

31 March 2023

**PRESS SUMMARY**

***The King (on the application of British Gas Trading Limited and others) v Secretary of State for Energy Security and Net Zero***

**[2023] EWHC 373 (Admin)**

**Lord Justice Singh & Mr Justice Foxton**

1. The High Court gives judgment on the application of British Gas Trading Limited (**BGT**), Scottish Power Energy Retail Limited (**SP**) and E.ON UK plc (**E.ON**) (and associated companies) for permission to bring a claim for judicial review to challenge two decisions (**the Decisions**) taken by the Secretary of State for Energy Security and Net Zero (**the SoS**) The applications were considered at a “rolled up” hearing.
2. Octopus Energy Group Limited (**Octopus**) and Bulb Energy Limited (**Bulb**) participated in the heading as Interested Parties.
3. The applications for permission were refused on the ground of undue delay under s.31(6)(a) of the Senior Courts Act 1981. The applications for permission to challenge the Decisions on public law grounds would also have been refused because the challenges were not reasonably arguable. Had it not been for the undue delay, the court would have granted permission on the Subsidy Control grounds raised under the Trade and Co-operation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland of the other part (**the TCA**) but would have rejected those grounds on their merits.

*Background to the appeal*

4. In 2021 the retail energy supplier Bulb ran into serious financial difficulty. On 24 November 2021 an Energy Supply Company Administration Order was made by the High Court (Insolvency and Companies Court). Joint Energy Administrators (**the JEAs**) were appointed to administer Bulb. The JEAs conducted a sale process to sell Bulb's business. At the end of Phase-1 of that process, in early April 2022, only two indicative offers were received, one from BGT and one from another bidder. SP. E.ON and Octopus had made it clear that they would not be making a bid.
5. From mid-April 2022 there were communications with Octopus to see if it would be willing to consider re-entering the process to make a bid. On 24 May 2022 Octopus' re-entry into the process was approved. In its final form, the Octopus bid involved:
  - (a) the transferred business benefiting from a payment from Bulb (funded by HMG) for the period up to 31 March 2023, which would meet the actual cost of the business in acquiring energy on the wholesale market, in return for a payment limited to the amount of the wholesale price cap;
  - (b) a deferred payment obligation on the part of the transferred business, with no interest accruing save in limited circumstances, and a further option to defer payment on favourable terms in certain circumstances;
  - (c) a one-off adjustment payable to the transferred business to ensure that the financials of the deal remained broadly equivalent to those as at 1 October 2022, which was the date when Octopus' offer was intended to take effect;
  - (d) "regulatory change protection" against the costs of complying with any ringfenced protections imposed by Ofgem in respect of customer credit balances and renewables obligations.
6. In the ensuing months the JEAs recommended that the bid from Octopus should be accepted.
7. The SoS commissioned an independent review of the JEAs' final recommendations, which was supportive, and also received a supporting assessment from the Accounting Officer and a subsidy control assessment performed by BEIS which concluded that the terms of the Octopus transaction did not contravene the subsidy control principles set out in the TCA.

8. The Octopus transaction was closed on 28 October 2022. On 29 October 2022 HMG published a press release stating that it had approved the acquisition of Bulb by Octopus. This was referred to as **the Funding Decision**. On 7 November 2022 the SoS granted approval for the transfer of Bulb's business pursuant to the Octopus transaction. This was referred to as **the Approval Decision**.
9. The JEAs applied in the Chancery Division for an order fixing the effective date of the transfer. At a hearing before Mr Justice Zacaroli on 11 November 2021, BGT asked the court not to fix a date, to give it time to bring a public law challenge to the Decisions. BGT sent its Pre-Action Protocol letter to the SoS on 21 November, and SP on 23 November. The Claim Form of BGT was issued on 28 November 2022, and of SP and E.ON on 29 November. On 30 November, Mr Justice Zacaroli fixed the effective time of the ETS as 23.58 on 20 December 2022.

### *The issues*

10. The Claimants brought a number of challenges to the Decisions. Those challenges fell into two groups.
11. First, there were a series of Public Law Grounds, it being said that the Decisions were unlawful because (i) the SoS was wrongly directed, or because he wrongly directed himself, that the sale process had been fair, open, non-discriminatory and competitive; (ii) that the sale process had fail to comply with Article 303 of the TCA; (iii) the SoS had breached a duty to act fairly; (iv) in taking the Decisions, the SoS took account of irrelevant considerations and failed to take account of relevant considerations; and that the SoS had breached a common law duty of consultation.
12. Second, it was said that the SoS had failed to meet the requirements of the subsidy control principles set out in Article 364, 366 and 367 of the TCA on one or more of the following bases: (i) in proceeding on the basis that the sale process was open, non-discriminatory and competitive; (ii) the SoS's reasoning took into account irrelevant considerations and/or failed to have regard to relevant considerations and/or failed to make adequate enquiries including as to the effects of the transaction on competition; (iii) the regulatory change protection was not proportionate; (iv) the subsidies had not been granted for permissible objectives; (iv) the SoS erred in law in concluding that the subsidy responded to a national or global economic

emergency and in concluding that Octopus contributed significant funds or assets to the cost of restructuring, or that there was a credible restructuring plan.

13. The SoS, with the support of the Interested Parties, challenged the Claimants' case on the merits, but also argued that there had been undue delay in bringing the challenges, and that permission should be refused on that basis.

*The Court's conclusion on the issue of delay*

14. Section 31(6) of the Senior Courts Act 1981 provides that where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant leave (i.e. permission) for the making of the application if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.
15. The Court concluded that the need for urgency in bringing any public law challenge was clearly apparent by 11 November 2022, and it was incumbent on the Claimants to move very speedily after that date ([139]-[140]). The Claimants were aware of the essential substance of their grounds for seeking judicial review at that stage ([141]). In those circumstances, the Court concluded that the applications for permission must be refused on grounds of delay alone ([159]).

*The Court's conclusion the public law grounds*

16. The Court accepted that the Decisions were amenable to judicial review, but held that the commercial context in which the Decisions were taken called for a relatively "light touch" intensity of judicial review, a conclusion reinforced by the statutory framework in which the Decisions were taken, including the involvement of the JEAS appointed by and answerable to the Companies Court ([167]-[169]).
17. The Court held the question of public law which arises is not whether the SoS himself acted fairly; but whether the SoS was reasonably and lawfully entitled to found his decisions upon the basis of the advice which he had received in particular from the JEAs ([176]). The Court concluded that the SoS was reasonably entitled on the material before him to accept the JEAs advice as to the fairness of the process ([181]).

18. The Court held that there was no common law duty of consultation in this case ([189]-[191]) and rejected the argument that the SoS should have applied the provisions of the Public Contracts Regulations 2015 by analogy ([192]-[194]). The arguments that the SoS had had regard to irrelevant considerations or ignored relevant considerations were also rejected ([195]-[203]).

*The Court's conclusion on the subsidy control grounds*

19. After reviewing the provisions of the TCA by reference to the appropriate principles of interpretation, the Court held that the compatibility of the Decisions with the subsidy control principles in the TCA was subject to review by the Court on conventional domestic law principles such as rationality and proportionality, but that review did not involve the transfer of the effective decision-making power to the court ([238]). Context was very important in applying the principle of proportionality ([235], [241]), and an enhanced margin of appreciation was appropriate when the courts were tasked with reviewing the decisions of the executive in a context involving scientific, technical and predictive assessments ([239]). The Court rejected the submission that the Court should adopt a more intensive approach to reviewing Decisions by reference to the subsidy control principles in respect of decisions taken before the Competition and Markets Authority had been appointed as the “operationally independent authority or body with an appropriate role in its subsidy control regime” required by Article 371(1) of the TCA ([245]-[246]).
20. The Court rejected the submission that the SoS had acted unlawfully in proceeding on the basis that sale process was open, non-discriminatory and competitive, holding that the SoS was reasonably entitled to conclude that it was, and in any event the Court was not persuaded the outcome of the sale process could not be relied upon as a fair reflection of the value which the market placed on Bulb’s business ([252]).
21. The Court rejected the argument that the SoS’s subsidy control assessment had failed to take account of relevant factors ([257]). It also found that the SoS had identified a legitimate objective for the regulatory change protection ([258]), that account had been taken of the effects of the Octopus transaction on competition ([202] and [259]), and that it was reasonably open to the SoS to conclude that the subsidies granted served the legitimate objective of avoiding social hardship ([263]-[265]). The Court was not persuaded that the SoS could lawfully have granted a subsidy solely for the purpose of identifying a perceived failure in the loan market, the

reference to this subsidiary objective does not in the circumstances have the effect that the subsidy was not granted for a lawful objective ([267]). The SoS was also reasonably entitled to conclude that the subsidy was a proportionate response to a national or global economic emergency, namely the Russian invasion of Ukraine ([276]), that Octopus had made a significant contribution to the restructuring of Bulb's business ([278]) and that there was a credible restructuring plan ([279]).

**NOTE: This summary is provided to help in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

**<https://caselaw.nationalarchives.gov.uk/>**

**Paragraph numbers in bold are those assigned in the judgment.**