> applied. Thus there will be no interference with possessions within [A1P1] if the value of a business (including presumably, its goodwill) declines only in so far as loss of future income is anticipated. The practical difficulties of this distinction did not have to be explored in that case."

36. At para 65, he said:

> "The distinction between marketable goodwill, or at any rate that goodwill which it is acknowledged is a vested possession, and what the European Court describes as being merely a present-day reflection of anticipated future income, has never had to be determined on the facts. That such a distinction may turn out to be difficult, possibly even unworkable, given that the present-day value of any business will inevitably reflect its future profit-earning capacity, has been highlighted by the analysis of Mr Kenneth Parker QC in *Nicholds & Ors v. Security Industry Authority & SSHD* [2006] EWHC 1792 (Admin). One solution may be that suggested by *Countryside Alliance* and *Nicholds*, looking only to marketability. I am not sure of that, however, for two reasons: one is the substantive distinction drawn by *Denimark*; the other is the emphasis placed by the Strasbourg jurisprudence on goodwill as a possession in the case of professionals with respect to their clientele. I suspect that such goodwill is not readily marketable: on the other hand, I can conceive that a professional practice can perhaps only or best be thought of as involving a vested possession in terms of the goodwill consisting in its clientele."

37. Finally, Moses LJ said:

> "83. Goodwill which is marketable is undoubtedly a possession, notwithstanding that its present-day value reflects a capacity to earn profits in the future. But does goodwill have to be marketable in order to be identified as a possession within the meaning of article 1 of the first protocol? Goodwill is composed of a variety of elements, which differs in different businesses and professions (see Lord Macnaghten in *IRC v Muller & Co's Margarine Ltd* [1901] AC 217 at 233): "It is the benefit and advantage of the good name, reputation, and connection of a business."
>
> ….
>
> 86. However, I agree, on the basis of the reasoning of Rix LJ (at paragraphs 59 and 66) and of Auld LJ (at paragraph 40), that that element of goodwill, "the dog", which is founded on the doctor's reputation, is not a possession within article 1 of the first protocol. It cannot be sold, it has no economic value other than being that which a professional man may exploit in order to earn or increase his earnings for the future. If the

> principle that the ability to earn future income is not a possession within article 1 of the first protocol is to be maintained, it must follow that if the element of goodwill which has or may be damaged is reputation, or the loyalty of past clients, that element is not to be identified as a possession. In *Denimark* terms, the doctor's complaint is as to an unjustified loss of reputation, caused by unlawful acts. But, in economic terms, that is no more than a complaint of a risk of loss of future income. It is not possible to distinguish his claim that his goodwill has been damaged from a claim to loss of future income."

38. In *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719, Lord Bingham said at para 21:

> "Strasbourg jurisprudence has drawn a distinction between goodwill which may be a possession for purposes of article 1 of the first protocol and future income, not yet earned and to which no enforceable claim exists, which may not: see, for instance, *Ian Edgar (Liverpool) Ltd v United Kingdom* Reports of Judgments and Decisions 2000-I p4665; *Wendenburg v Germany* (2003) 36 EHRR CD 154, 169…….. In *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265, [2007] 1 WLR 2092, the Court of Appeal held that the inclusion of Dr Malik's name on a list of those qualified to work locally for the NHS was in effect a licence to render services to the public and, being non-transferable and non-marketable, not a possession for purposes of article 1. While I do not find the jurisprudence on this subject very clear, I consider that the Court of Appeal reached a correct conclusion in that case basing itself as it did on the very convincing analysis of Mr Kenneth Parker QC in *R (Nicholds) v Security Industry Authority* [2006] EWHC 1792 (Admin), [2007] 1 WLR 2067, paras 70-76."

39. Dr Malik took his case to Strasbourg: *Malik v UK* (Application No 23780/08), 23 March 2012. The ECtHR held that there had been no violation of A1P1. The court reiterated at para 93 that, "where an applicant refers to the value of his business based on the profits generated by the business or the means of earning an income from the business as 'goodwill'", it is to be understood that a claim for loss of goodwill is "in substance" a complaint which falls outside the scope of A1P1. At para 96, the court said that, in order for A1P1 to apply, it had to be established that there was "an underlying professional practice of a certain worth that had, in many respects, the nature of a private right and thus constituted an asset and therefore a 'possession' within the meaning of the first sentence of [A1P1]". And at para 109:

> " Finally, although the Court accepts that a reduction in patient numbers could have an impact on the value of the goodwill in a medical practice, the issue does not arise here given that the applicant was prevented from selling the goodwill in his

> practice and that any decrease in its marketable value was therefore of no consequence to him."

Discussion of the possessions issue

40. Mr Grodzinski QC submits that the judge erred in law in holding that goodwill was only capable of being an A1P1 possession to the extent that it reflected something which had been built up in the past and had a present-day value as distinct from something which was only referable to future events (such as future income). He says that the judge was wrong to draw a line between (i) the marketable value of the goodwill of a business (which he rightly accepted was protected by A1P1) and (ii) the future income of a business (which he found was not). Mr Grodzinski relies heavily on the analysis in *Nicholds* which was approved as "powerful" by Auld LJ and "very convincing" by Lord Bingham. This analysis draws a clear and coherent distinction between (i) the mere possibility of earning some future income *which cannot be capitalised* and which thus has no present economic value and (ii) a customer base or clientele which *can be capitalised* and does have a present economic value. The latter is, but the former is not, a possession within the meaning of A1P1.

41. On the *Nicholds* approach, Mr Grodzinski submits that the capitalised value of a claimant's business protected by A1P1 includes the goodwill representing the free future cash flows of the business discounted to a present value derived from those contracts which had not yet been signed as at 31 October 2011, but which would, but for the Proposal, have been signed. Thus if a potential purchaser of a claimant's business had been seeking to value the business as at 31 October 2011 and would have ascribed a present capital value to the contracts which it expected to be signed (leading to FIT payments at 43.3p per kWh for 25 years or income derived therefrom), then that capital value is a present economic asset protected by A1P1.

42. I see the force of these submissions. They are grounded in sensible economic theory and the realities of commercial life. But I am unable to accept them largely for the reasons given by Mr Beloff. The term "possessions" in A1P1 is an autonomous Convention concept: see, for example, *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015, [2009] INLR 180 at paras 30 and 49. Moreover, as we have seen, the issue of whether (i) goodwill and (ii) future profits amount to possessions has been the subject of a considerable amount of Strasbourg and domestic case-law. Section 2(1)(a) of the Human Rights Act 1998 requires us to "take account of" any judgment of the ECtHR. It has been repeatedly said that, in the absence of special circumstances, we should follow any clear and constant jurisprudence of that court: see, for example, *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 at para 26 per Lord Slynn.

43. The well-established distinction between goodwill and future income is fundamental to the Strasbourg jurisprudence. The consistent line taken by the ECtHR is that the goodwill of a business, at any rate if it has a marketable value, may count as a possession within the meaning of A1P1, but the right to a future income stream does not. I agree with Rix LJ that the distinction is not always easy to apply and it seems that the ECtHR has not addressed the difficulties. As Moses LJ put it in *Malik* at para 83, marketable goodwill is a possession "notwithstanding that its present day value reflects a *capacity* to earn profits in the future" (emphasis added). The important

distinction is between the present day value of future income (which is not treated by the ECtHR as part of goodwill and a possession) and the present day value of a business which reflects the capacity to earn profits in the future (which may be part of goodwill and a possession). The capacity to earn profits in the future is derived from the reputation that the business enjoys as a result of its past efforts. That is why the applicant succeeded in a case such as *Tre Traktorer* (a decision on which Mr Grodzinski relies).

44. Goodwill is not susceptible to precise definition. Like the judge, I have derived assistance from what Lord Macnaghten said (admittedly in a wholly different context) in *Commissioners of Inland Revenue v Muller and Co. Margarine Ltd* [1901] AC 217 at p 223:

> "It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade…The goodwill of a business is one whole, and in a case like this it must be dealt with as such."

45. The same idea was expressed by the ECtHR in *Van Marle* at para 41 (see para 28 above). A possession comprising the goodwill of a business is the product of past work: "by dint of their own work, the applicants had built up a clientele". Goodwill is the present value of what has been built up. It is to be distinguished from the value of a future income stream. From an accountants' point of view, this distinction may make little practical sense. But it is the distinction that has been clearly drawn by the ECtHR for the purposes of A1P1.

46. It is worth repeating the critical passages in *Edgar (Liverpool) Ltd* and *Denimark*: "..the applicants are complaining in substance of loss of future income….The element of the complaint which is based upon the diminution in value assessed by reference to future income, and which amounts in effect to a claim for loss of future income, falls outside the scope of [A1P1]".

47. It is now necessary to return to the five categories of potential or actual contracts identified in Homesun's Statement of Case to which I have referred at para 24 above. Coulson J held that category (i) cases (leases requested by and sent to customers following successful surveys of their properties) fell outside the scope of A1P1; and category (ii) cases (leases signed by customers, but not signed by their counterparties) fell within the scope of A1P1 if the leases could be treated as concluded contracts. Mr Grodzinski submits that the judge took too restrictive an approach. He says that there were possessions in both categories of case. That is because the capitalised value of a claimant's business protected by A1P1 included the goodwill representing future cash flows of the business discounted to a present day value derived from those contracts which had not yet been signed as at 31 October 2011, but which would have

been signed but for DECC's conduct and thus which would have led to 25 years of FIT payments or income derived from such payments.

48. There is no challenge to the judge's conclusion that category (iii) cases (leases signed by both parties) were *prima facie* an element of the marketable goodwill of Homesun's business and were therefore A1P1 possessions. At para 79, the judge concluded that category (i) cases (possible future concluded leases) were not possessions: "they were much too speculative to represent an element of marketable goodwill" in the business. Mr Grodzinski criticises this conclusion and submits that it was a matter for evidence at the trial whether these possible future leases had any marketable value. At para 80, in relation to category (ii) cases the judge said that, to the extent that the leases were not legally binding, the cases "had more in common with a claim for loss of future income than a claim for loss of marketable goodwill". *Prima facie,* therefore, these potential future contracts were not possessions, although any issue of fact would have to be resolved at a later date. Mr Grodzinski criticises the judge's conclusion in relation to the category (ii) cases for the same reasons as he criticises his conclusion in relation to the category (i) cases.

49. As I have said, the distinction between goodwill and loss of future income is not always easy to apply. But in my view, the judge was right to see a clear line separating (i) possible future contracts and (ii) existing enforceable contracts. Contracts which have been secured may be said to be part of the goodwill of a business because they are the product of its past work. Contracts which a business hopes to secure in the future are no more than that. For this reason, I would uphold the judge's classification.

THE LEGITIMATE EXPECTATION ISSUE

50. The judge decided at paras 94 to 97 of his judgment that the claim for loss of a legitimate expectation was not a "trump card" which enabled a claimant to recover damages for interference with possessions even where the claim would otherwise fail because it was for loss of future income rather than loss of goodwill. He relied on what this court said in *Malik* at para 29 (Auld LJ) and at para 64 (Rix LJ).

51. In the alternative, he accepted the defendants' argument that a legitimate expectation had to be linked to a property right that was already enjoyed. Thus there was a legitimate expectation in respect of contracts which had been signed/concluded before 31 October 2011 that payment would be made at the maximum rate for the installations completed by 1 April 2012.

52. It followed that many of the claims made in these proceedings would not give rise to a legitimate expectation. Where the contracts were "matters of hope or aspiration" there was not a sufficient property right to which the legitimate expectation could be attached. But where a contract had been concluded prior to the Proposal, there was a legitimate expectation that there would be no interference with it by DECC.

53. Mr Grodzinski submits that the judge's conclusion on the goodwill issue was wrong. He did not, however, develop any oral submissions before us. He accepted that, if he failed on the possessions issue, he could not succeed on the legitimate expectation issue. But he reserved the right to advance his case in relation to the legitimate expectation issue in a higher court.

INTERFERENCE

The judgment

54. The judge held first that the demonstration of material economic consequences was a necessary, but not sufficient, condition for an interference with A1P1 rights (paras 114-115). Secondly, the making of the Proposal was, on the assumed facts, an interference (paras 116-125). He relied inter alia on the decisions of the ECtHR in *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35 and *Agrotexim and others v Greece* (1996) 21 EHRR 250. Thirdly, he rejected the defendants' argument that the direct cause of the solar PV installations not being completed by 3 March 2012 was the commercial decisions of the claimants, their customers and others rather than the Proposal (paras 126-128). He therefore concluded that, on the assumed facts, the Proposal constituted an interference.

DECC's case on interference

55. The following is a summary of Mr Beloff's submissions. The Proposal had no effect in law on any contracts and did not affect the obligations between the parties or prohibit or restrict the parties from performing their contracts. As the Proposal was not implemented, it remained the case that solar PV installations with an eligibility date on or before 2 March 2012 would receive the original FIT rate of up to 43.3p/kWh for the entire period for which they were eligible. At most, *if it had been implemented,* the Proposal would have reduced the amount of FIT payable for those installations that became eligible after 11 December 2011. The operative cause of any non-fulfilment of contracts that is alleged to have arisen was because of the commercial decisions of the claimants and others, and not the Proposal. The basic difficulty with the claimants' case is that the Proposal was no more than the subject of a consultation which is assumed for present purposes to have been open-minded and genuine and whose outcome was not pre-determined. A mere proposal cannot, as a matter of law, amount to an interference.

56. Mr Beloff submits that the implications of the judge's approach are startling and therefore cannot be right. Government and public authorities generally are constantly doing things that affect the profitability (and hence the value) of businesses. On the judge's approach, any such act would, *prima facie*, be a violation of affected persons' A1P1 rights (unless it could be justified). The raising by the Government or any public authority of even a non-preferred option for debate can have an effect on businesses. Again, on the claimants' case this too would (subject to justification) be a violation of A1P1.

57. Mr Beloff says that the judge's conclusion was entirely novel and has no basis in Strasbourg jurisprudence. This court should go no further than Strasbourg has gone: *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 at para 20.

A trilogy of cases

58. At this stage, I need to refer to three decisions of the ECtHR which Mr Grodzinski submits support the judge's conclusion on this issue. The first is *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35. State authorities had issued expropriation permits and prohibitions on construction on the land of the applicants. The land was

in an area where redevelopment was planned. The effect was to impair the applicants' right to use and dispose of their land. The properties were never in fact expropriated. Eventually, the permits were cancelled and the prohibition notices lapsed. The court upheld the applicants' claims that their A1P1 rights had been infringed.

59. The court noted at para 37 that an expropriation permit did not automatically lead to an expropriation: "[i]t leaves intact the owner's right to sell, let or mortgage his property…" At para 60, the court concluded:

> "Although the expropriation permits left intact in law the owners' right to use and dispose of their possessions, they nevertheless in practice significantly reduced the possibility of its exercise. They also affected the very substance of ownership in that they recognised before the event that any expropriation would be lawful and authorised the City of Stockholm to expropriate whenever it found it expedient to do so. The applicants' right of property thus became precarious and defeasible.
>
> The prohibitions on construction, for their part, undoubtedly restricted the applicants' right to use their possessions.
>
> The Court also considers that the permits and prohibitions should in principle be examined together, except to the extent that analysis of the case may require a distinction to be drawn between them. This is because, even though there was not necessarily a legal connection between the measures (see paragraph 35 above) and even though they had different periods of validity, they were complementary and had the single objective of facilitating the development of the city in accordance with the successive plans prepared for this purpose.
>
> There was therefore an interference with the applicants' right of property and, as the Commission rightly pointed out, the consequences of that interference were undoubtedly rendered more serious by the combined use, over a long period of time, of expropriation permits and prohibitions on construction.

60. Mr Beloff submits that *Sporrong* is distinguishable from the present case because (i) the interference lay in the combined effect of the expropriation permit and the prohibition on construction; and (ii) measures had already been taken by the state which had legal effect and these had remained in force for a period of years: they had not merely been proposed measures.

61. But as Mr Grodzinski points out, it was the practical position created by the state's conduct, and not the legal position, which constituted the interference: the permits "in practice significantly reduced the possibility" of the owners' right to use and dispose of their possessions. It is true that the court relied in part on the combined effect of the expropriation permit and the prohibition on construction, but it is clear from the first subparagraph of para 60 that the court's decision would have been the same even

if there had been no prohibition on construction: "the applicants' right of property thus became precarious and defeasible".

62. The second case is *Agrotexim v Greece* (1996) 21 EHRR 250. The applicant companies were shareholders in a brewery. The brewery wished to develop two of its sites, but Athens Municipal Council adopted measures with a view to expropriating the land, although no formal expropriation procedures had been initiated. The council had placed signposts on the land which stated "area to be expropriated" and the Mayor had repeatedly stated that the municipality would acquire the land. The practical effect of these steps was that the company had been prevented from making an effective use of the properties.

63. The European Commission of Human Rights held that it could pierce the corporate veil and found that there had been a violation of the applicant shareholders' A1P1 rights. At para 61, it found that the subject-matter of the complaint was not an isolated administrative act, but

> "the prolonged and continuing situation created by the activities and acts of the Municipality of Athens by which, without introducing a formal expropriation procedure, this authority conveyed to the public its intention to expropriate the company's land."

64. And a little later:

> "64. The commission has also examined the government's argument that in the absence of enforceable administrative decisions the company's property rights remain intact and that, therefore, no interference with such rights can be established. It finds that, in the present case, the repeated declarations of officials of the administration that the Municipality of Athens will acquire the company's land and above all the placement and maintenance of signposts indicating that the area would be expropriated even though they left intact in law the company's property rights could in practice affect substantially the possibilities to exercise these rights.
>
> 65. Although the applicants have not proved that the devaluation of their shares was the direct result of the situation described above, it is, in the commission's view, established that these measures must have affected the company's capacity to negotiate development projects for its properties. Notwithstanding the absence of formal expropriation proceedings until 1989 the impression was created that the Municipality of Athens would proceed to the expropriation whenever it found it expedient to do so. Therefore, the commission finds that the situation created by the placement of the signposts and the repeated declarations of the Municipality's intention to acquire the company's land amounts to an interference with the applicants' right to peaceful enjoyment of their possessions.

> …
>
> 76. In the Commission's view, the decisive feature in the applicants' case is the fact that the threat of expropriation, as manifested through various concrete preparatory acts and other actions of the administration, was prolonged for almost 10 years. The applicants were left during the whole of this period in complete uncertainty as to the fate of their properties since, on the one hand, no formal expropriation proceedings had started and, on the other hand, the envisaged expropriation discouraged in practice any potential investors."

65. The ECtHR decided that the applicants did not have standing to make their complaint. Accordingly, it was not necessary for it to decide the other issues. In relation to these, at para 58 the court went no further than to say:

> "A preliminary study of the case leads the court to conclude that it may be possible to regard the successive actions of Athens Municipal Council as a series of steps amounting to a continuing violation and indicating the existence of a plan by the Municipal Council to purchase the two sites at the lowest possible price."

66. Mr Beloff seeks to distinguish *Agrotexim* from the present case on the basis that the Commission placed particular reliance on the concrete physical acts "*above all* the placement and maintenance of signposts indicating that the area would be expropriated" (para 64) (emphasis added). This was a case where there had been actual measures taken by the state in relation to the applicants' property and over a prolonged period. Moreover, the ECtHR was not convinced that even these would suffice to qualify as an interference: para 58 is expressed in circumspect terms.

67. But as Mr Groszinski points out, the "measures" taken by the Athens Municipal Authority amounted to warnings of what was likely to happen to the property. There was no formal legal decision. As in *Sporrong* so too in *Agrotexim*, what mattered was that, although the measures left the company's property rights intact, they had a real practical effect on its freedom to exercise its property rights. That the measures took place over a "prolonged period" cannot have been a determinative factor. If a threat is made of an imminent state interference with an individual's property rights, and the person threatened has to work on the assumption that the state means what it says, it cannot matter whether the threat is not operative over a prolonged period. I accept that the duration of an interference is relevant to the seriousness of any violation of A1P1 and, therefore, the damages that may be awarded for a breach. I also accept that an interference may be of such short duration that it does not pass the threshold of seriousness for an interference at all. But subject to these two points, the duration of an interference is not material.

68. The third authority is *Matos e Silva LDA v Portugal* (1997) 24 EHRR 573. The applicants challenged various measures taken by the Portuguese Government in connection with the creation of a nature reserve which affected their land. These included "a ban on building and easements and restrictions affecting development of the land" and a "public interest declaration" which was a preliminary to expropriating

land (paras 76 and 77). But the proposed expropriation procedure had not been set in motion. The court held:

> "79. Like the Commission, the court notes that although the disputed measures have, as a matter of law, left intact the applicants' right to deal with and use their possessions, they have nevertheless greatly reduced their ability to do so in practice. They also affect the very substance of ownership in that three of them recognise in advance the lawfulness of an expropriation. The other two measures, the one creating and the other regulating the Ria Formosa Nature Reserve, also incontestably restrict the right to use the possessions. For approximately 13 years the applicants have thus remained uncertain what would become of their properties. The result of all the disputed decisions has been that since 1983 their right over the possessions has become precarious. Although a remedy in respect of the contested measures was available, the position was in practice the same as if none existed."

69. Mr Beloff submits that *Matos* is distinguishable from the present case in several respects. First, a public interest declaration had been made and this was "a preliminary to expropriation proceedings" (para 77) i.e. there had been a step in legal proceedings. Secondly, the court relied on the combination of a number of measures as constituting the interference (para 79). Thirdly, all the measures on which reliance was placed were of legal significance. Fourthly, the impact of the measures had been felt over 13 years.

70. Unsurprisingly, these submissions are similar to those made by Mr Beloff in relation to the other two cases. As I have already said, it is not material that the measures had legal effect or were of legal significance. The critical point was that, although they left the applicants' property rights intact "as a matter of law", the measures reduced their ability to deal with their property "in practice". I have already dealt with the duration point.

Conclusion on the interference issue

71. In my view, the judge was right to conclude that the Proposal interfered with the claimants' A1P1 rights. Para 52 of the assumed facts states that the Proposal had "an immediate and serious adverse impact on the claimants' businesses" so that it was not economically viable for them to continue with their businesses in relation to the installation of solar PV systems. We are to assume that the Proposal had this effect and that this was its intended effect.

72. It is true that the Proposal was just that, i.e. a proposal, and not a final decision. But *as a matter of fact* it did in a real and practical sense interfere with the claimants' businesses in precisely the way that was intended. There is a close analogy between the present case and the trilogy of Strasbourg cases which I have discussed above. The Proposal affected the claimants *in practice* although it did not have any legal effect. As the ECtHR has held, the fact that an expropriation permit has no legal effect (because there may be no expropriation) does not mean that there is no interference. The focus of the enquiry is on the practical and not the legal effect of

the permit. So too, the fact that the Proposal had no legal effect (because it was no more than a proposal) does not mean that it did not affect and interfere with the claimants' A1P1 rights. In short, I reject the submission that a mere proposal cannot, as a matter of law, amount to an interference. It all depends on the nature of the proposal. Many (perhaps most) proposals have no material effect on the property rights or other possessions of those who have an interest in their outcome. They are mere proposals which have no effect on their rights or possessions unless they lead to concrete decisions which do have such an effect. A proposal which has no effect does not amount to an interference. But for the reasons I have given, the Proposal did have practical adverse effect on the claimants' businesses and therefore amounted to an interference.

73. I accept that the Government and public authorities consult on proposals from time to time where the mere fact of consulting can affect the value of individuals' land and businesses. Proposals for the development of land are an obvious example. I see no difficulty in characterising such proposals as interferences with A1P1 rights. It will almost always be possible for the authority in question to justify the interference as being "in the public interest and subject to the conditions provided for by law". It is well established that authorities have a wide margin of discretion in implementing social and economic policies of the kind with which we are concerned in this case. It follows that the *in terrorem* argument mentioned at para 56 above carries little weight.

WAS THE INTERFERENCE JUSTIFIED?

The judgment

74. The judge rejected the defendant's submission that the interference was lawful on the simple ground that it had been held to be unlawful by this court in the *Friends of the Earth* case. An unlawful scheme cannot, as a matter of principle, be justified (paras 135 to 143 of his judgment). In case he was wrong to attach such significance to the issue of lawfulness, he went on to consider the question of proportionality (paras 144 to 149). He concluded that the interference was not justified because it did not strike a fair balance between the legitimate aim sought to be achieved by the defendant (principally the financial interests of the taxpayer) and the interests of the claimants. I set out in more detail at paras 85 to 87 below how the judge addressed the issue of fair balance.

Lawfulness

75. I shall start with the question whether the Proposal was lawful. It is common ground that, if an interference is unlawful, that is fatal to an authority's ability to justify it: see, for example, *Centro Europa 7 Sri v Italy* (2012) 32 BHRC 417 at paras 187-189. In *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC1 Lord Reed said at para 116:

> "116. The Strasbourg court has often said that the first and most important requirement of A1P1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: see, for example, *Iatridis v Greece* [1999] 30 EHRR 97, para 58. In this context, as elsewhere in the Convention, the concept of "law" does not merely require the

> existence of some domestic law, but requires it to be compatible with the rule of law: see e.g. *James v United Kingdom*, [1986] 8 EHRR 123 at para 67."

76. Mr Beloff submits that the Court of Appeal in *Friends of the Earth* did not address the question of whether the making of the Proposal was unlawful. The court was considering the position that would have arisen if the Proposal had been implemented. It held that there was no power in section 41 of the 2008 Act "to introduce a modification which reduced a rate fixed by reference to an installation becoming eligible prior to the modification. To do so would be take away an existing entitlement without statutory authority": see per Moses LJ at para 52 of his judgment.

77. Mr Beloff submits that the claimants' case is independent of the fact that the Court of Appeal held that the Proposal would, if implemented, be unlawful. He says that, on their case, the claimants would have been just as much entitled to damages for violation of their A1P1 rights if (i) following consultation DECC had decided not to proceed with the Proposal; (ii) following consultation DECC had decided to proceed by emergency primary legislation amending section 41 of the 2008 Act to allow for modifications to have retrospective effect; or (iii) DECC had from the outset proposed to implement the Proposal by way of primary legislation. It is adventitious that the Proposal was to implement the modification by a means which turned out to be *ultra vires*. The illegality did not go to the *gravamen* of the alleged interference, namely the *announcement* of a retrospective change. The proposal to implement the modification by what turned out to be *ultra vires* means was not unlawful. This is because the Proposal was subject to, and could have been affected by, the responses to the consultation and, in any event, depending on the necessary support in Parliament, the retrospective change could have been effected by primary legislation.

78. Mr Grodzinski submits that if, as was held in *Friends of the Earth*, the Proposal would have been unlawful had it been implemented, it cannot have been lawful for it to be proposed in the first place. Once it is established that the Proposal was an interference with the claimants' A1P1 possessions, then if what was being proposed was *for any reason* unlawful, the Proposal itself must have been unlawful. As a matter of principle, a public authority cannot lawfully consult on a proposal which, if implemented, would be unlawful. The reason why, if implemented, it would be unlawful is immaterial. It might be unlawful because the authority has no power to implement the proposal or because it would be contrary to a statutory provision or contrary to the general law or international law. The rule of law requires a public authority to comply with the law. It is contrary to principle for the court to sanction as lawful a proposal to do something that is unlawful. All the more so in case where the publication of the proposal is intended to have and does have an adverse effect on individuals' personal or property rights. If the position were otherwise, in a case such as the present, an authority could lawfully achieve by means of a mere consultation the object which it could not lawfully achieve by carrying a proposal into effect without a consultation. That would be a remarkable result.

79. Mr Grodzinski also submits that it is no answer to say that DECC could have achieved the same result by the alternative means of passing lawful primary legislation with retrospective effect. There is no authority to support what Mr Grodzinski describes as the "constitutional solecism" that where secondary legislation is *ultra vires*, it can be treated as lawful because primary legislation might have been

passed to achieve the same policy objective. As the judge found, this would require the court to decide whether Parliament would in fact have passed such primary legislation. This is non-justiciable territory.

80. Finally, Mr Grodzinski submits that, even if it were permissible for the court to decide whether Parliament would have passed such retrospective legislation, the judge was right to find that on the balance of probabilities it would not have done so. He was entitled to have regard to the serious criticism of DECC's approach in the joint report of the House of Commons Energy and Climate Change and Environmental Audit Committees on "Solar Power Feed-in Tariffs" published on 22 December 2011. Reference to that report, which was in the public domain, did not interfere with Parliamentary privilege.

81. I do not consider that the making of the Proposal was contrary to our domestic law. No authority has been cited to us which supports the proposition that it is unlawful as a matter of domestic law to consult on a proposal to do something which is unlawful. If Mr Grodzinski is right, powers of consultation, whether under statute or at common law, are subject to a condition that the proposal consulted on would be lawful if implemented. But one of the purposes of consultations is to enable consultees to identify legal as well as substantive objections to what is proposed. It would be odd if a public authority could not lawfully consult on a proposal just because some or all of what is proposed could not lawfully be implemented in the manner proposed or at all. It hardly needs to be stated that there is a fundamental difference between consulting on a proposal and implementing it. A consultation may lead to a decision not to implement the proposal at all; or it may lead to a decision to implement it in a modified form which would be lawful. That is why there is no inherent illegality in consulting on a proposal which would be unlawful if implemented. The whole point of a genuine consultation is to enable the consulting authority to take into account consultees' responses in order to make a fair, informed and lawful decision. The responses might even include a convincing assertion that the proposal, if implemented, would be unlawful and cannot be implemented at all; or that it needs to be modified in order to make it lawful.

82. I accept without question Mr Grodzinski's submission that the rule of law requires a public authority to comply with the law. But that disarmingly simple proposition sheds no light on the answer to the question at issue, namely whether it is contrary to the law to consult on a proposal which, if implemented, would be unlawful. For the reasons I have given (which in substance are those advanced by Mr Beloff), it is not.

83. There is the further point that our courts are cautious about permitting a judicial review challenge to the issue of a consultation document. Such a challenge would usually be rejected on the grounds that it was premature. If it is unlawful to issue a consultation document containing a proposal to do something that would be unlawful if implemented, it is difficult to see how such challenges to the issue of consultation documents could be stopped. In my view, that would be a regrettable development.

84. I would, therefore, hold (in disagreement with the judge) that the Proposal was not an unlawful interference.

Fair balance

The judgment

85. Before I address this issue in any detail, I should say a little more about the way in which the judge addressed it. Having set out the legitimate aim sought to be achieved by the Proposal, the judge identified at para 145 of his judgment a number of countervailing factors. These included:

> "(a) The certainty promised by all of the consultation documents…. aimed deliberately to encourage investors;
>
> (b) The importance of the original April 2012 cut-off date ….which was itself linked to questions of certainty;
>
> (c) The statement made in the House of Commons by the relevant Minister, just ten days before the proposal, to the effect that any modifications would not be retrospective….;
>
> (d) The scale of the investments by the claimants based entirely upon the FIT scheme as originally laid out; and
>
> (e) The fact that the proposals were deliberately intended to reduce the number of solar PV installations (Assumed Facts 50 and 51…..)".

86. At para 146, the judge added that the reduction in the number of solar PV installations would have a detrimental effect on the environment and that this too was a factor that he had to bear in mind in undertaking the fair balance.

87. At para 147, he said that, taking all these matters in the round, DECC had not made out a case for justification. The matter could be fairly summarised by comparing the savings which the unlawful act had generated (£1.6 billion) with the outstanding claims made in these proceedings (approximately £200 million). This showed that, in the absence of compensation being paid to the claimants, a fair balance had not been achieved as a result of the Proposal.

Discussion

88. The Proposal was made to redress the rapidly accelerating burden on electricity consumers caused by the substantially greater than expected take-up of FITs for solar PV installations while maintaining a reasonable rate of return for generators. It is not in dispute that this was a legitimate aim. The issue is whether in pursuing this legitimate aim DECC struck a fair balance between the interests of the public and those of the claimants.

89. Mr Beloff submits that the following points render the balance fair between these two interests: (i) the need to encourage a range of low-carbon generation methods (not just solar PV); (ii) the importance, if possible, of retaining the FIT scheme rather than closing it to new entrants; (iii) the financial constraints on the FTT scheme, shared with other green levy schemes operating in the UK, acting to minimise pressure on consumer bills and pursue value for money; (iv) the high rate of return available to eligible solar PV installations by reason of the significantly reduced cost of solar PV equipment; (v) the undesirability of a "run" on the FIT scheme prior to the

implementation of a any new tariff rates; (vi) the interests of persons who already had eligible installations; and (vii) the interests of persons owning installations that would become eligible on or after 31 October 2011 (but before 1 April 2012).

90. In concluding that the Proposal did not strike a fair balance between the public interest and the interests of the claimants, Mr Beloff submits that the judge erred in a number of respects.

91. First, although he correctly recognised at para 130 that a wide margin of discretion was afforded to the state in justifying an interference in A1P1 cases, in fact, he applied a narrow margin of discretion. As a matter of principle, the margin of discretion should be particularly wide where the interference is a mere proposal.

92. Secondly, the judge was wrong to rely on the figure of £200 million as the value of the claimants' claims. He should not have assumed that the claimants would recover such a sum, particularly in view of his conclusion restricting the range of possessions on which they could rely.

93. Thirdly, the judge erred in taking into account the alleged detrimental effect on the environment of the Proposal when there was no Agreed or Assumed Fact to that effect and no evidence before him on the point either. Anyway, in view of the fixed budget of the FIT scheme, reducing the tariff paid per kWh of low-carbon energy generated by solar PV would, all other things being equal, potentially have allowed more kilowatt hours of low-carbon energy generation to be subsidised within that budget, whether from solar PV or other (less heavily subsidised) low-carbon generation technologies.

94. Fourthly, the judge was wrong to attach weight to the importance of the original April 2012 cut-off date. There was no such certain cut-off date. The passage from the 2010 Consultation Response on which the judge relied was concerned with when the process of automatic degression would start to take effect: there would be no automatic degression during the first two years of the scheme. It was not concerned with any reduction in the tariff following a review (which could take effect at any time). Both the February 2011 Ministerial Statement and the June 2011 Consultation Response had made clear that (i) all aspects of the FIT scheme were being reviewed, including tariff rates and (ii) existing tariff arrangements could change before April 2012, if the review revealed a need for urgency.

95. In my view, subject to one qualification, the judge was right to determine the issue of "fair balance" in the way that he did and for the reasons that he gave. The qualification is that, for the reasons given by Mr Beloff, he was wrong to take into account the environmental effect of the Proposal. Indeed, Mr Grodzinski does not support this part of the judge's reasoning.

96. As regards the value of the claims, it is immaterial to the issue of fair balance whether the claims were worth £200 million or £100 million or some other (substantial) figure. The point is that, if DECC had to pay sums of this order to achieve estimated savings of £1.6 billion, a refusal to do so was unfair and disproportionate.

97. As for the suggestion that there was no certainty of an April 2012 cut-off for the higher FIT tariff, this ignores DECC's own published statements, including that quoted by the judge at para 10 of his judgment. When introducing the FIT scheme in its February 2010 Response to the Summer 2009 Consultation, DECC had stated that "degression" (i.e. the reduction of tariffs for new installations) would be "delayed until April 2012, providing generators with tariffs at initial levels of two years". There was a proper process, set out in section 42 of the 2008 Act, by which tariff rates could have been reduced sooner, following consultation and approval by Parliament. But there was no warning that any such reduction would take effect prior to April 2012 until the Proposal was published in October 2011. The June 2011 Response stated:

> "A consultation on the comprehensive review will be launched this summer with the intention that any resulting changes to the scheme will take effect from 1 April 2012, unless the review itself reveals the need for greater urgency. As with the fast-track review, the Coalition Government will not act retrospectively and any changes to generation tariffs resulting from the comprehensive review will only affect new entrants into the FITs scheme from that date. Installations which are already accredited for FITs at the time the changes come into force will not be affected."

98. I accept the submission of Mr Grodzinski that the judge was not in error in referring to the importance of the original April 2012 cut-off date. On a fair reading of the documents published by DECC before October 2011, potential investors in solar PV generators would have understood that DECC would respect the April 2012 cut-off date. This was an important element of the scheme in view of the substantial investments that they were encouraged by DECC to make. The Government recognised this only a few days before the Proposal was published. On 20 October 2011, the Secretary of State for DECC was asked in the House of Commons about a report which suggested that he was pulling the rug from underneath "thousands of people up and down the country who might have taken steps to invest in solar power for their own houses and who are now finding that their investment is being completely undermined by his decisions". The Secretary of State replied:

> "There is no question of anybody's investment being undermined by any of our decisions, because this Government…..[we] are very committed to not having retrospection in legislation and legislative changes. However, we keep all our subsidies under review…."

99. In view of (i) DECC's statements that April 2012 was the cut-off date, (ii) the statements that there would be no retrospective tariff changes, (iii) the scale of the investments made by the claimants (and others who were in the same position) in reliance on these statements, and (iv) the fact that the losses caused by the interference with their possessions were dwarfed by the savings achieved by DECC as a result of the interference, I would hold that the judge was right to hold that the Proposal did not strike a fair balance between the public interest and the interests of the investors in the scheme. I reach this conclusion despite the fact that DECC enjoyed a wide margin of discretion in relation to the making of the decision.

100. I should add that this conclusion is reinforced by the fact that very little consideration appears to have been given by DECC at the time to the impact the Proposal would have on existing businesses. The published Impact Assessment did not look at this aspect of the matter beyond a brief reference to "sunk costs, e.g. deposits of investors who are not able to complete their installations and submit their application for accreditation before 12 December" and the optimistic assertion that the new tariffs "will ensure that businesses installing domestic solar PV remain viable".

LOSS OF PROFITS

The judgment

101. The final preliminary issue for determination was whether (if any interference with the claimants' possessions was not justified) "the claimants are entitled in principle to an award of damages, assessed by reference to their loss of profits caused by [DECC's] interference with their A1P1 possessions".

102. The judge rightly recognised that it was not possible to go far in determining precise entitlements to damages "given that such matters are inevitably going to be fact-sensitive" (para 151). At para 152, he set out a number of principles which applied "beyond argument". These included that (i) damages would generally not be awarded unless the court was satisfied that the loss was "actually caused by the violation it has found" and (ii) the applicant should so far as possible be put in the position he would have enjoyed but for the violation of his rights: see *Kingsley v UK* (2002) 35 EHRR 10 at para 40.

103. As regards the application of these principles, the judge said that the calculation of the damages would involve a consideration of the particular contracts and/or particular elements of goodwill which comprised the possessions in question. Arguments as to whether individual claimants had been directly and demonstrably affected by the violation would depend on the facts. He considered the submission that causation would not be established by the claimants because their decision to scrap a particular installation or abandon a particular contract had been their commercial decision and had not been caused by the Proposal. As to this, he said at para 158:

> "Whilst individual disputes of that kind may depend on the facts, in my view the general position must be that the defendant cannot rely on such an analysis so as to escape its potential liability for damages. If the claimant company in question can identify the commercial decision that it took as having been due to the proposals (that, but for the proposal, the decision to scrap the contract or abandon the project would not have been taken) then in my view they can demonstrate a direct consequence. The defendant cannot rely on the fact that there were a number of private companies investing in this technology and taking the commercial risk now to argue that it was those companies that were responsible for the losses, rather than the defendant. The whole point of the FIT scheme was that private companies were positively encouraged by the Government to invest and take the commercial risk required. The defendant cannot now hide behind that structure (which it

> promoted) in seeking to avoid liability for the losses that it has caused."

104. At para 160, he determined this issue in the following terms:

> "Although the entitlement to damages will ultimately depend on the facts, as a matter of general principle, the claimants have demonstrated an entitlement to damages assessed by reference to the loss of those possessions for which recovery is permissible, namely signed/concluded contracts and/or the marketable goodwill referable to such contracts".

Discussion of the damages issue

105. Mr Beloff submits that the judge was wrong to hold that DECC was, in principle, precluded from relying on the argument that any effect on the claimants' concluded contracts arose from decisions of the claimants or other players in the solar PV market. He should not have denied DECC the opportunity of seeking to prove at trial that the operative cause of the non-fulfilment of contracts that is alleged to have arisen was the commercial decisions of the claimants and others, and not the publication of the Proposal. The judge cited no authority for his rejection of DECC's argument that such decisions might break the chain of causation. Mr Beloff submits that he appeared to place no limit on how remote from the publication of the Proposal the response of the claimants and other persons involved in a particular solar PV installation needed to be in order for the chain of causation to be broken. Nor did he leave room for the assessment of the reasonableness of any particular response by such persons.

106. Mr Grodzinski points out that DECC has not sought to appeal the judge's determination set out at para 100 above, nor have they challenged his summary of the relevant principles. The sole criticism is of the way in which the judge dealt with the "break in the chain of causation" point. Mr Grodzinski submits that the judge's reasoning was unimpeachable. He says that Mr Beloff's argument amounts to saying that, if a public authority takes action which, on the evidence, makes a company's business unviable (because it is not longer profitable and/or because third parties cannot continue profitably to supply the company), then the decision not to invest further time and money in that business has not been caused by the public authority, but rather by the independent decisions of that company and/or its contractors. Mr Grodzinski submits that this argument is plainly wrong.

107. As the judge recognised, the question of whether DECC's conduct did indeed render the claimants' businesses unviable is a question of fact which will need to be determined on the evidence at trial. I doubt the utility of determining that the claimants are in principle entitled to an award of damages assessed by reference to this loss of profits when, as is common ground, the entitlement to damages will ultimately depend on the facts of each case. It seems to me that the judge's decision on this issue is unexceptionable, but of little value. The judge was right to reject DECC's argument that every claim must fail because the losses were caused by the claimants' commercial decisions. It will all depend on the facts.

OVERALL CONCLUSION

108. For the reasons that I have given, I would dismiss both the appeal and the cross-appeal.

Lord Justice Richards:

109. I agree.

Lord Justice Ryder:

110. I also agree.