Claim No CO/1013/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING AT MANCHESTER

Before HHJ Sephton QC, sitting as a Judge of the High Court

Between :

The Queen on the application of Hero Renewables Limited — Claimant

- and –

(1) Renewable Energy Assurance Limited — Defendant
(2) An applications panel appointed by Renewable Energy Assurance Limited
(3) Mr Bryn Aldridge
(4) Ms Sarah Chambers
(5) Mr David Millington

Judgment

Mr Daniel Cashman instructed by FMGS Law Limited, Lancaster, for the Claimants

Dr Malcolm Birdling instructed by Womble Bond Dickinson, Bristol, for the Defendant

Introduction

1. The subject of microgeneration systems is highly topical in the light of our current preoccupation with climate change. Such systems are designed to generate energy from sources that minimise the effect upon climate change. The state accordingly provides various incentives to those who operate microgeneration systems that meet the Government's requirements.

2. In order to enable their customers to obtain those incentives, those who supply and install microgeneration systems must be recognised by the Microgeneration Certificate Scheme ("MCS") as MCS Contractors or equivalent. In order to become an MCS Contractor, one of the requirements is that an applicant must subscribe to a code of practice which is relevant to the scope of business in the microgeneration sector and which is approved by the Chartered Trading Standards Institute. Since microgeneration equipment is a considerable expense for householders and small businesses, MCS has introduced this requirement to safeguard consumers from high-pressure selling, aggressive discounting, the making of unrealistic claims and other sharp business practices.

3. In the present case, the applicant ("Hero"), which is a supplier and installer of microgeneration systems, applied to join the Reusable Energy Consumer Code ("RECC"), a code of practice sponsored by the first respondent ("REAL") and recognised by the MCS for the purpose of being recognised as an MCS Contractor. Hero's application was rejected by RECC. Hero appealed to an Applications Panel. The Applications Panel rejected Hero's appeal and directed that no further application to join RECC should be entertained for a year.

4. Hero sought a judicial review of the Applications Panel's refusal to allow it to become a member of RECC and of the Panel's decision to forbid it from making any further application for a period of a year. Upon a renewed oral application for permission, HHJ Eyre QC (as he then was) granted Hero permission to pursue its complaint about the year-long ban against further application, but dismissed the other grounds.

5. This is the determination of the application for judicial review for which Judge Eyre gave permission. The issues are:

   (a) The threshold issue of whether the Panel's decision is amenable to judicial review and

   (b) If so, whether the Panel's decision about the one-year ban was unlawful.

Legal framework

6. In Directive 2009/28/EC ("the Directive"), the Parliament and Council of the EU made provision about the promotion of the use of energy from renewable sources[1]. Article 14 was headed, "Information and training". Point 3 provided:

> "Member States shall ensure that certification schemes or equivalent qualification schemes become or are available by 31 December 2012 for installers of small-scale biomass boilers and stoves, solar photovoltaic and solar thermal systems, shallow geothermal systems and heat pumps. Those schemes may take into account existing schemes and structures as appropriate, and shall be based on the criteria laid down in Annex IV. Each Member State shall recognise certification awarded by other Member States in accordance with those criteria."

7. Annex IV was headed "Certification of Installers". It provided, so far as material, as follows:

> "The certification schemes or equivalent qualification schemes referred to in Article 14(3) shall be based on the following criteria:
>
> 1. The certification or qualification process shall be transparent and clearly defined by the Member State or the administrative body they appoint.
>
> 2. Biomass, heat pump, shallow geothermal and solar photovoltaic and solar thermal installers shall be certified by an accredited training programme or training provider.
>
> 3. The accreditation of the training programme or provider shall be effected by Member States or administrative bodies they appoint…"

The Annex then set out requirements for the theoretical and practical content of training courses and qualifications for installers.

8. The UK met its obligations under the Directive by the making of the Promotion of the Use of Energy from Renewable Sources Regulations 2011 SI No 243 ("the Regulations"). Regulation 12 imposed upon the Secretary of State the obligation of ensuring that certification and qualification schemes were established that were based on the criteria set out in Annex IV to the Directive.

The MCS scheme

9. Pursuant to the Regulations, the Secretary of State replied upon the Microgeneration Certification Scheme to satisfy the obligations under Annex IV of the Directive. The Scheme is currently run by MCS Service Company Limited, a wholly owned subsidiary of the MCS Charitable Foundation.

[1] Directive 2009/28/EC was repealed and substantially re-enacted by Directive (EU) 2018/2001. The repeal of 2009/28/EC has no significance for this case.

10. MCS has published a general scheme with the requirements of which all MCS Contractors are required to comply. Paragraph 4 of the general scheme provides:

> "The MCS Contractor shall be a member of and, when dealing with domestic customers, shall have agreed to comply with a code of practice (Consumer Code) which is relevant to the scope of business in the microgeneration sector and which is approved by the Chartered Trading Standards Institute (CTSI). Where appropriate, the documented management system shall address the requirements of the Chartered Trading Standards Institute (CTSI) Approved Consumer Code."

The Code Sponsors

11. There are currently three codes of practice relevant to the scope of business in the microgeneration sector. They are sponsored by REAL, the Home Insulation & Energy Systems Contractors Scheme ("HIES") and Glass and Glazing Federation ("GGF"). I refer to these bodies as "Code Sponsors". Each Code Sponsor has its own byelaws which govern, amongst other things, the procedure for considering applications to subscribe to its code.

12. The Code Sponsors together agreed a memorandum of understanding ("the MOU") which was designed to create a level playing field for multiple consumer codes in the sector. The introduction to the MOU exposes the motivation of the parties:

> "There has been a high incidence of mis-selling cases in the microgeneration sector. This is partly due to the complex technical nature and relatively high costs small-scale renewable and low-carbon energy systems. Since these systems tend to be one-off, high value purchases, consumers are unfamiliar with the typical cost of them and so are particularly vulnerable to high-pressure selling, including aggressive discounting. This is compounded by the Government financial incentives which give wider scope for mis-selling, where systems do not qualify for the incentives or underperform and fail to provide the promised level of financial returns. Consumers can thus face significant financial loss. In many cases. businesses have targeted the elderly or otherwise vulnerable consumers in this manner.
>
> Consumers therefore need adequate, accurate and timely information, provided in advance, in order to make informed purchasing decisions. They need sufficient time to consider carefully the implications of purchasing a renewable or low carbon energy system before making a decision.
>
> For the reasons set out above, it is essential to have robust Consumer Codes to strengthen consumer protection to prevent mis-selling and to provide a route for redress where things go wrong. ..."

13. To this end, Part 2 of the MOU requires Code Sponsors to make checks on applicants with a view to checking that the applicant does not have an antecedent history of adverse conduct. Part 3 of the Code relates to the Applications Panel, and provides, so far as relevant, as follows:

"Applications Panel

Code Sponsors must rule on application for membership as set out in their byelaws. In cases where Code Sponsors refuse an application, applicants may request access to the independent Applications Panel who will decide whether the initial decision was justified. Each party will provide their cases to the Panel's secretariat within the timescale set out in the Bye-Laws.

A decision of the Applications Panel may not be appealed, although the applicant will be permitted to re-apply for membership…"[2]

The memorandum goes on to make provision that the Panel should be independent.

RECC's rules about applications

14. An aspiring contractor's initial application is made to the Code Sponsor, which makes a decision on admission to its code in accordance with its byelaws. The relevant byelaws in the present case are those of RECC. Part 3 of those byelaws deals with applications to subscribe to the code. It contains various provisions designed to ensure that the applicant is a fit and proper person to join the Code. Paragraph 3.13 of the Code identifies some of the reasons why membership might be refused. I draw attention to paragraph 3.13.11 which states that membership might be refused if

> "there is reasonable evidence to suggest that admission of the Applicant would be likely to bring the Code into disrepute"

Paragraph 3.14 of the byelaws relates to appeals to the Applications Panel. If the Executive of RECC refuses an application to join the Code, it must notify the disappointed applicant that it "may elect to request the Applications Panel to reconsider the application."

Paragraph 3.19 of the byelaws deals with the Applications Panel as follows:

> "Where an application has been referred to the Applications Panel the Applications Panel shall make a decision in writing as to whether the Applicant shall be admitted as a Code Member, taking into account the provisions of clause 3.13. The Applications Panel shall conduct itself in accordance with these Bye-laws and the Applications Panel Rules. Based on these considerations, the Applications Panel will decide whether the Applicant should be:
>
> 3.19.1 admitted as a Code Member, in which case clause 3.12 will apply; or
>
> …
>
> 3.19.4 rejected as a Code Member, in which case the provisions of clauses 3.27 and

[2] REAL qualified its position in relation to an applicant's right to re-apply following an adverse decision by the Applications Panel: "Under RECC's byelaws there is no bar to applicants re-applying unless the Applications Panel has considered their case and directed that applications from that named applicant need not be considered by RECC for a specified period of time…". This qualification is embodied in Rule 3.26 of the RECC byelaws.

3.28 will apply, and clause 3.26 may apply if the Applications Panel so directs."

Paragraph 3.26 provides:

> "Where the Applications Panel decides that an Applicant's application for Code Membership should be rejected in accordance with clause 3.19.4, the Applications Panel may direct a reasonable period of time in which renewed applications from the Applicant will not be considered by the Executive. Once any period of time directed by the Applications Panel has expired, the Executive will consider any renewed application."

15. The RECC Applications Panel is governed by its own rules. The following rules are relevant to this case:

Rule 3.2 provides, materially:

> "Panel Members shall at all times in the discharge of their duties
> 1. have regard to the best interests of the Renewable Energy Consumer Code, and the effective implementation of the Code and Bye-Laws;
> 2. act in accordance with the principles of natural justice in reaching decisions…"

Rule 7.2 provides:

> "Decisions of the Applications Panel will be made in writing and will set out the reasons for the decision being made. Decisions should be logical and concise."

Rule 7.5 of which suggests a format for any decision the Panel might make and sub-paragraph 6 states:

> "Any direction as to a period in which further applications from the Applicant will not be considered by the Executive in order to allow the Applicant time to address the issues which have resulted in its application for Code Membership being rejected, in accordance with clause 3.21 of the Bye-Laws."

The circumstances giving rise to the application

16. The applicant made an application for membership of RECC on 3 August 2020. By letter dated 27 October 2020, REAL refused Hero's application for membership. By letter dated 10 November 2020, Hero requested that the membership decision be reconsidered by the Applications Panel. The Panel convened on 16 December 2020 and produced the decision on 22 December 2020. The decision followed the format suggested by paragraph 7.5 of the rules of the Applications Panel. It set out the reasons that REAL had refused Hero's application and Hero's response. It continued as follows:

> "3. Essential findings
> The Panel's response is as follows:
>
> ● The connection between the Applicant and Russell Brighouse is established in his position as director of the Applicant's parent company, Hero Group Holdings Ltd.
>
> ● In 2017 TD Eco Energy Ltd. was dissolved, with Russell Brighouse as director.

● The Applicant should therefore have disclosed in the application that Russell Brighouse, a person with whom the Applicant is clearly connected, was director of a company (TD Eco Energy Ltd) which was dissolved in the relevant 5-year period, and is also a director of Hero Heat (now named Cheshire Heat Pumps). Failure to declare these connections, and the dissolution of TD Eco Energy, is a contravention of Code Bye-Law 3.13.10.

● There is some evidence of the Applicant responding only slowly and incompletely to the RECC audit in 2015, despite reminders. This casts doubt over the willingness of the Applicant to comply with Code obligations at the time, in contravention of Bye-Law 4.15 and section 3 of the Code. The fact that remedial actions were being taken and no final conclusion about breach had been found before the Applicant withdrew its RECC membership, however, means that we cannot conclude that the Applicant is not able to comply (Clause 3.13.12 of the Bye-Laws). Nevertheless, when combined with other behaviour demonstrated during its membership of various Codes, this suggests a repeated pattern of lack of proper regard to the importance of adhering strictly to Code rules.

● The Applicant's conduct during its HEIS membership concerns the Panel. The reluctance to engage with resolution processes such as ADR, and to communicate in a timely and effective way with customers, should be at the heart of the Applicant's business. Complaints demonstrate that some consumers are likely to have been adversely affected by this poor customer service, as they could also have been by the late or incomplete registration of domestic contracts. In combination, this amounts to sufficient evidence of behaviour which adversely affects consumers, in contravention of Bye-Law 3.13.9.

● The 're-branding' of equipment has left a number of consumers adversely affected through the risk that eligibility for the DHRI could be withdrawn. Even if Ofgem decide not to take action, these consumers are and have been adversely affected by the risk hanging over their heads for a substantial time. This is a further contravention of Bye-Law 3.13.9.

● The use of the RECC logo for nearly two months in 2017 will have indicated to consumers that the Applicant was a Code member and therefore compliant with RECC requirements. Given that this was not the case, consumers were misled. This may well have been unintentional but it was clearly the Applicant's responsibility, under the Consumer Protection Regulations, to ensure that such misleading claims did not appear on their website or other materials.

● The online reviews about the Applicant suggest that some customers received very poor customer service, though the numbers do not appear particularly significant as a proportion of the Applicant's business. The appearance of "fake" positive reviews is potentially a serious concern, but there is insufficient evidence to prove that the Applicant either directed these reviews or was aware of their existence before they were pointed out and steps were taken to remove them.

4. Decision

This application is rejected on the grounds that the Applicant has failed to make the necessary declarations in its application (Bye-Law 3.13.10), that consumers have been adversely affected by the Applicant, through 're-branding' and failing to register

domestic contracts in a timely manner (Bye-Law 3.13.9). The Applicant also incorrectly used the RECC logo, in breach of Consumer Protection Regulations. All these contraventions, aggravated by evidence of the Applicant's weak regard for complying promptly with audit and other Code requirements under both RECC and HIES, lead the panel to conclude that admission of the Applicant would be likely to bring the Code into disrepute (Bye-Law 3.13.11).

Under Clause 3.21 of the Code's bye-laws, the Panel directs that no further application from the applicant will be considered by the RECC Executive for a period of 12 months from the date of this decision.

The Application Panel's decision has been taken having regard to the best interests of the Renewable Energy Consumer Code and the effective implementation of the Code and the Bye-Laws."

17. Sarah Chambers was the Chair of the Applications Panel. In her witness statement, she explains the decision the panel made. She refers to a contemporaneous note of the panel's discussion about the decision not to permit a fresh application for 12 months. The note says,

> "Do we state a period when they should not be allowed to apply?
>
> Different to other refusals of people who really need to train themselves up, there have been other cases with clear dishonesty with long terms for not reapplying.
>
> Discussion over length of term appropriate for not reapplying."

I draw these conclusions from her evidence, that the Applications Panel:

(a) Discussed whether or not to bar Hero from making a fresh application immediately;

(b) Considered the length of any bar with reference to bars imposed in other cases with different circumstances.

(c) Made a judgment that a period of 12 months was appropriate and just sufficient to enable Hero to address the shortcomings that had been identified.

18. It is relevant to note that the applicant currently subscribes to the GGF code. However, GGF has given notice that it will cease to operate in this sector after March 2022. Since the claim form was issued, Hero sought membership of the HIES code. Following HIES's refusal of Hero's application, Hero appealed to the Applications Panel, which directed that Hero should be granted temporary membership of HIES subject to measures of enhanced monitoring to last for six months.

Amenability to Judicial Review

19. The first issue is whether the decision in issue is amenable to judicial review. It is important before embarking upon a detailed examination of the issues which this point raises to be clear

about the nature of the decision which is under challenge. The decision which the Applications Panel took and about which the applicant has permission to complain is the decision to prevent the applicant from making any application for admission to RECC for a period of one year.

20. In *R v Panel on Takeovers and Mergers ex p. Datafin Plc* [1987] QB 815 (CA) Lloyd LJ considered what powers were amenable to judicial review. He said (at 847):

> "...the source of power will often, perhaps usually, be decisive... If, at the other end of the scale, the source of the power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review...
>
> But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may be sufficient to bring the body within the reach of judicial review. It may be said that to refer to 'public law' in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we [were] referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other"

Sir John Donaldson MR said at 838:

> "In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction."

21. In *R v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909, Sir Thomas Bingham MR explained *Datafin* as a case where a body, namely the Takeover and Mergers Panel, whose birth and constitution owed nothing to any exercise of governmental power, had been woven into the fabric of public regulation in the field of take-overs and mergers. Farquharson LJ said at 931 that *Datafin*

> "shows that the absence of a formal public source of power, such as statute or prerogative, is not conclusive. Governmental power may be exercised de facto as well as de jure. But the power needs to be identified as governmental in nature"

The Government's use of existing institutions amounted in *Datafin* to a "privatisation of government itself".

22. In *R(Beer) v Hampshire Farmers' Market Ltd* [2004] 1 WLR 233 (CA) Dyson LJ said at [16]:

> "...unless the source of the power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the

> decision has a sufficient public element, flavour or character to bring it within the purview of public law" .

23. I was referred to two unreported cases in which the court considered whether decisions made by a body not appointed by Government were amenable to judicial review. In *R v London Metal Exchange Limited ex p Albatros Warehousing BV* (2000) Richards J (as he then was) concluded that the decision of the appeal committee of the London Metal Exchange was amenable to judicial review. He held that the power exercised by the respondents was a necessary adjunct to its statutory duties and powers under the Financial Services Act 1986. He observed at [23]:

> "The fact that the powers are exercised pursuant to a contractual relationship between the LME and the warehouse is a factor telling against the performance of a public function but is far from decisive of the question. It is necessary to make a broader assessment based on all the circumstances of the case and in particular on the extent to which the powers can be said to be woven into a system of governmental control."

In *R(Underwritten Warranty Company Limited) v FENSA Limited* [2017] EWHC 2308, Dove J held that the decisions made by FENSA in running a competent persons' scheme for the purposes of the Building Regulations were not amenable to judicial review. I was much assisted by the helpful consideration of the authorities in *Albatros* and *FENSA* and by the illuminating manner in which the courts approached the issue of whether the decisions in questions had the necessary public quality to render it susceptible to a judicial review.

24. Mr Cashman, who appeared for Hero, submitted that the MCS was a statutory scheme adopted pursuant to the Regulations so as to satisfy the requirements of the Directive. The public function with which the court was concerned was the regulation of installers in the microgeneration sector. He submitted that the Applications Panel was performing a gatekeeper function in relation to the ability to be certified in accordance with the scheme. He submitted that the respondents should not beguile the court into taking an artificially narrow view of the relationship between Hero and REAL; the court should address the realities of the scheme, not merely the outward appearance. In answer to the point that the statutory framework did not require that consumers be protected against mis-selling, he submitted that the consumer protection function of MCS is so woven into its statutory function that one cannot separate it for the purposes of deciding whether it exercises a public function. He submitted that if MCS were to conclude that Hero ought not to be admitted because it was insufficiently consumer-focused, that decision would be amenable to judicial review. The fact that MCS had contracted out the consumer protection function did not protect the respondents from scrutiny by way of judicial review.

25. Dr Birdling, who appeared for the respondents, submitted that neither the Directive nor the Regulations contain any requirement for consumer protection; that requirement arose from the decision of MCS. He urged the court to the view that the Applications Panel represented an independent dispute-resolution service which Hero chose to engage with. He pointed out that Hero was not compelled to engage the Applications Panel; submission to its jurisdiction is voluntary. He submitted that Applications Panel fulfilled the function of a private arbitrator between RECC and Hero, and accordingly, it fulfilled a function purely in the field of private law and not public law.

26. In my judgment, an important consideration is that neither the Directive nor the Regulations makes any mention of consumer protection. In my view, the object of the legislation is to ensure that equipment that is fit for purpose is installed by those who know how to do so. The requirement that an accredited contractor had to subscribe to codes of business practice is one that was introduced by MCS out of a perception that in this highly technical field where there was ample opportunity for high pressure sales, it was desirable to impose such an obligation. It did not arise out of any statutory obligation.

27. It is also significant, in my view, that MCS's requirement about subscription to a code allowed an applicant to choose how it would comply with the requirement. At present, there are 3 codes, membership of any of which would satisfy the requirement. The introduction to the MOU contemplates that other codes may be approved in this field. In my opinion, this militates against the view that MCS has "outsourced" or "privatised" a decision about code membership which it could have taken itself. The decision which code should be subscribed to is one for the applicant and the Code Sponsors and not for MCS. Neither can it be said that the requirement to join a particular code is "woven in" to a system of governmental control. MCS has identified a requirement and allowed applicants to decide how they choose to fulfil it.

28. I reject the submission that the Applications Panel was a gatekeeper in relation to the ability to be certified in accordance with the scheme. I understand that by "gatekeeper", Hero means a person or body who alone can grant the code membership status required to become an MCS Contractor. In the present case, Hero was already a member of GGF and was thus a member of a code that qualified it to be an MCS Contractor. It applied to HIES and was eventually granted a qualified membership of that code. The decision of the Applications Panel in the present case did not prevent Hero from using other means to achieve membership of a code that allowed it to become an MCS Contractor. The Applications Panel was not the sole arbiter of access to a code that met the requirements of MCS. When I taxed Mr Cashman with this point during submissions, he explained that Hero wished to be a

member of RECC and not the other codes. In my view, his answer demonstrates that the nature of the dispute between Hero and the Applications Panel is the latter's refusal to allow Hero to become a member of the code of its choice, and not a refusal to allow Hero to join any relevant code. The decision to refuse Hero membership of RECC did not prevent Hero from applying for membership of other codes: see (a) Part 3 of the MOU, cited above, which provides that a disappointed applicant may make a fresh application (b) the fact that Hero in fact applied, successfully, to become a member of HIES.

29. I accept the submission that Hero was not obliged to invoke the jurisdiction of the Applications Panel. There was no compulsion to do so, and Hero could simply have made a fresh application to RECC in due course. This is important, because it supports the submission that Hero has turned to an independent dispute resolution service to resolve its disagreement with RECC. In doing so, it exposed itself to the risk that the panel would exercise its power to prevent Hero from re-applying, a power which only the Panel enjoyed.

30. I have carefully considered Mr Cashman's submission that I should not focus on the fine detail in this case, but should take into account the bigger picture which was, he submitted, that without the agreement of the Applications Panel, Hero might not be able to continue to be an MCS Contractor. The difficulty I have with that submission is that, looking at matters in the round, the Applications Panel's decision is only relevant to Hero's membership of RECC; Hero could – and did – maintain its position as an MCS Contractor by subscribing to the 2 other codes available to it. The decision the Applications Panel took is better characterised as a decision relating to whether Hero could join RECC than as a decision whether Hero could practise in the field of the supply and installation of microgeneration equipment in a subsidised market.

31. Having regard to these conclusions, my view is that the Applications Panel's powers were not of a governmental nature such as to render them liable to Judicial Review. The Applications Panel was determining a dispute between REAL and Hero about whether Hero could become a member of RECC. The power that the panel exercised and which is now the subject of this application only arose because Hero had applied to the Applications Panel. This was essentially a private law dispute.

The substantive issue

32. I address the substantive issue in deference to the submissions made and in case I am wrong about whether the decision is amenable to judicial review.

33. Mr Cashman submitted that the Applications Panel's decision about the one-year ban was unlawful because no reasons were given. He submitted that the decision was irrational: it was common ground that the moratorium on applications was "in order to allow the Applicant time to address the issues which have resulted in its application for Code Membership being rejected;" the panel's "Essential Findings" relate to matters that could be remedied very quickly; therefore there was no rational justification for a moratorium of a year. He submitted that in lighting on a period of a year, the Applications Panel was seeking to punish Hero for its past misdemeanours and such was an irrelevant and inadmissible reason.

34. Dr Birdling submitted that the reasons for the Applications Panel's decision were obvious, particularly when supplemented by the evidence of Sarah Chambers. He pointed out that there was no evidence from Hero that it did not know or understand the reasons for the panel's decision. He submitted that the decision was quite rational: the panel had concluded that admission of the Applicant would be likely to bring the Code into disrepute. It had given thought to what period of time was proportionate to remedy the position and had reached a decision that it was perfectly entitled to make.

35. In *South Bucks District Council and another v Porter (No 2)* [2004] UKHL 33, Lord Brown gave (at [36]) this summary of the law about the giving of reasons:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

36. I was referred to *R(Oakley) v South Cambridgeshire DC* [2017] EWCA Civ 71 in which Elias LJ pointed out that, absent reasons, it may be difficult for an aggrieved party to challenge a decision, given that it was to be presumed that the decision of a public authority was taken lawfully. However, as Elias LJ pointed out, if the aggrieved party persuaded a court to give

permission for a judicial review, the public authority would be constrained to give the reasons for the decision in question. I was not greatly assisted by this case: in the present case, the applicant has obtained permission and Sarah Chambers has elaborated the reasons for the decision under review.

37. I accept the submission that the panel's decision must be considered in context. The relevant context was that the decision was taken within a framework of rules that clearly set out the panel's duties to the code and powers to determine the outcome of the case; Hero had been found deficient in the respects set out in the panel's "Essential Findings"; the panel concluded that that the admission of Hero would be likely to bring the Code into disrepute, a view to which they were amply entitled to come. In my view, the words of the panel's decision were sufficient (though only barely) to convey to Hero that the panel considered that it was appropriate to impose a moratorium on further applications owing to the likelihood that Hero's admission to the code would bring it into disrepute and that the panel considered that 12 months was the appropriate period to enable Hero to address the issues raised in the decision. If there were any doubt, such was removed after the service of the witness statement of Sarah Chambers which in my judgment provides ample reasons for the decision. I am fortified in this conclusion by the observation that Hero has not served any evidence to suggest that it was in any way misled about the reasons for the ban. It has not demonstrated that it has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.

38. I reject the submission that the decision was irrational. The mischief at which the decision was aimed was the potential damage to the reputation of the code if Hero were admitted to it. The reason that the code might be brought into disrepute was a history of misconduct on the part of Hero over a prolonged period. The panel was entitled to take the view that it was not enough that Hero said that it had changed its attitude; they were entitled to require Hero to wait before making a new application and in the meantime to show that it had indeed improved its conduct. I accept the submission that the period of one year chosen by the panel was a judgment that was well within the scope of reasonable decisions. It was not irrational.

39. I reject the submission that the panel failed to apply the correct test in making its decision. As stated above, the decision was directed to addressing the potential reputational damage to the code. There is no support for the submission that the panel was seeking to punish Hero for past misdeeds.

40. It follows from what I have concluded that I am not satisfied that the decision in issue is one which was subject to public law and the supervision of this court by means of an application for judicial review. Even if I were wrong about that I do not consider that ground that the applicant has been permitted to argue is made out. The claim must therefore be dismissed.