

Neutral Citation Number: [2016] EWHC 228 (Admin)

Case No: CO/4166/2015

IN THE HIGH COURT OF JUSTICE

**QUEEN'S BENCH DIVISION**

**ADMINISTRATIVE COURT**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 10/02/2016

**Before**:

MR JUSTICE JAY

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**Between:**

**The Queen on the application of**

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| --- | --- | --- |
|  | 1. **DRAX POWER LTD** 2. **INFINIS ENERGY HOLDINGS LTD** | Claimants |
|  | **- and –** |  |
|  | 1. **HM TREASURY** 2. **HM REVENUE & CUSTOMS**   **-and-**   1. **SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE** 2. **THE GAS AND ELECTRICITY MARKETS AUTHORITY** 3. **FCC ENVIRONMENT (UK) LTD** | Defendants  Interested Parties |

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**Michael Fordham QC, Jason Pobjoy and Eesvan Krishnan** (instructed by **PwC Legal LLP**) for the **Claimants**

**James Eadie QC, Jennifer Thelen and Oliver Jones** (instructed by **HM Revenue & Customs Solicitors Office**) for the **Defendants**

Hearing dates: 27th and 28th January 2016

Approved Judgment

**Mr Justice Jay:**

**Introduction**

1. This is the “rolled-up” hearing of the Claimants’ application for judicial review challenging the removal, with effect from 1st August 2015, of the exemption for renewable source electricity (the “RSE Exemption”) from the Climate Change Levy (the “CCL”).
2. The removal of the levy was announced by the Chancellor of the Exchequer in his Summer Budget Statement delivered to the House of Commons on 8th July 2015. On that occasion the reasons for the removal of the levy were pithily expressed – *“now we have a long term framework for investment in renewable energy in place, we will remove the outdated CCL exemption for renewable electricity that has seen taxpayer money benefitting electricity generation abroad”* – and not much additional detail was furnished in the Summer Budget Report. However, during the course of these proceedings the Defendants have made available certain high level policy documentation which provides greater insight into the decision-making process, and witness evidence from Mr Nico Heslop, the Deputy Director of the Energy and Tax Team in HM Treasury, explains the rationale much more fully.
3. The target of these proceedings (strictly speaking, proposed proceedings, given that permission to pursue them has not yet been given) is not the Chancellor’s Summer Budget Statement, because that had no immediate legal consequences, but rather a resolution of the House of Commons passed on 14th July 2015, which by virtue of section 1 of the Provisional Collection of Taxes Act 1968 had temporary statutory effect. In due course, the removal of the RSE Exemption found its way into section 49 of the Finance (No 2) Act 2015, which came into force on 18th November 2015 and amended paragraph 19 of Schedule 6 to the Finance Act 2000.
4. The Claimants’ Judicial Review Claim Form wrongly characterises the decision under challenge as being “the peremptory withdrawal of the [RSE Exemption] … [dated] 8th July 2015, with effect from 1st August 2015”. Nothing really turns on this, because paragraph 5 of the Grounds correctly sets out the position in relation to the statutory effect of the Commons’ Resolution: this embodies the “decision” for judicial review purposes. The use of the epithet “peremptory” is no doubt rhetorical, and is at least intended to capture the notions of immediacy and of lack of prior warning, although one its meanings is “not open to challenge”. That apart, on any view this was an untrailed and extremely rapid change in the law, mitigated only to a modest extent by the Defendants’ permission to suppliers to allocate levy exemption certificates (“LECs”) referable to energy generated before 1st August 2015 to supplies they make of that energy up to 31st March 2018.
5. Thus, the Claimants’ challenge must be to primary legislation, and under our constitutional settlement may only be brought under EU law and the Human Rights Act 1998, the latter of which schedules Convention rights. Mr Michael Fordham QC for the Claimants both admits and avers that this is the position. He invokes two fundamental principles of EU law, and his clients’ property rights under Article 1 Protocol 1 of the ECHR (“A1P1”). There are three grounds of challenge advanced under these various rubrics, namely that the decision violates:
6. the EU law principle of foreseeability, legal certainty and protection of legitimate expectations;
7. the EU law principle of proportionality;
8. the Claimants’ rights under A1P1, as incorporated into domestic law by the Human Rights Act 1998.
9. The Claimants accept that they cannot challenge the decision to withdraw the RSE Exemption *per se*; what they seek to assail is the mode of implementation of the withdrawal, in particular, its effectuation with only 24 days’ notice (taking for these purposes the 8th July date). Specifically, they contend under the umbrella of their first ground that in all the circumstances of this case they could legitimately expect that any abrogation of the exemption would be subject to a lead time of two years, being on Mr Fordham’s argument the minimum period which should have been given in order to honour his clients’ legitimate expectations. I note that this was not quite how the point was advanced under paragraph 6 of his original Grounds.
10. Having considered Mr Fordham’s grounds, skeleton argument and oral submissions, I am satisfied that all three grounds surmount the hurdle of arguability. I therefore grant permission and proceed to determine the merits of the claim. But before I lock horns with the legal issues which arise, I need to cut through the mass of evidence and background material in order to provide essential backdrop and context, thereby rendering this judgment intelligible to those who are not intimately involved in this case.

**Essential Factual Background**

The Parties

1. The First Claimant, Drax Power Ltd, is a power generation business based in North Yorkshire. It owns the largest power station in the UK, currently providing power to meet 7-8% of the UK’s electricity needs. Given changes in the fiscal support regime for renewable energy, in the summer of 2012 the First Claimant decided to become a predominantly renewable biomass generator, and is currently executing plans to convert three of its six generating units to burn biomass. The second witness statement of the First Claimant’s Chief Executive, Mr Andrew Koss, tells me that Board decisions to change the direction of its business were closely linked to the timing of Government decisions relating to Renewable Obligations’ banding levels, as more fully explained below.
2. The Second Claimant, Infinis Energy Holdings Ltd, is the leading independent renewable energy generator in the UK with a 5% market share as at the end of 2014. At all material times it was the wholly-owned subsidiary of a listed company. It is the largest landfill gas operator in the UK and one of the leading onshore wind generators in the country. I am told by the Second Claimant’s Commercial Director, Mr Steven Hardman, that the Group’s corporate structure has three divisions: landfill gas, onshore wind and wind development pipeline. The Group owns and operates a portfolio of 137 generating plants across the country.
3. As Mr Fordham explained in opening the case to me, and as anyone familiar with the energy business will know, there are in effect three separate links in the relevant chain of supply: (i) from fuel supplier to electricity generator; (ii) from electricity generator to supply company; and, (iii) from supply company to business customer. I am excluding domestic consumers from the relevant chain of supply because their electricity use is excluded from the CCL. Thus, the present case is concerned with the second link. In this regard the individual Claimants have slightly different contractual arrangements. According to paragraph 32 of Mr Koss’ first witness statement, the First Claimant enters into “wholesale market agreements” which typically last 1-2 years. According to paragraph 13 of Mr Hardman’s first witness statement, in relation to its wind business the Second Claimant enters into “power purchase agreements” (“PPAs”) which typically last 5-15 years; in relation to its landfill gas business, the Second Claimant either enters into shorter-term PPAs or participates in the NFFO regime. Pursuant to these contractual arrangements, LECs are sold by the Claimants to the supply companies, who would then (in line with the Defendants’ policy intention but not necessarily in practice) redeem them against the renewable electricity supplied, and claim their value. The detail of this will be set out more fully below.
4. For ease of reference, I will refer henceforth to the First Claimant and the Second Claimant individually as “Drax” and “Infinis”, to them collectively as “the Claimants”, to the First Defendant and the Second Defendant individually as “HMT” and “HMRC”, to them collectively as “the Defendants”, to the First Interested Party as “DECC” and to the Second Interested Party as “Ofgem”. I will use the term “Government” where no element of precision is required.

International and EU Obligations

1. In 2001 only 2.5% of the UK’s electricity needs were derived from renewable sources. The current level is slightly over four times that, and Government believes that it is on track to meet its target of delivering at least 30% of electricity demand from renewable sources by 2020. Government’s targets no doubt reflect the UK’s international and EU obligations, but the ambition is to surpass these. On my understanding, in pursuance of this goal the Climate Change Act 2008 sets higher standards in relation to the UK’s net carbon amount and greenhouse gas emissions.
2. Relevant international obligations are contained in the Kyoto Protocol which was adopted in 1997, ratified by the UK and the EU in 2002, and entered into force in 2005. For the period ending in 2020, the EU and its Member States are jointly responsible for achieving an emissions reduction target of 20%. There is clearly a relationship in practice between emissions reductions and increasing electricity generation from renewable sources, because the latter do not entail significant production of carbon, carbon dioxide and related gases into the atmosphere.
3. On 27th October 2003 the Council of the European Union promulgated Directive 2003/96/EC (“the ETD”). Recital 7 of the Preamble provides that the taxation of energy products, and where appropriate, electricity is one of the instruments available for achieving the objectives of the Kyoto Protocol. As Ms Nicola Stinton, leader of the energy taxes team at HMRC, explains at paragraph 7 of her witness statement, all Member States are required under the ETD to have an energy tax on energy products and electricity, imposed at a single rate at or in excess of a specified level. Pursuant to Article 15, Member States are permitted to apply exemptions or reductions in tax to, amongst other things, electricity of renewable origin.
4. On 23rd April 2009 the European Parliament and the Council of the European Union promulgated Directive 2009/28/EC (“the RED”). By Article 3 a legally binding commitment is set to ensure that, by 2020, at least 15% of all energy comes from renewable sources. One of the specified means of achieving this goal is through “support schemes”.
5. Other aspects of the EU legal and policy framework are covered in paragraphs 13-15 of the witness statement of Mr Tim Warham, senior policy adviser in clean energy at DECC.
6. It is readily apparent that the enactment of a network of taxation, tax exemptions and other “green-friendly” arrangements will, if carefully calibrated, serve to ensure, either directly or indirectly, that the generation of green energy is favoured (and brown energy disfavoured), so that the UK’s renewables and emissions targets are met.

The CCL

1. The CCL is an environmental tax levied on electricity, gas, solid fuels and liquefied petroleum gas supplied to business and the public sector. Its intended advent was announced in the 1999 Budget, and it was formally introduced with effect from 1st April 2001 by operation of the provisions of section 30 of and Schedule 6 to the Finance Act 2000. The RSE Exemption was introduced at the same time. Although it is apparent from the chronology that the CCL antedated the ETD, the Defendants accept through Ms Stinton that “negotiations on the Directive were well advanced whilst the CCL was being designed and the design therefore reflected the anticipated requirements of the Directive”. Ms Stinton further states that the CCL remains “an integral part of the UK’s climate and energy change and energy policy framework and assists in meeting the UK’s … targets”. However, it is also true that the UK’s renewables framework has developed substantially since the CCL was introduced, owing to technological, qualitative and quantitative enhancements.
2. Mr Fordham took me through the relevant provisions of Schedule 6 to the Finance Act 2000, both in its original and amended versions. It is unnecessary to set out all the key features, save to emphasise the following matters. In the Schedule as originally enacted, supplies to electricity generators were outside the scope of the tax. By virtue of paragraph 5 of Schedule 6, supplies by electricity utilities are subject to the CCL. Accordingly, they must register with HMRC, submit regular returns, and charge CCL to their customers when making relevant supplies. They are saved from this obligation when making exempt supplies.
3. The core provision for present purposes is paragraph 19 of Schedule 6, which contains either directly or with reference to subordinate legislation the conditions and mechanisms for the exemption for renewable source electricity – the RSE Exemption. These are all itemised and explained in paragraphs 27ff of Ms Stinton’s evidence, and for present purposes I can alight directly on the critical component of the scheme, namely the LECs which are provided for under regulation 48 of the CCL (General) Regulations 2001, as amended. The role of LECs is clearly explained in paragraph 46 of Ms Stinton’s witness statement, as follows:

“Once electricity enters the distribution grid (upon generation), it becomes impossible to identify its origin, as an electron from a renewable source is indistinguishable from an electron from a “brown” source … The CCL legislation therefore introduced LECs to help identify quantities of generated electricity that qualify for the CCL exemption, with one LEC being issued for each megawatt of qualifying electricity generated. The LEC is simply a registration/serial number that is allocated to the appropriate party on “issue” or “transfer” and then cancelled on redemption.”

1. The production of a LEC by a supplier is a necessary but insufficient condition for meeting the requirements of the legislation; what is also required under paragraph 19 of Schedule 6 is *inter alia* that the supplier should have entered into a renewable source contract with its business customer. When the system was introduced, it was therefore anticipated that LECs would follow the supply of electricity from the generator to the supplier, who would then redeem the LEC associated with it and claim the value of the exemption on behalf of their business customers. However, and as Ms Stinton frankly explains, the practical reality of the matter is that it is very difficult to prove that a particular LEC is other than related to a qualifying source, and consequently what may be described as “floating” certificates, namely those separated from the electricity to which they were originally associated, have been honoured by the authorities for the purposes of triggering the entitlement to the exemption. A different way of putting this point is that a collateral market in the trade of LECs has formed, with on the Claimants’ figures approximately 46% of the market being sold from generators directly to suppliers, 44% between vertically integrated suppliers and 10% from third-party or “over the counter” trades. This, on my understanding, has led to a spreading of the financial benefits of the RSE Exemption between generator, supplier and customer.
2. The Defendants argue that this uncovenanted state of affairs serves to undermine the policy intendment of the scheme. They also point to the fact, although this was an inherent feature, that the fiscal support being given to the generators is indirect rather than direct. The value of the LEC is received by the generators not in the form of a direct subvention but as additional consideration under the various contractual arrangements made with their suppliers (see paragraph 10 above). Owing to market forces, this additional consideration is lower than the LECs’ true value (in 2015, in the region of £5.54 per certificate). For similar reasons, to the extent that LECs are being traded in the market, this would be reflected in a discount against their true value in order to reflect commercial risk. I have seen confidential documents setting out the discounted figures. These are much higher than the figure of 24% suggested in one of the HMT’s early briefing notes, but following discussions with DECC it was understood by officials that the generator received 70% of the benefits. Without delving into the fine detail, and potentially confidential matters, this figure is still lower than the Claimants’, but in my view nothing in the end turns on that.
3. The revenue yield from the main rates of CCL has historically been substantial, namely £471M in 2014/15. The cost of the RSE Exemption for that year was £381M, being 45% of the tax yield from the CCL and the cost of the exemption. In June 2015 HMT estimated that the RSE Exemption would cost the Exchequer £485M in 2015/16, and £535M in 2016/17 (although these are indicative figures and the data contained elsewhere in the same briefing note are slightly different).
4. As the cost of generating renewable energy decreases, so will the value of the exemption. Indeed, in 2015 it was estimated that the value of the LECs would dwindle to zero by 2020. Their value to the Claimants in the two year period at issue is addressed below.

Other Support Schemes

1. There are a number of these addressed in the Defendants’ evidence, but I propose to mention just four.
2. First, the Renewables Obligation (“RO”) is one of the main support mechanisms for renewable electricity projects in the UK. It came into effect in April 2002, pursuant to secondary legislation made under the Utilities Act 2000, having been announced in a statutory consultation document dated August 2001. Its purpose is to oblige UK electricity suppliers to acquire an increasing proportion of the electricity they supply from renewable sources.
3. In essence, and as explained by Mr Warham, this scheme is administered by Ofgem, which issues certificates known as “ROCs” to operators of accredited generating stations in relation to the renewable electricity they generate. ROCs are ultimately used by suppliers to demonstrate that they have met their obligations under the RO. If they have not, they are obliged to pay a form of penalty known as the buy-out price. The administrative cost of the scheme is recovered from the fund and the rest is distributed back to suppliers in respect of their individual obligations.
4. In common with the RSE Exemption, the RO is an indirect support scheme. As with LECs, there is also a market for ROCs but the Defendants regard the latter as “fully fungible” in the sense that this is covenanted and in concordance with the policy objectives of the scheme. Moreover, unlike LECs, the furnishing of ROCs is regarded as both necessary and sufficient to fulfil the exemption.
5. In April 2009 the RO was reformed in order to progress it from a mechanism which offered a single level of support for all renewable technologies to one where support levels vary by technology, according to a number of factors including cost and potential for future development. These differentiated support levels are known as banding. The fine detail does not matter for present purposes, but a limited number of points should be made. Under the Renewable Obligations Order 2009 [SI 2009/785], DECC has power to review the RO bands at four-yearly intervals. Before making any banding provision, it must take into account the matters set out in section 32D(4) of the Electricity Act 1989, which include the effect of paragraph 19 of Schedule 6 to the Finance Act 2000, i.e. the levels of the RSE Exemption expressed in terms of the deemed value of the LECs. Overall, the core objectives are cost-effectiveness, value for money, and the meeting of the UK’s 2020 renewable energy targets.
6. In general terms, the RO regime will close to new capacity in 2017 (being superseded by the Contracts for Difference – see paragraphs 32-33 below), and electricity generation that is by the cut-off date accredited under the RO will continue to receive support until 2037.
7. Finally, it should be noted that, in general terms, only UK generators may avail themselves of the RO (because foreign generators cannot, by definition, contribute towards the UK’s renewables targets). As explained below, the European Commission has not regarded this as creating a difficulty for the purposes of the State aid rules.
8. Secondly, a Contract for Difference (“CfD”) (or its predecessor, an Investment Contract) is a private law arrangement between a low carbon electricity generator and the Low Carbon Contracts Company, a government-owned entity. These contracts, typically between 15-35 years in duration, were sanctioned under the Energy Act 2013. This scheme came into effect on 1st April 2013 having been announced by Government in December 2010. In short, the generator receives a form of direct subsidy by being paid the difference between the “strike price” (based on the cost of investing in a particular low carbon technology) and the “reference price” (the market price). The initial ascertainment of the strike price is a matter which I will need to address below, but at this stage I note Mr Warham’s evidence that CfDs can be entered into further to a competitive allocation round (i.e. auctions) or bilateral negotiation. The first CfD “allocation round” concluded in 2015 and led to an overall reduction in strike prices – around 20% lower than the equivalent support under the RO. Very recently, and following the publication of State aid details, the strike price in relation to Drax’s Investment Contract was potentially reduced by around 5%.
9. As with the RO, foreign generators are not currently eligible for competitively allocated CfDs.
10. Thirdly, in December 2010 DECC consulted on the proposed introduction of the Carbon Price Floor (“CPF”), a new rate of tax (the Carbon Price Support rate or “CPS”) to be levied on all fossil fuels used in the UK to generate electricity. The implementation of the CPF was announced in March 2011, to take effect from 1st April 2013. The CPF works by ensuring a mandatory minimum price that has to be paid for carbon fuels, thereby deterring their use.
11. Fourthly, in the March 2011 budget the Chancellor announced the removal of the exemption from CCL for indirect supplies of electricity generated in CHP stations (the “CHP Exemption”) to be implemented with effect from 1st April 2013 (see paragraphs 14 and 24A to Schedule 6). In his oral argument, Mr Fordham linked the removal of the CHP Exemption to the inauguration of the CPF, and an examination of the amended provisions I have referenced demonstrates that this is so.
12. I note that Mr Heslop postulates that a prudent RSE generator “could have made the link between the support the CPF gave to renewables (as well as CHP) and considered whether withdrawal of the RSE Exemption might also be something the Government might consider in the future”. Like Mr Fordham, I consider that, without more, there is little in this point. Although I would agree with the Defendants that RSE generators benefited from the CPF increasing the wholesale price of electricity, the indirect support the Government was giving to renewables by penalising fossil fuels did not mean that other indirect supports – in the form of exemptions from the CCL – were any the more likely to be in jeopardy. I return to this aspect under paragraph 41 below.
13. It may be seen that over the past 15 years Government has introduced a patchwork quilt of measures designed to favour the generation of electricity from renewable sources, and penalise generation from fossil fuels. Sometimes the sticks and carrots are direct; on other occasions they are designed to operate indirectly. The Claimants argue that these measures are “inextricably intertwined”, working like exquisitely designed cogs in a perfectly conceived, finely calibrated clock. The extent to which this is truly so lies at the heart of this case.
14. With that introduction, I turn now to address the evidence which Mr Fordham drew to my attention in support of his overarching submission that, owing to his clients’ legitimate expectations, it was not foreseeable that the RSE Exemption would be removed as abruptly as it was.

The Evidence Relied on by the Claimants as Founding their Legitimate Expectations

1. Few would dispute the general desirability of giving plenty of warning to commercial taxpayers of fiscal changes which will benefit or harm their interests, in order to facilitate measured rather than precipitate business planning. In this particular context, the sound practical and commercial sense of this principle has been consistently recognised by a number of sources to which reference was made by Mr Fordham: see, for example, page 7 of Lord Marshall’s Report on Economic Instruments and the Business Use of Energy (“in order to help businesses plan for future investment and maximise the environmental impact of a tax, a clear signal should be given of the long-term direction of policy, with changes in the rates of tax made in a gradual and predictable way”); and page 5 of the European Commission’s Guidance for the Design of Renewable Support Schemes (“planned review periods and no unannounced interim changes” and “clear commitments to avoid changes that alter the return on investments already made and undermine investors’ legitimate expectations”). Furthermore, adherence to this principle is evidenced by the brief examination I have undertaken of four relevant support schemes in the preceding sub-section to this judgment. In all cases, significant lead times have been given, but they have varied: sometimes in the region of two years (e.g. the CPF and the associated removal of the CHP Exemption); sometimes longer (e.g. the CfDs); sometimes shorter (e.g. the RO).
2. This point may be illustrated further by examining the HMT’s consultation paper on the CPF published in December 2010. Mr Fordham drew my attention to paragraph 3.20 which addresses the lead times involved between investment decisions and plant actually generating electricity – e.g. around 2-3 years for offshore wind. Paragraph 3.21 refers to the “strong case for the policy [the CPF] to be introduced as soon as practically possible”, and under the rubric, “Summary of Proposal”, “the Government intends to introduce proposals in Finance Bill 2011 (and subsequent secondary legislation) and to bring the proposals into effect from 1st April 2013”. The introduction of the CPF was linked to the removal of the CHP Exemption, and it is not unreasonable to infer that it was Government’s view that in the circumstances which pertained in December 2010, in relation to these measures, a lead in time of slightly over two years was the minimum which was practically possible. This inference is to some extent supported by paragraphs 1.19-1.29 of the Defendants’ Response to the CPF Consultation, published in March 2011, which proclaimed that “it [was] an early and long-term signal to investors that the Government is serious about encouraging investment in low-carbon electricity generation now”.
3. In December 2015 external consultants gave a confidential report to HMT covering, amongst other matters, “possible timing and cause of the abolition of the CCL and the renewable-sourced electricity exemption”. They reminded readers that in June 2010 they had warned that the new Coalition Government’s intention to introduce a CPF might be linked to the Conservative Party’s policy on CCL as announced before the Election, which was to replace it with a new carbon levy providing a floor price. There was, accordingly, “considerable uncertainty … over the future of the CCL exemption benefit for renewable generation”. However, we have already seen that when the CPF was proposed by Government in December 2010, any possible linkage to the RSE Exemption was conspicuously absent. Mr Fordham is entitled to point to this, and to the fact that between 2010 and July 2015 nothing further was said, floated or hinted about the durability of the RSE Exemption.
4. In July 2012 DECC published an Impact Assessment on the RO banding proposals for the period 1st April 2013 to 31st March 2017. The objectives of the banding review were to set cost effective support levels for renewable technologies over this period which would keep the UK on track to meet the 2020 target. DECC’s Response to the Consultation specifically stated that “our aims for the banding review are to … ensure coordination with other DECC financial incentive schemes”.
5. It is clear from other documents that the banding review was closely coordinated, as had it to be in the light of section 32D(4) of the Electricity Act 1989. Modelling was carried out by external consultants on behalf of DECC in December 2011, on the following basis:

“It was assumed that the LEC value remains constant in real terms at £4.70/MWh in 2010 prices, and the CCL remains in place for the length of the modelled period. It was also assumed all currently eligible technologies remain eligible.

In our experience, generators generally incur transaction costs in the sale of LECs. This can be around 7% of the LEC price. Although this will tend to vary according to the exact terms and the proportions achieved for the other elements of value in a PPA.

For the purpose of our modelling, in agreement with DECC, it was assumed that generators receive 93% of the value of their LECs under the terms of PPAs. Offshore wind generators were assumed not to sign PPAs, and to DECC [sic] therefore asked us to assume they receive 100% of the LEC value.”

1. Plainly, therefore, the RO bands directly took into account the availability of the RSE Exemption, and did so on a pence for pence basis (subject to the 7% discount), assuming that the LEC value remained constant in real terms (it would increase in nominal terms, and I assume that the modelling reflected this). The Defendants do not dispute these basic facts, although the inferences to be drawn from this approach are contested. Further, it is clear that the modelling was carried forward over four years until 2017, from which it would follow that if the RSE Exemption had been withdrawn in, say, 2014 the Claimants would no doubt have been arguing for a three year lead time.
2. A similar analysis may be successfully undertaken, from the Claimants’ perspective, with regard to the initial fixing of the strike prices for the purposes of the CfD regime. Here, the position is somewhat more complicated, and therefore disputatious, owing to the fact that a secondary market exists for a number of these contracts, with the consequence that the traded price has ended up lower than the price appearing in Government models. This, however, seems to me to be an irrelevant detail, because the real focus should be on the methodological factors deployed by Government, or by those advising it, in arriving at the initial levels. Thus, in a document promulgated in December 2013 entitled “Annex B: Strike Price Methodology”, the following appears:

“**Other Policy:** LECs provide around 5/MWh of support. The modelling assumes CfD plants (like those supported under the RO) will receive LEC revenue and the strike price is reduced to account for this.

…

Strike prices for 2014/15-2016/17 are set so that, given our current assumptions set out [above], they are at broadly equivalent levels to the RO in order to enable a smooth transition between the instruments and avoid all investors preferring one to the other. We refer to this approach as “Renewable Obligation minus X” or “RO-X.

…

Calculating strike prices on the basis of RO-X involves the following steps: …

Round strike prices to the nearest £5. ROC bands have been set in 0.1 ROC increments, with 0.1 ROC indicating a difference in support of around £5/MWh. All strike prices are therefore rounded to the nearest £5/MWh (2012 prices), to be consistent with this convention. The actual strike price paid to generators will then be uprated in line with CPI inflation.”

1. Here, it is explicitly stated that the strike price was based on the RO price and was reduced to reflect LEC revenue. Had there been no such revenue, the strike price would have been commensurately higher. However, Mr Warham makes the point at paragraph 57 of his witness statement and footnote 15 that LEC revenue “is counted on both the CfD and RO side so removing it would have no impact on the strike prices as calculated” (because, I deduce, the strike price is based on the RO price).
2. In support of his legitimate expectation argument, Mr Fordham also relied on the fact that no one in the industry, and no informed commentators, foresaw the withdrawal of the RSE Exemption, the Claimants had made budgeting decisions based on its perpetuation, and that they will consequently suffer considerable losses (in terms of reduced income streams). It is more convenient to elaborate on these matters below.

The Genesis and Evolution of the Defendants’ Decision to Withdraw the RSE Exemption

1. In 2011 HMRC undertook some limited scoping work on the removal of the RSE Exemption. It is clear from Ms Stinton’s second witness statement, and from an email from RT (a junior official) dated 30th June 2011, that the timing of any reform would be linked to the introduction of the new banding for ROCs, namely April 2014 (although the email gives this year, I have understood the new ROC bands to have been brought into operation in April 2013). However, this work stopped in December 2011 when HMT indicated that it did not wish to pursue the issue any further. To my mind, this issue has generated far more heat than light in these proceedings. Given, in particular, the stated nexus with the coming into force of the ROC bands, and the obvious fact that it would be extremely difficult for the Claimants to spell out any legitimate expectations from a practice which was hidden from them, no support for the Claimants’ case may be derived from this evidential nugget.
2. In January 2015 Ms Stinton’s team was asked to analyse the options for reforming the RSE Exemption. On 24th March 2015 HMRC provided a paper for HMT which highlighted a number of problems with the RSE Exemption and analysed two options for reform, one of which was removing it altogether. The reform option was seen as being time-consuming because it would require a full review of the current system, public consultation etc. It is not right to see this paper as other than setting out the HMRC’s initial views on the issues. Two matters, in particular, were highlighted, namely the benefit to overseas generators and:

“… the overarching problem we have is that whilst we are trying to exempt the “actual” RSE, because of how the market works what we are really doing is exempting the “paper trail” that represents the RSE.”

1. On 29th April 2015 a meeting took place between HMRC and Ofgem. Some reliance during the course of argument was placed on paragraph 4.9 of the meeting notes, which states that “all changes would take a very long time”, but in my view little weight may be placed on this. Even if this expression of opinion covers removal of the RSE Exemption as much as its reform (paragraph 63 of Ms Stinton’s first witness statement appears to place a different emphasis in comparison with paragraph 16 of her second), the fact remains that the policy was still at a relatively early stage of its gestation, and – without prejudice to the Claimants’ first ground - officials are entitled to change their mind when debating policy outside the public domain.
2. Mr Heslop, speaking for HMT, frankly informs the court that “following the General Election on 7th May 2015, Ministers in the new Government had an appetite for reforms to tax policy and in particular to ensure greater value for money in the execution of the UK’s energy policy”. HMT produced two sets of slides which showed their developing thinking on the topic; one of these (dated 28th May 2015) suggested that the exemption “could be announced at Budget 2016” with a transition period for existing or already accrued LECs. However, it seems clear that HMT was working very rapidly at about this time, because on 17th June 2015 it was briefing the Chancellor recommending that the changes be brought in as soon as operationally possible, in July. As Mr Heslop explains in his first witness statement:



“… there was a strong policy and value for money argument to end the RSE Exemption. Critically, the benefit provided by the RSE Exemption was regarded as inefficient compared to other support mechanisms for renewable generation, supported foreign generation and was diffused across the supply chain. Removing the RSE Exemption would also help eliminate the deficit, which is a primary fiscal objective for this Parliament.”

As for “handling and stakeholder reaction”:

“This will impact generators and stakeholders, although it is difficult to know how much as the precise effect will depend on individual commercial arrangements.”

Nowhere is any express recognition given to the possibility that generators, including the Claimants, might enjoy legitimate expectations promoted by previous administrations.

1. That said, in an undated document entitled “Problems with the current CCL exemption for renewables”, the following is stated:

“The ‘three year cap’ – Precedents in VAT have highlighted that taxpayers have a legitimate expectation with regard to claiming reliefs that they are entitled to and they should expect a reasonable period of notice when they are withdrawn.”

Clearly, this is of some assistance to the Claimants’ case, to the extent that it enlightens the state of mind of officials. However, the status and authorship of this document is unclear, the three year cap was not explained to me, neither were the VAT precedents.

1. On 23rd June 2015 further high-level advice was given by officials within HMT to Ministers. This pointed out that the cost to the Exchequer of the RSE Exemption was likely to be £3.9B over the course of this Parliament. Further:

“UK renewable generators could be impacted in the short-term, but the value they receive from the exemption was expected to be negligible by the early 2020s, and any short-term loss will be minimal compared to the £4.3B of support they are expected to receive in 2015/16 alone.”

1. Mr Fordham alighted on a particular passage in the “Q&A” section of the briefing note which he submitted contained a series of errors:

“Any loss UK renewable generators face will be small compared to the other support they receive … Unlike other forms of renewable support, this exemption is not targeted specifically at UK renewable generators. They do receive some value from the exemption but this is uncertain and shared with other stages of the supply chain. The value generators receive will also be negligible by the early 2020s, as the supply of renewable electricity exceeds business demand for it. This uncertainty over the future value of the exemption makes it difficult for generators to factor it into their businesses plans [sic], and so it is unlikely to be decisive in their investment decisions.”

1. The errors (on the Claimants’ case) are these: (i) although the value is shared, a large proportion of it is retained by generators (a point which, as I have already pointed out, is accepted in the Defendants’ witness evidence), (ii) the fact that the value of LECs will be nugatory post-2020 cannot be a reason for disallowing a lead time expiring in 2017, and (iii) the Claimants’ evidence clearly shows that the value of LECs has been factored into their business plans. I will be returning to these matters below.

Immediate Market Reaction

1. The Claimants’ evidence in these proceedings is that the removal of the RSE Exemption was completely unexpected, and had not been prefigured in any of their contemporaneous documents. The market viewed the Chancellor’s announcement in exactly the same way because Drax’s share price fell by 28% on the day, and Infinis’ by 26% over the period 8th–10th July.
2. The Claimants have prepared what they describe as a “Sub-Index of Illustrative Reaction Documents”. For present purposes I quote from an independent, reputable source, the Financial Times:

“Shares in Drax, the power utility switching from burning coal to wood pellets, tumbled on Wednesday after a climate change exemption was abruptly scrapped … Drax said the move, which is estimated to save £450M in the current financial year and £900M by 2020, could reduce its revenues by about £30M this year and £60M in 2016.”

Evidence of Impact

1. Mr James Eadie QC for the Defendants submits that there is a paucity of evidence demonstrating that any individual investment decision was adversely affected by the removal of the RSE Exemption. Indeed, he submits that, given that the current focus is on a two year lead time, rather than on the long term, it is inherently unlikely that the withdrawal of this income stream could have had serious, persistent consequences. The court needs to weigh in the balance more important factors such as constant and significant changes in fuel prices, the greater value of the retained support schemes, macro-economic factors, and matters such as the fall in the corporation tax rate.
2. I see some of the force of Mr Eadie’s arguments, but in my judgment one cannot avoid the conclusion that this sudden and unheralded removal of an income stream of this nature will have had, and did have, a significant short-term impact on the Claimants’ business plans and marketable goodwill. Much of the material drawn to my attention in this regard by Mr Fordham is of a confidential nature, and the “ballpark” figures offered up to the Financial Times have now been superseded, for my eyes only, by schedules which show the anticipated reduction in revenues over the next two years. Furthermore, as is wholly unsurprising, the Claimants’ confidential business plans prepared before July 2015 clearly show that what is described as LEC income has been taken comprehensively into account. In my judgment, the figures at stake could scarcely be characterised as being at such a low level that they should be regarded as capable of being “lost in the wash”. Even if any impact on individual long-term investment decisions may be difficult to prove (save in the general sense that a significant reduction in revenue over a two year period will inevitably mean that there is less wherewithal to make the investment decisions which would or might otherwise have been made), I take Mr Koss’ point that, given that business plans are typically reviewed annually, and business finance tends to be arranged on a longer-term basis, LEC income or the lack of it represents a substantial disturbance both to business planning and business financing.
3. At this juncture, I should address two contrary arguments advanced on behalf of the Defendants.
4. The first is that there is documentary evidence to support the proposition that the Claimants were aware that regulatory change, and the abrogation of the RSE Exemption, was a “key” risk. For example, on 2nd December 2013 the Executive Committee of Drax noted as follows:

“While LEC value is explicitly recognised in recent DECC calculations on returns from investment in renewable capacity, CCL is a Treasury initiative and there may be limited incentive to support LEC value, or to ensure demand exceeds supply.”

1. In a similar vein, in a share prospectus dated November 2013 Infinis warned prospective investors as follows:

“The development of renewable energy sources and generation of renewable energy in the UK relies, in large part, on the national and international regulatory and financial support of such development. While the EU and the UK have, in recent years, adopted policies and support mechanisms actively supporting renewable energy, it is possible that this approach could be modified or changed in the future, including as a result of a change in Government or a change in Government policy, relating to renewable energy directly or to energy policy more generally. ”

Infinis contends that its prospectus made no specific reference to the RSE Exemption. That is correct, but to my eyes what the prospectus is clearly warning is that any extant support mechanism, in the form of a fiscal exemption or whatever, may be removed in the future, depending on the complexion and policy direction of a particular Government.

1. There are other documents, many of which are of a confidential nature, to similar effect.
2. The Claimants cannot point to an internal document which demonstrates in terms that either of them believed that they had a legitimate expectation that Government policy would not be changed without a two year lead time. The absence of such material is harmful to the Claimants’ case on its first ground, particularly on account of Drax’s acceptance (see paragraph 61 above) that policy might change notwithstanding that DECC had expressly factored the value of the LECs into its recent calculations. However, I do not regard this as a decisive countervailing consideration; rather, it is one which falls to be weighed in the balance against all the other factors Mr Fordham prays in aid. Even sophisticated commercial operators such as these Claimants do not necessarily think in terms of legitimate expectations – these amount to a forensic concept, devised by lawyers after the event to interpret past facts and assurances – and, in my view, the material relied on by the Defendants does not establish that the Claimants foresaw that the RSE Exemption could or would be removed with practically immediate effect.
3. Secondly, the Defendants also rely on the fact that the Claimants’ contracts with their suppliers (the wholesale market agreements and the PPAs) contain change of law provisions, the existence of which demonstrates that the Claimants had foreseen the possibility that, for example, the RSE Exemption might be removed. Indeed, as the Defendants’ “Note on Factual Points” shows, with reference to the underlying documentary material, the withdrawal of the RSE Exemption is one of the contingencies expressly catered for within relevant change of law provisions. However, I am not persuaded that this material significantly adds to the Defendants’ case, beyond that which I have already recognised. Given the length of these supply contracts (in most cases), anyone offering competent legal advice to the Claimants would insist on there being such clauses to protect against the possibility of change at some point in the future. I cannot draw the inference that it was therefore foreseen that the RSE Exemption was at risk of being abrogated with practically immediate effect.

**A Prior Question: Does EU Law Apply?**

1. The Defendants do not dispute that the principles of legal certainty, foreseeability and proportionality are fundamental principles of EU law. However, they submit that these principles are irrelevant because EU law has no application to the RSE Exemption at all. The Claimants accept that, if EU law does not apply, then no apparatus imposed or implied by principles of domestic public law might avail them, since at this national level legitimate expectations cannot be raised against a sovereign Parliament.
2. Mr Eadie’s submissions took the following steps:
3. For EU law to apply in this situation, it must be demonstrated that the relevant provision of national law implements EU law: see Advocate General Sharpston in Bartsch v Bosch und Siemens Hausgerate (BSH) Altersfursorge GmbH [2009] All ER (EC) 113 and Siragusa v Regione Sicilia [2014] 3 CMLR 13.
4. There is no obligation under EU law to impose the RSE Exemption; it is a purely domestic scheme which lies within the substantial discretion accorded to Member States in this domain.
5. The objectives of the RSE Exemption go much further than the ETD and the RED.
6. Article 15(1) of the ETD contains a “carve-out”, and provides for a total exemption from taxation for RSE. Because the ETD does not regulate in this domain, the present situation is not an example of Government engaging in a permitted derogation from EU law; rather, for EU law purposes, this is *terra incognita*.
7. An obvious difficulty confronting Mr Eadie’s argument is that he draws an *ex facie* uncomfortable distinction between Articles 15 and 16 of the ETD. He is constrained to accept that, unless the decision of the Third Chamber of the CJEU in Plantanol GmbH v Hauptzollamt Darmstadt [2009] ECR-108343 should be regarded as wrongly decided, or the point was not taken, cases falling within Article 16 of the ETD *are* within the material scope of EU law, because “rather than carve out an exemption, Article 16 continues to regulate the way in which the exemption from taxation operates”. The subordinate clause of this citation (from paragraph 26(g) of the Defendants’ Skeleton Argument) is borne out by the adjectival provisions of Article 16(2)-(8), but in my judgment the alleged fundamental line of differentiation between Article 16 and Article 15 is not made out. In relation to the latter exemptions, apt to accommodate the RSE Exemption, there is EU oversight in a number of respects: see Article 15.1(d), (g), (h) and Article 15.3. Further, the opening words of Article 15.1 and Article 16.1 are not materially dissimilar, and (as I pointed out in argument) it is difficult to comprehend why a partial exemption case should be within the scope of EU law, as it would have to be, whereas a total exemption case should not be.
8. Further, I am not prepared to find that Plantanol was wrongly decided, or that the contrary argument was not advanced.
9. Viewing the matter more widely, it is clear that the RSE Exemption is within the spirit and intendment of both the ETD and the RED, because it promotes the cause of generating energy from renewable sources and lends support to the war against carbon emissions. I accept that regulation in a field of shared competence does not automatically amount to implementing EU legislation, but these background policy considerations lend weight to the argument that Article 15 of the ETD, and if necessary Article 4 of the RED, expound specific, substantive requirements of EU law.
10. Accordingly, although the instant case is not as clear as was the provision of the relevant EU Regulation confronting Lloyd Jones J in R(Zagorski) v Secretary of State for Business, Innovation and Skills [2010] EWHC 3110 (Admin), I conclude that the amendments to paragraph 19 of Schedule 6 of the Finance Act 2000 are within the scope of EU law, and that the Claimants’ case does not fall at the first hurdle.

**The First Ground: Foreseeability**

Introduction

1. It is not in dispute that the EU law principle of legal certainty, and its corollary the protection of the legitimate expectations, requires that the application of rules of law must be foreseeable by those subject to them (see, for example, Plantanol at paragraph 46). Further, it is clear that a breach of the EU law principle of foreseeability would also be a breach of domestic law, on account of the European Communities Act 1972. However, beyond these very general statements of principle, the parties are far apart as to the scope of the doctrine and its application to the facts of the instant case.

The Rival Contentions

1. It is convenient to summarise the parties’ submissions before making any reference to relevant decisions of the CJEU. On this issue, it is more convenient to start with the submissions of Mr Eadie.
2. Mr Eadie submitted that four key principles may be distilled from the case law in relation to the EU law principle of foreseeability. These are:
3. The principle of legitimate expectation requires a precise and unambiguous promise.
4. It also requires, judged objectively, that the change could not have been foreseen. In this particular domain, namely tax law, this is particularly difficult (on one reading of his Skeleton Argument, impossible) to establish.
5. The claimant must have taken specific steps as a result of the expectation engendered by the assurance.
6. Even if there is a legitimate expectation, it can be overridden in the public interest.
7. On the basis of these principles, Mr Eadie submitted that the Claimants cannot point to an express assurance by Government that the RSE Exemption would not be removed without a two year lead time. The legislative framework militates strongly against the possibility of there being relevant assurances made and expectations arising, because it is a basic principle of national law that the UK Parliament does not and cannot bind itself, and once Governments change, as happened in May 2015, anything said by a previous administration becomes legally and functionally irrelevant. The EU framework is precisely to the same effect. Thus, both in fact and in law it is not open to the Claimants to argue that no legislative change was foreseeable. Indeed, the Claimants are constrained to argue (on the facts) either that an assurance was given to the effect that any change would be accompanied by a specific lead time; or, if it was not, its effects would be softened by the provision of a counterbalancing benefit broadly equivalent in value to the lost exemption. However, on the facts it is quite impossible to spell out an assurance along these lines, whether express or implied. Moreover, the evidence demonstrates that the Claimants did foresee the possibility of change – by implication at any time – on the footing that those responsible for the regulatory landscape might take a different view as to the weight to be accorded to different elements comprising the public interest.
8. Mr Eadie made a series of detailed submissions directed to the Claimants’ case, taken at its highest. The broad sweep of those submissions was that it was impossible to infer from Government’s (in particular DECC’s) modelling of the future value of the ROCs and the strike price that the value of the LECs, which as we have seen were factored into these other schemes, would enure to the benefit of the Claimants on a free-standing basis for at least two years beyond their statutory repeal.
9. Finally, Mr Eadie submitted in the alternative that if the Claimants succeeded in persuading me that their legitimate expectations were frustrated by the implementation of the July 2015 amendments to paragraph 19 of Schedule 6 to the Finance Act 2000, I should conclude nonetheless that the Defendants had demonstrated the existence of an overriding public interest which outweighed the Claimants’ private rights.
10. Mr Fordham submitted that the legal test was more flexible and open-textured than that expounded by Mr Eadie. At its heart is the concept of legal stability, which mandates an inquiry by this court into whether a prudent and circumspect economic operator could have foreseen the possibility of a without notice withdrawal of the RSE Exemption in these circumstances. This requires an examination of all the circumstances of the case, in order to ascertain whether the legitimate expectations of the relevant economic operators have been respected.
11. In opening his case to me, Mr Fordham submitted that the giving of a precise assurance, detrimental reliance and the absence of an overriding public interest were not ingredients of the EU doctrine of foreseeability and the honouring of legitimate expectations. In his opening, as well as in his reply, he relied on the following core elements of the factual matrix:
12. The settled practice in this domain, since the Chancellor’s first announcement in 1999, of giving warnings and lead times of at least two years, creating an expectation of a stable and durable statutory scheme, with various exemptions and benefits embedded within a complex, mutually interdependent and inextricably intertwined regime.
13. The irresistible inferences which arose from the deliberate and precise calibrations of the RO bands and the strike prices for the CfDs, namely that the value of the LECs would be preserved for at least two years – the value of the LECs had, after all, served commensurately to reduce the value of the ROCs and the strike prices for the CfDs over a modelled period which expired in 2017. For these purposes Mr Fordham draws no distinction between separate Government departments, and neither do I, because the Crown is indivisible.
14. The fact that there was a two year lead time for the removal of the CHP Exemption.
15. The fact that no economic operator or commentator actually foresaw the events of July 2015, in particular the removal of the RSE Exemption without notice, from which it could safely be inferred that none could have foreseen it.
16. Mr Fordham advanced other detailed submissions on the law and on the facts. I will endeavour to do justice to the former in my review of the relevant jurisprudence of the CJEU (see below). As for the facts, I believe that I have already addressed his best points.
17. In his closing argument I detected a slight shift in emphasis in Mr Fordham’s submissions. On my understanding of them, he was disposed to accept that, even though an express representation or assurance from Government was not required, one needed to be implied from all the circumstances for the Claimants’ case to be made out. My note of Mr Fordham’s argument records that he put the case “that high”. In my judgment, at that stage he was not putting his case particularly high; he was advancing it entirely fairly and realistically, although he was of course recognising the quantum of the burden of persuasion that fell to be discharged.

A Brief Review of the Relevant Jurisprudence of the CJEU

1. The parties took me to a large number of Grand Chamber and individual Chamber decisions emanating from the CJEU, both in the context of references from national courts and decisions made by EU institutions. Counsel had difficulty in picking out a clear and consistent set of principles from these decisions, and so do I. It is unnecessary to refer to all these authorities in this problematic quest for a clear and unambiguous statement of what the EU law doctrine of legitimate expectation mandates.
2. Mr Eadie relied in particular on two Grand Chamber decisions which indicate that the concept of legitimate expectation requires something more specific, precise and concrete than any generalised reference to all the circumstances of the case and the conclusion from those circumstances that manifest unfairness has arisen. In paragraph 81 of its judgment in Masdar (UK) Ltd v Commission of the European Communities [2009] 2 CMLR 1, the CJEU referred to the “settled case law” which establishes that precise assurances by the administration are required to generate any legitimate expectation, and that “a degree of flexibility” was inapposite – in particular, stating that such expectations could not arise merely on account of a course of conduct by a Community institution inducing an entity to act in a certain manner (paragraph 82). In paragraph 41 of its judgment in Bundeswettbewerbsbehorde v Schenker & Co [2013] 5 CMLR 25, the Grand Chamber expressed itself along similar lines.
3. There are broadly similar statements of principle in Van den Burgh v Van Dijk [Case C-265/85, judgment 11th March 1987] (paragraph 45), Di Lenardo and Dilexport v Ministero del Commercio con l’Estero [2004] ECR 1-6911 (paragraphs 70-71), Spain v Council of the EU [2006] ECR 1-07285, and Accorinti v ECB [Case T-79/13, judgment 7th October 2015] (paragraphs 75-76). Mr Fordham rightly points out that the factual context of all these cases differs from the instant case, and that other cases on which he relies come closer to home. Even so, it is worthwhile setting out parts of paragraphs 75 and 76 of the Fourth Chamber’s judgment in one of the most recent cases, Accorinti:

“It is settled case law that the right to cite the principle of protection of legitimate expectations extends to any persons in whom a European Union institution has given rise to entertain reasonable expectations. The right to make use of this principle implies however the satisfaction of three cumulative conditions. First, the administrative bodies of the union must give precise, unconditional and consistent assurances, deriving from authorised and reliable sources. Secondly, those assurances must be such as to create a legitimate expectation on the part of the entity to which they are addressed. Thirdly, the assurances given must comply with the applicable rules …

In addition, it should be noted that, though of course the possibility of enforcing the protection of legitimate expectations, is a fundamental principle of European Union law, exists for any economic operator in whom an institution has given occasion to entertain reasonable expectations, the fact remains that when a prudent and circumspect economic operator is able to predict the taking of a measure likely to affect its interest by the Union it cannot invoke that principle in the event that such a measure is adopted. In addition, economic entities cannot rest their legitimate expectations in the maintenance of an existing situation which could be changed within the discretion of the institution of the Union, especially in the sectors such as monetary policy, whose purpose involves constant adjustment in line with movements in the economic situation.”

1. Not merely do these citations emphasise the necessity of establishing the existence of a precise and specific assurance, they indicate that in any event the economic operator cannot rest on such expectations if in objective terms the measure in question was predictable. This is especially so in a sector such as monetary policy – and, one might add, fiscal policy.
2. Mr Fordham drew my attention to other cases which he submitted were less stringent, at least from his clients’ perspective. I will examine these in their chronological order.
3. In Gemeente Leusden and another v Staatssecretaris van Financien [2004] ECR 1-05337, the Fifth Chamber was considering the withdrawal by the Dutch Government of the right to opt for taxation of lettings of immovable property in a VAT context. The reason for the withdrawal was that the Dutch had become aware that this option was being used for tax avoidance purposes. The CJEU recognised that the Sixth Directive gave Member States wide discretionary powers in the fiscal realm, such that it could not be said that the legislative amendment adopted was unforeseeable (paragraph 66). However, it also recognised the possibility of legitimate expectations arising:

“Although Article 20 of the Sixth Directive does not, as such, breach the above principles, it cannot nonetheless be ruled out that the national legislature has breached them in that, without taking account of a legitimate expectation of taxable persons which had to be protected, it suddenly and unexpectedly withdrew the right to opt for taxation of lettings of immovable property, when the objective to be attained did not require it, without allowing taxable persons bound by leases current at the time of entry into force of the law the time to adjust to the new legislative situation. (paragraph 70)”

My reading of this paragraph is that it is incumbent on the relevant national authority to weigh up any legitimate expectations of taxpayers against the public interest sought to be attained by the enactment or amendment at issue, and that the former would outweigh the latter if that public interest did not demand the legislative change. Insofar as it goes, paragraph 70 of Gemeente is helpful to Mr Fordham’s case. On the particular facts, the taxpayers were unsuccessful, because the Dutch Government took steps to warn them of the proposed amendment (paragraph 81) and, in any event, the public interest in combating tax avoidance defeated any countervailing private interests (paragraph 77).

1. In Plantanol (*loc.cit.*) the Third Chamber of the CJEU was considering the withdrawal of an energy tax exemption scheme intended by the German authorities to transpose the provisions of *inter alia* Article 16 of the ETD. The exemption scheme had an express end-date, and the authorities had stated on two occasions, by way of express legal provisions, that it would be maintained in force until then. The taxpayer had made significant investments on the faith of those assurances.
2. The CJEU held that the principle of legal certainty, and its corollary principle of the protection of legitimate expectations, could not prevent the making of the legislative amendment *per se*, but what it did require was that account be taken of the “particular situations of traders”, in other words any legitimate expectations which they may have enjoyed (paragraph 49).
3. In my view, there is a tension between paragraphs 53 and 57 of the CJEU’s judgment, which provide as follows:

“[53] It is clear from the Court’s settled case law that any economic operator on whose part the national authorities have promoted reasonable expectations may rely on the principle of the protection of legitimate expectations. However, where a prudent and circumspect economic operator could have foreseen that the adoption of a measure is likely to affect his interests, he cannot plead that principle if the measure is adopted. Furthermore, economic operators are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the national authorities in exercise of their discretionary power will be maintained.

[57] However, it is for the national court to determine whether a prudent and circumspect economic operator could have foreseen the possibility of such withdrawal in a context such as that of the main proceedings. As the case concerns a scheme laid down under national legislation, the procedures for dissemination of information normally used by the Member State which adopted it and the circumstances of the case must be taken into account when the national court makes an overall and specific assessment of the question whether the legitimate expectations of the economic operators covered by those rules were duly respected in the specific case.”

1. The tension arises because, whereas paragraph 53 suggests that in this context, namely one where the existing regime is capable of being altered by the national authorities in exercise of their wide discretionary powers (see also paragraph 54), such changes will always be foreseeable, paragraph 57 suggests otherwise – and that it always depends on all the circumstances. As soon as one proceeds to read paragraphs 60-67 of the judgment, it becomes clear that this tension falls to be resolved in favour of paragraph 57 in the sense that amendments to fiscal rules are not inherently foreseeable having regard merely to the nature of broad discretions reposed in the tax authorities. Rather, an examination falls to be made of all relevant circumstances, in particular whether the taxpayer, as a prudent and circumspect operator, “had sufficient information to permit it to expect that the tax exemption scheme at issue in the main proceedings could be withdrawn before the date initially laid down for its expiry” (see paragraph 67).
2. The CJEU in Plantanol did not refer expressly to any need for precise and specific assurances. It did indicate, at least on one interpretation, that the absence of objective foresight of the possibility of legislative change was an additional requirement which the taxpayer had to establish, although its core analysis in paragraph 57, and its later treatment of the matters to be taken into account by the national court in due course, tended to assimilate the concepts, or at least treat legitimate expectations and foreseeability as opposite sides of the same coin. The CJEU did make clear that in evaluating all the circumstances of the case, the national court would need to look carefully at the communications made by the tax authorities. Thus, this was not a freewheeling inquiry into the fairness of their conduct but a more specific exercise focusing on what they said and did.
3. In my judgment, it is clear from Plantanol that, in a situation of broad discretionary powers being exercised in the fiscal realm, and where the taxpayer was not contending that its legitimate expectations were being dishonoured, or where the court reached that conclusion, there could be no legal impediment to the removal of a tax exemption in exercise of discretionary power.
4. Finally, in Berlington Hungary and others v Hungarian State [Case C-98/14, judgment 11th June 2015), the legislation at issue was a five-fold increase in the flat-rate tax to be paid on slot machines operating in amusement arcades. At paragraph 80 of its judgment, the First Chamber of the CJEU expressed itself in terms similar to paragraph 57 of Plantanol, and at paragraph 81 invited the referring court to take into account “all relevant elements which emerge from the terms, objectives or the general scheme of the legislation concerned”. To my mind, the strong drift of paragraphs 83-88 of the CJEU’s judgment is that the legitimate expectations of the slot machine operators were likely to carry the day, given (i) the fact that there had been no legislative changes for nearly twenty years, (ii) transitional periods or reasonable compensation schemes are ordinarily required, (iii) legitimate expectations arose out of the enactment of a separate law which required that expenditure be incurred to introduce online systems, and (iv) a trader who had made costly investments would be considerably affected by the sudden and unforeseeable withdrawal of this scheme. It is debatable whether items (i), (ii) and (iv) would have been sufficient.
5. On my reading of paragraph 92 of the CJEU’s judgment in Berlington, the presence of “overriding reasons in the public interest” did not serve to trump any legitimate expectations which had been generated, but was relevant to the broader question of the restriction on freedom to provide services.

Domestic Jurisprudence

1. Mr Eadie drew my attention to the unreported decision of the Court of Appeal in HMRC v BT Plc [2014] EWCA Civ 433. It does not assist me much, because – as Rimer LJ pointed out – “if … BT had any expectations as to the future of the Old Scheme, it would, as a prudent and circumspect operator, be likely to have foreseen its eventual repeal” (paragraph 120). Thus, the case turned on its own facts, which were weak from the perspective of the taxpayer. Rimer LJ noted that he did not derive much assistance from the European authorities to which the court had been referred.

Findings, Analysis and Conclusions

1. It is not possible to reconcile the various strands of jurisprudence emanating from the CJEU. On the one hand, Mr Eadie is able to point to Grand Chamber decisions which tend to support his narrow approach; on the other hand, Mr Fordham is able to point to individual Chamber decisions which are much closer to the instant case on their facts. The Grand Chamber of the CJEU has referred to “settled case law”, but I cannot share that comfort. The metaphor of the patchwork quilt, deployed by me earlier in a different context, does not seem wholly inapposite.
2. I do not accept that the Defendants must succeed on the narrow basis that legislative change, in particular the withdrawal of the RSE Exemption, was inherently foreseeable in the sense that it was always on the cards. If that were so, the approach of the CJEU in Plantanol and Berlington would have been different, and its reasoning very much briefer. In contrast to the context of Di Lenardo, the instant case is not akin to a sphere of activity such as the common organisation of the markets, “the objective of which involves constant adjustment to reflect changes in economic circumstances” (paragraph 70). It is unnecessary for me to attempt to make general statements about the nature of fiscal changes in the UK. The more limited, and parsimonious point, is that in the present context of green energy regulation, a consideration of the recent history suggests an absence of constant adjustment – and something much closer to measured deliberation.
3. However, these considerations alone cannot bring home the Claimants’ case. In my judgment, the Claimants cannot succeed unless they establish to my satisfaction that the Defendants *promoted* a legitimate expectation of there being no withdrawal of the RSE Exemption without a two year lead time, or equivalent fiscal benefit *in lieu*. I am not holding that this is sufficient for the Claimants’ purposes, but it is undoubtedly necessary – even on the cases most favourable from their perspective, in particular Plantanol. Accordingly, I must address this matter first before going any further. If the Claimants fail at this stage, they fail altogether; and if they succeed, I cannot determine the issue of foreseeability in abstract: I must do so on the premise that the Claimants possess legitimate expectations which have not been respected.
4. The reason why the CJEU requires, at the very least, proof that legitimate expectations have been *promoted* must be clear: the principle is a sub-set of the doctrine of legal certainty; it cannot depend merely on a generalised sense of unfairness; and must logically require that Government has said or done something in particular such as to generate specific expectations in individuals or groups of persons which EU law demands will be honoured. Given that the Claimants’ case is not, and cannot be, that the law cannot be changed, but rather that the law cannot be changed without providing for a two year lead time to reflect anterior expectations which have been generated, it seems to me that a quest for the identification of “something in particular” means, in practice, either that Government has given an express assurance that any withdrawal of the RSE Exemption would be coupled with this specific lead time, or that this may irresistibly be inferred from what Government has said and done such that the giving of an assurance may be implied: in other words, the giving of something tantamount to an express assurance.
5. The Claimants are not saying that the lead time should be one year or three years; they are saying that it must be two years. Advancing the case with that level of precision, as it must be, carries with it the obvious corollary that Government must have been similarly precise.
6. As I have observed, Mr Fordham in his reply did not shrink one iota from submitting that the materials he relied on enable an inference of this specificity to be drawn. I must now decide whether I accept that.
7. The Defendants do not dispute that the banding review for the RO assumed that the income stream from the RSE Exemption would be continuing, and I have found (see paragraphs 43-46 above) that this income was factored into the fixing of the initial strike price (described in Mr Warham’s evidence as “administered” or “reserve” prices) for the CfDs. In both cases, the Defendants’ modelling was undertaken for a four year period expiring in 2017. Further, I find that in both cases the RO bands and the strike prices would have been commensurately higher had the RSE Exemption not been available.
8. Mr Warham informs me that the relevant modelling was undertaken on the assumption that the value of the income stream from the RSE Exemption would remain constant in real terms at £4.70/MWh at 2010 prices, and that the CCL would remain in place for the length of the modelled period. Further:

“At the date of the review, there was no basis to assume that the RSE Exemption would be removed. I should point out, here, that DECC would only be in a position to make an assumption that the RSE Exemption would be removed after a public announcement announcing a policy change had been made. Without that announcement, we would simply lack the evidence on which to base such an assumption. Put another way, to include an assumption that the CCL would not continue would amount to an announcement. It could have a material impact on the price. All models (government and commercial) are based on assumptions that will change over time.”

There are elements of circularity in some of this, albeit less so when Mr Warham puts his point another way.

1. As for the CfDs, Mr Warham draws attention to the fact that Government response to the consultation exercise noted that “actual revenues from LECs are uncertain” and that “there is no clear, strong evidence that these revenues will definitely [be] absent or lower” (see paragraph 57 of his witness statement). At paragraph 58 of his witness statement, Mr Warham develops this theme:

“In the absence of an announced policy change, then, income from LECs would be assumed to be ongoing. The approach taken was, effectively, a binary one. The assumption of a continuing income stream from LECs simply did not take into account the likelihood of government policy changing, in the absence of an announced change, and thus cannot be and should not be relied upon as an affirmation that it was likely the policy would not change.”

1. I have to be wary in placing too much reliance on Mr Warham’s evidence, because he cannot be regarded as a proxy for the hypothetical prudent and circumspect operator, the EU analogue of the reasonable man on the Clapham omnibus or the Paris Metro. However, he offers a helpful insight which it seems to me I should take into account.
2. The critical issue for me is how a prudent and circumspect operator, equipped with all the information, knowledge, experience and understanding reasonably to be attributed to such an individual, should have interpreted these key materials.
3. In my judgment, such an operator could not and should not have drawn the inference from these materials that the RSE Exemption would not be removed without a two year lead time. My reasons are as follows. Although this intrinsically reasonable operator was quite entitled to note that the modelling of the RO and the CfD strike prices until 2017 directly reflected the continued existence of the RSE Exemption at 2010 values until that date, and to deduce that these support schemes would have been calibrated at a commensurately higher level had the RSE Exemption not been available, it could not reasonably be inferred from these bare facts that Government was committing itself to the perpetuation of the RSE Exemption until the end of the modelled period. As Mr Warham points out, and as any prudent and circumspect operator should have understood, the approach taken was effectively a binary one: either the LEC value would be factored into the model, or it would not. Had it been excluded, that not merely would have been bizarre and unhelpful, because Government had no current plans to remove the RSE Exemption, but it would have been misleading.
4. It is true that the modelling documents did not say in terms that no inferences should be drawn from the inclusion of the RSE Exemption in the calculations, or attach some form of caveat or warning, but to say that they should have done would be to reverse the burden of proof, and this was not on my understanding Mr Fordham’s submission. The correct question to ask is as to what inferences should be drawn from what was said, seen in its proper context. Applying the correct test, it seems to me that the prudent and circumspect operator would and should have understood the modelling to have been undertaken, perforce, on the premise of current Government policy, and as it happens then current power prices, with no inferences capable of being drawn one way or another as to the future direction of policy. This was the only honest, straightforward basis on which such modelling could have been undertaken, and that too would and should have been understood.
5. Furthermore, once the Claimants accept that it was always open to remove the exemption, and that the case they must run is that they legitimately expected that such a change would not occur without a two year lead time, it is difficult to understand how this key material avails them. The Claimants cannot say that Government made any express promise as to a lead time, and so they are forced back onto implied promise or irresistible inference. Given that the exemption could always have been removed, the modelling would in my view have to be understood as supplying indicative figures based on current Government policy: *ex hypothesi*, policy could change. I see nothing in this material which gives rise to the inference that such change could only occur with a particular lead time, or the giving of equivalent value *in lieu*. On this approach, the 2017 date is even more firmly fixed as being part of the model, and no more, rather than as creating a timescale for legally effective change. Put another way, the Claimants’ case is weakened, rather than enhanced, by limiting itself to an implementation period rather than the fact of change in the first place.
6. Mr Fordham submitted that this was an integrated package of measures which were, or had become, inextricably intertwined. In my judgment, care needs to be taken as to what the concept of an integrated package means. Taking any snapshot in time, the tax system in any particular domain may properly be seen as possessing a series of mutually interdependent levies and exemptions, against the backdrop of the wider policy considerations which determine from time to time the rate of universal taxes such as (in a corporate sphere) corporation tax and VAT. The emphasis must, however, be on the here and now. The calibrations are designed for the present, and the near future, but are not designed to be enduring. Macro-economic circumstances are apt to change, as well as Government policy. Following a change of Government, integrated package A, deemed to be desirable and appropriate at a particular point in time by a previous administration, can swiftly be turned into integrated package B – maybe just as integrated, but without a particular exemption or tax break.
7. Thus to my mind, Mr Fordham’s submission on these measures forming an integrated package or being inextricably intertwined is overly ambitious and proves too much. The integrated or intertwined nature of these arrangements endures only for so long as Government considers that they are working as they were supposed to. Imagine, for example, that after a period of time it becomes clear that a particular exemption is plainly no longer fit for purpose. Why should not Government have a free hand in removing it? No one is of course suggesting that Government is precluded from adding to the suite of exemptions, should the need arise, but this absence of preclusion has nothing to do with the package being integrated and mutually interdependent.
8. Further, Mr Fordham accepts that his clients should either have been afforded a two year lead time, or equivalent value. However, he was somewhat vague as to the latter. Is it his case that equivalent value should be provided for two years, and then withdrawn? The logic of his case would suggest so, but that would be distinctly odd; and a factor which tells against his main argument. The correct analysis is that a prudent and circumspect operator would appreciate that, if the RSE Exemption were withdrawn for good reason, its value would only be replaced elsewhere if Government considered at that time that it needed to be. The same logic naturally applies to the conferring of any lead time.
9. Mr Eadie advanced a series of submissions to the effect that the prudent and circumspect operator would understand that change in this fiscal sphere is always possible, and may be given immediate effect. In my judgment, these submissions would be nullified if I were satisfied that it was quite clear that the Defendants gave assurances, express or implied, along the lines contended for by the Claimants (although they might be relevant to points arising downstream such as foreseeability and the wider public interest). On the other hand, it seems to me that Mr Eadie’s points are relevant if the Claimants’ case were nowhere near that strong (as indeed it is not) and I am making an overall assessment on all the available evidence of whether an irresistible inference is capable of arising. In other words, in evaluating whether legitimate expectations arise in these circumstances I can factor into my assessment the background considerations which Mr Eadie presses on me.
10. Looking at the matter from a slightly different angle, to what extent is it relevant that Government policy over the past 15 years or so has been stable, settled and deliberate, and sudden and abrupt changes have not been made? In my judgment, this is of some relevance, but not much. A legitimate expectation cannot be spelled out of the conduct and practice of Government over the past 15 years, and I did not understand Mr Fordham to be submitting that it could, at least on a free-standing basis. The highest that the matter can be put in this regard is that previous administrations regarded it as fiscally desirable and good practice to give as much warning as possible, and did so. On the other hand, administrations have the habit of changing, and they would not ordinarily regard themselves as bound by the policies and practices of their predecessors. In fairness to this Government, I should make clear that the witness evidence makes clear that ordinarily it would give as much warning as possible, and would consult. The point remains that the particular circumstances of the present case militated otherwise.
11. I return to the two year point. I have already observed that a close examination of the introduction of levies and exemptions over the last 15 years does not support the contention that Government has consistently operated on the basis of a two year lead time (see paragraph 39 above). Further, it is convenient for Mr Fordham’s purposes that Government withdrew the RSE Exemption in July 2015 against the backdrop of the modelling of RO bands and CfD strike prices carried forward to the end of March 2017. That on my reckoning is not quite two years. More importantly, it would be less convenient for the purposes of Mr Fordham’s submission if this amendment had been made in 2014. These are not pedantic points; the expectation sought to be invoked is specific.
12. Mr Fordham also sought to draw analogies from the removal of the CHP Exemption, which as I have said was announced by the Chancellor in March 2011 and removed in April 2013. The basic arithmetic helps him, as does the fact that an exemption in the same schedule to the Finance Act 2000 was being withdrawn, but the analogy is not complete, nor could it be – the exemptions are not the same. At paragraph 50 of his first witness statement, Mr Heslop identifies three matters of “significant difference” between the CHP Exemption and the RSE Exemption. Other Government witnesses have entered the fray. If the Claimants cannot succeed on their primary line of attack, in my view this subsidiary point cannot come close to availing them. I note in passing that paragraph 4.22 of the Claimants’ Skeleton Argument comes close to reversing the burden of proof on this point (e.g. “there is no basis to suggest that any prudent and circumspect economic operator would have drawn this distinction between what was foreseeable in the CHP generation sector and what was foreseeable for renewable source electricity, so far as the CCL exemptions were concerned”). It is for the Claimants to demonstrate that the analogy is complete, not for the Defendants to show that it is not.
13. Accordingly, I conclude that the Defendants did not promote any legitimate expectation in the Claimants to the effect that the RSE Exemption would not be withdrawn without providing a lead time of two years, or equivalent value.
14. This conclusion is sufficient to dispose of the Claimants’ first ground. Mr Fordham advanced other submissions under the rubric of foreseeability, but these must be to no avail if Government is not constrained by its own prior statements and conduct from altering policy in its overall assessment of the public interest. In other words, in such circumstances, the Defendants’ default position applies, namely that a prudent and circumspect operator must be deemed to expect tax changes at short notice. It is at this stage that, legitimate expectations having been swept away, the Defendants are entitled to rely on the breadth of their discretionary powers and the Claimants’ apprehension of the background risk.
15. I appreciate that the jurisprudence from the CJEU does not paint a consistent picture, but there is clearly a significant seam of authority which holds that the absence of an ability to predict the legislative amendment at issue is an additional requirement for any claimant to meet (i.e. even if its case on legitimate expectation is made out). On any view of the jurisprudence, the absence of any relevant legitimate expectation does not give Mr Fordham a further bite of the cherry.
16. In the circumstances, it has not proven necessary for me to resolve the jurisprudential inconsistencies and tensions within and arising out of the EU case law. Nor is it either necessary or appropriate for me to state in hypothetical terms what my decision would have been at the second stage (viz. what a prudent and circumspect operator could have foreseen – see, for example, the second sentence of paragraph 53 of Plantanol) had I concluded that Mr Fordham was right at the first stage. I content myself with making the observation that interesting questions are capable of arising of whether assurances given by a previous administration or administrations can bind the current administration, with its own democratic mandate, and/or Parliament.
17. I should address, finally, two subsidiary matters. First, Mr Eadie submitted that it was incumbent on the Claimants to prove that they relied on any promises or assurances given by Government. I accept Mr Eadie’s submission on the law, because in my view it needs to be established that the Claimants were induced to act on the basis of what Government promoted. Inherent in the concept of inducement is that of reliance; and, moreover, the authorities relied on by Mr Fordham speak of operators who have made substantial investments. In my judgment, the Claimants would have surmounted this hurdle (had their case been successful at all anterior stages), having regard to their actions, both in 2012 and thereabouts, when the RO bandings and the CfDs were being introduced, and at all material times between then and July 2015. Their business plans reflected the continued revenue stream, the sums of money involved are plainly substantial, and both Messrs Koss and Hardman have clearly explained how their respective companies relied on maintenance of the *status quo* in their short-term commercial decisions (see, in particular, their seventh witness statements, and their confidential schedules). I should make clear that this finding does not presuppose that relevant assurances or implied promises were made; only that the Claimants believed that the RSE Exemption would not be withdrawn at the time it was and without notice.
18. Secondly, an issue arises between the parties of whether, even if a legitimate expectation may be invoked, it must nonetheless yield to an overriding public interest. Here, as elsewhere, the authorities do not speak in a consistent voice, but in my judgment the better view is that there must be circumstances in which the private rights, including the legitimate expectations, of economic operators should succumb to the wider public good, provided that this is strictly required by the objectives sought to be attained (see, for example, paragraph 70 of Geemente, and c.f. my interpretation of paragraph 92 of Berlington).
19. However, in my judgment the burden of justification must be high, given that those seeking to do the justifying, as it were, are responsible for generating the relevant expectations in the first place. It is not a case of performing a general proportionality exercise and concluding that the public interest outweighs the private rights of economic operators. Rather, the issue is whether Government has demonstrated that the legislative amendment is *required* with immediate effect, notwithstanding that entrenched private interests will be harmed.
20. This is not the exercise carried out by the Defendants. Paragraphs 70 and 71 of Mr Heslop’s first statement make clear that the impact on renewable generators was assessed, and not considered to be other than manageable to the sector overall, but this was not on the premise that the Claimants and others like them enjoyed any legitimate expectations; the Defendants have consistently denied that they did – subject to the document I referred to under paragraph 52 above.
21. I will be setting out my conclusions on proportionality under the banner of the second ground. In my judgment, there is a substantial difference between (i) performing a proportionality exercise on the premise that operators do not enjoy relevant legitimate expectations, and (ii) seeking to justify a decision on the basis that it is required in the public interest notwithstanding that relevant legitimate expectations will be infringed.
22. Had my conclusion on this issue been critical to the outcome, I would have lengthened my judgment still further by setting out detailed reasons for my conclusion. However, it is not critical to the outcome, and it suffices for present purposes for me to hold that I am not persuaded that the Defendants have justified the July 2015 decision on the premise, contrary to my actual finding, that the Claimants had relevant legitimate expectations in play.

**The Second Ground: Proportionality**

The Legal Test

1. For the purposes of the Claimants’ second ground, the concept of proportionality is that enshrined in Article 5(4) of the Treaty on European Union and Article 52(1) of the EU Charter of Fundamental Rights. Mr Fordham submits that this is a context involving interference with property rights, these being protected rights and interests in EU law under Article 17 of the EU Charter.
2. My analysis of this second ground must proceed on the premise that my rejection of the Claimants’ first ground was correct in law. Of course, if it was incorrect, then Mr Fordham does not have to succeed on this second ground to achieve his clients’ practical objectives. Further, on that footing his case on proportionality would be much stronger than it is.
3. It is common ground between the parties that the relevant principles are those expressed and explained by the Supreme Court in R (Lumsdon) v Legal Services Board [2015] 3 WLR 121. In principle, it is for the national court to reach its own conclusion. As Lords Reed and Toulson explained at paragraph 33 of their joint judgment:

“Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method. There is some debate as to whether there is a third question, sometimes referred to as proportionality *stricto sensu*: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits this question from its formulation of the proportionality principle.”

1. In oral argument, Mr Eadie reminded me that the second question requires this degree of refinement: the issue is not to be considered in abstract, but rather in the context of whether any less onerous or intrusive method equally well achieves the stated objectives.
2. As is usual in these cases, there was some discussion in the parties’ Skeleton Arguments as to the intensity of judicial review. The Supreme Court has made clear that the considerations in play are multifactorial, and that as a general rule macro-economic and fiscal questions fall at the less rigorous end of the spectrum, with decision-makers being accorded a generous margin of appreciation. Ultimately, however, there was very little if anything between the parties on this issue, with Mr Eadie accepting that whether or not a “manifestly disproportionate” test was applied should not affect the outcome of the claim, and Mr Fordham for his part accepting that the Defendants are entitled to a reasonably broad margin. Of course, we are talking about a spectrum, not about discrete locations on a map, and there may be room for argument about how wide the margin should be in a case which involves both macro-economic/fiscal questions and rights protected under Article 17 of the EU Charter. Given, however, that the result of this case will not turn on any exact formulation of the test, I am not required to be any more precise about it.

The Claimants’ Case

1. Mr Fordham launched a full frontal attack on the Defendants’ decision, deploying two separately directed cannons.
2. First, Mr Fordham submitted that an examination of the Defendants’ internal contemporaneous documentation reveals that (i) no sound reason is given for the sudden and abrupt withdrawal of the RSE Exemption, and (ii) the Defendants have perpetrated numerous errors and misunderstandings, thereby undermining the decision-making process and the proportionality balance which has been struck. For example, in the slides produced as late as 15th June 2015, one sees the following:

“The latest market intelligence from DECC’s commercial team is that the exemption is worth about £2/MWh to UK renewable generators. This means they receive just 24% of the total benefit of the exemption. This is expected to reach 0% by 2020, as the supply of renewable electricity outstrips demand.

…

The exemption is undermining the policy intention of the CCL tax more widely, by encouraging the inefficient use of renewable energy.”

The 24% figure was subsequently corrected, but the whole case based on inefficiency seems to depend upon it. The fact that the value of LECs will have dwindled to zero by 2020 is not a reason for failing to give a lead time ending in 2017.

1. The next slide clearly makes the point that a lot of money is at stake, and that “this was the fastest growing exemption over the course of the last Parliament”. This, submits Mr Fordham, tends to prove too much. The speed at which the exemption was growing tells us nothing about its effectiveness and overall value for money, and this emphasis on the headline figures throws light on HMT’s main objective, which was to save money regardless of the “green” benefits to be accrued.
2. Further, the Defendants have made clear their view that indirect RSE Exemption support is less efficient and cost-effective than direct support, the latter already involving significant incentives. Mr Fordham submitted that this point is “thoroughly unconvincing in the absence of any counterbalancing change to the direct support mechanisms, such as would focus on more efficient and cost-effective means of direct support, reversing the deflation of direct support levels which had been set under the RO and CfD schemes” (see paragraph 5.14 of his Skeleton Argument).
3. Mr Fordham’s Skeleton Argument made other detailed points which I also bear in mind. In the main, they were directed to the contention that the Defendants have conspicuously failed to justify the immediate withdrawal of this exemption.
4. Secondly, Mr Fordham submitted that a key driver for the withdrawal of the RSE Exemption was the fact that in 2014 33% of it went to overseas generators, which by definition could not contribute towards the UK’s renewables or decarbonisation targets. Mr Fordham did not deny that this was a valid concern, but his answer to it was that the Defendants could remove foreign generators from the scope of the exemption without the Commission objecting on the basis that this was State aid. Thus, there was clearly a less onerous means of achieving the Defendants’ stated objectives.
5. The State aid point is capable of much elaboration, but it is also capable of being put quite simply. On three occasions the UK notified relevant tax exemptions to the Commission on the ground that they might entail impermissible State aid – in 2001, when the CCL was introduced; in 2003, when it was extended; and in 2009, when the RO banding regime was under contemplation. On each occasion the Commission considered that the relevant exemption, or the changes to it, did not constitute State aid within the meaning of Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement, largely because the favouring of “green” over “brown” electricity was justified by the nature and scheme of the tax system, including germane European Directives.
6. The Claimants submit that these are unsurprising conclusions, and would be arrived at by the Commission today because the policy objectives remain constant and, as the Grand Chamber of the CJEU observed in Alands Vindkraft AB v Energimyndigheten [Case C-573/12], Article 3(3) of the RED:

“… must be interpreted as allowing a Member State to establish a support scheme … which provides for the award of tradable certificates to producers of green energy solely in respect of green electricity produced in the territory of that State.”

Analysis and Conclusions

1. My point of departure on this issue is explicitly to recognise two matters. First, I agree that the Defendants’ internal briefing notes and Ministerial submissions do not represent the sum total of their thinking on this issue. The witness statements of Ms Stinton, Mr Warham and Mr Heslop examine the matter in far more detail, and I must accept, and the contrary was not argued, that the analysis and reasoning one sees there is not *ex post facto* but existed at the time the relevant decision was made. Secondly, some of Mr Fordham’s submissions on this issue presupposed that he was right on the first ground (see, for example, his point about “reversing the deflation of direct support levels” – paragraph 136 above). I would agree with him that his clients’ private rights are relevant considerations even if they do not amount to legitimate expectations, but the weight they carry must be weaker. As I have already remarked, the Defendants have proceeded throughout on the basis that the Claimants did not enjoy any relevant legitimate expectations. They are correct about that, and the weight to be accorded to the Claimants’ private commercial and economic interests falls, in the main, within the relevant margin of appreciation.
2. Initially, I was concerned that the instant case exhibited all the hallmarks of rapid and rushed decision-making in a complex area. HMT’s slides are somewhat thin in the analysis they provide, and contain a number of mistakes. I do not know exactly when the decision was made to abolish the RSE Exemption in the 2015 Summer Budget, with immediate as opposed to prospective effect, rather than wait until 2016. If, in late May 2015, officials were clearly of the view that the withdrawal of the exemption could await the March 2016 budget, it might be asked, what changed to bring this forward? Sceptics might have the sense of HMT rushing to a decision in July 2015 because this would demonstrate Government’s renewed, vigorous commitment to reducing the deficit in a context where the headline amounts were large over the life of this Parliament, and the decision could be portrayed as staunchly upholding domestic interests.
3. However, initial reactions often prove to be overly hasty, and I have come round to the view that there is no evidential basis on which to conclude that this was a poorly conceived, rushed decision made largely on political grounds and without proper reference to the merits. I cannot second-guess the institutional competence of HMT, or its timescales for making measured decisions. Although Mr Heslop does not expressly say so, I am prepared to infer that he, his team, and his colleagues in related departments were working extremely hard in the pre-Budget period to bring home reforms which they believed to be firmly in the public interest.
4. The Defendants’ reasons for withdrawing the RSE Exemption with immediate effect (without prejudice to allowing holders of LECs referable to electricity generated before 1st August 2015 to claim their value before March 2018) are helpfully summarised in their Skeleton Argument. Aside from the need to tackle and eliminate the deficit, the key points are these (with my editorial additions and subtractions):
5. Government has been moving away from a system of indirect to direct support, which is more efficient and cost-effective.
6. The reversal of the deflation in direct support levels, once the rhetoric is removed, is not required – unless the Claimants’ argument on legitimate expectations is correct. If the RSE Exemption did not represent good value for money, logic would not (and did not) require its *pro tanto* substitution elsewhere.
7. In any event, removal of the RSE Exemption leaves domestic generators in a position in which they are still in receipt of very significant incentives and supports, far outweighing its lost value. In 2015/16 alone, these schemes are worth approximately £5.1B to renewable energy generators, whereas the RSE Exemption would have been worth in the region of £200M to UK generators in the same fiscal year.
8. The RSE Exemption benefits foreign generators – in 2015/16, to an estimated extent of 36% of the overall value. This was clearly a factor in the Defendants’ decision, but Mr Eadie submitted that the same decision would have been made without it.
9. Expanding the application of the CCL maintains the price signal for energy efficiency, encouraging the efficient use of energy from both renewable and non-renewable sources.
10. The impact on the Claimants, and others, was specifically considered, both before and after 8th July, but it was decided that it was outweighed by the public interest and the maintenance of the other valuable benefits to which the Claimants remained entitled.
11. Specific consideration was given to the issue of transitional relief, and/or a lead time, but the lost savings to the Exchequer were too large, the policy objectives for the withdrawal were too pressing and would have been undermined by delay, and there would have been a risk of forestalling.
12. Mr Eadie’s answer to the State aid issue was essentially two-fold. His first riposte was that I should refrain from reaching a concluded view on the issue, because it was and is one for the European Commission and not the domestic court. Secondly, he drew attention to paragraphs 74-85 of Ms Stinton’s first witness statement, which in my view advance a somewhat convoluted, recondite, series of reasons justifying the proposition that the landscape has changed over the years, and the Commission would probably take a different view in relation to the withdrawal of the RSE Exemption compared with what had occurred on the previous three occasions. In particular:

“If one applied to the proposal the same analysis which the commission applied to the RSE exemption, my colleagues and I are of the view that it is likely that the Commission would find that the proposal was a State aid and was not permitted by Article 107(3) TFEU. In particular, the impact of RSE on long-cycle CO2 emissions is the same regardless of where the electricity is generated. It would not be straightforward to argue that it was in the logic and general scheme of CCL to tax RSE differently depending on place of origin, as the proposal suggests. Such a difference in approach based on the nationality or location of the generator would require a powerful justification. For reasons set out in this statement and elsewhere in the Defendants’ evidence, my colleagues and I were of the view that the RSE exemption would not be regarded as a sufficiently efficient means of support for RSE generation to justify its continuance.”

At the very least, contends Ms Stinton, the lengthy State aid notification procedure would have resulted in unacceptable delay, such as to undermine the strong policy reasons for effectuating this reform with close to immediate effect.

1. The key question for me is whether, putting the State aid point to one side for one moment, the Defendants have discharged the onus placed on them to justify this reform in the light of the harm to the Claimants’ property rights and financial interests over the short to medium term. Although the Claimants have failed to persuade me of the correctness of their first ground, I still need to assess proportionality in the light of some sort of notional lead time, because the Claimants’ accept that they cannot seek to impugn the amendment *tout court*.
2. The parties have spilt much metaphorical ink over the minutiae, but in my judgment the strength of the Claimants’ case on proportionality cannot turn on these; regard must be had to the bigger picture. In any event, Government witnesses have, in my view, been able to meet the case on the fine detail, and no useful purpose would be served, for example, by examining any possible differences between the concepts of “forestalling” and “stockpiling”.
3. I asked Mr Eadie to explain to me why this reform was so pressing that it required immediate action, rather than the sort of lead time typically seen in this sphere. His answer was along the lines that many of the reasons for effectuating the reform in the first place carried through into the reasons for effectuating it with close to practical immediacy: in particular, the burden on the Exchequer, even in the short-term, was such that an inefficient, outmoded exemption, of admitted value to LEC holders, could not survive.
4. I have reflected carefully on this answer, and the high-level reasons for the reform as advanced in the Defendants’ and DECC’s witness statements. I remind myself that I am the decision-maker; I am not carrying out a form of soft-touch Wednesbury review. However, I must also remind myself of my lack of qualifications in this area, and of the margin of appreciation which this EU doctrine affords. Had the only material before the court been the Defendants’ internal documents, and briefing notes, I would have been troubled. In particular, the Defendants appear to have placed too much weight on the inefficiency of the exemption to the extent that fiscal benefits were diffused across the supply chain. Yet, without abandoning this factor the Defendants have been able to go much further, and ultimately in my judgment have advanced a reasonably compelling case that this reform is justified in the public interest, notwithstanding its evident harm to the private interests of the Claimants. Within the appropriate margin, this reasonably compelling case is sufficient for the Defendants’ purposes.
5. Mr Eadie urged that I should infer that the Defendants would have made the same decision even had no issue of State aid arisen: in other words, it was his submission that the conclusion I have just reached ought to be sufficient to dispose of this second ground. However, the Defendants’ evidence does not go that far, and in my view neither should I. This is not an irresistible inference which I may draw, particularly in the light of the prominence given to the point in the Chancellor’s announcement and in the Budget report. However, I do accept Ms Stinton’s contention that the Commission’s stance on this particular proposal could not be regarded as a metaphorical “done deal”, that serious issues arose, and that unacceptable delay would have been occasioned. Further, I decline Mr Fordham’s implied invitation to me to hold that there could be only one answer to any State aid objection. The Defendants' witnesses have advanced a reasonably compelling case that the European Commission would view the State aid point with disfavour, notwithstanding its previous robust decisions. Overall, the issue for me is whether any exaggeration by the Defendants of the State aid risk could render the decision disproportionate. Overall, I am unable to conclude that the Defendants have exaggerated the risk and acted disproportionately in that regard.
6. For all these reasons, this was a proportionate decision, and I cannot uphold the Claimants’ second ground.

**The Third Ground: A1P1**

1. The Claimants’ third ground adds little to the second ground, and in the circumstances of this case fails for very similar reasons.
2. However, given the importance of this case, it is necessary to cover a trio of points.
3. First, as Lord Mance explained in In re Medical Costs for Asbestos Diseases (Wales) Bill [2015] AC 1016, there are four stages to the ECHR proportionality analysis, not two. However, in the circumstances of the present case, the breadth of the margin of appreciation is similar. As Lord Mance observed at paragraph 54:

“… domestic courts cannot act as primary decision-makers and the principles of institutional competence and respect indicate that they must attach appropriate weight to informed legislative choices at each stage of the Convention analysis.”

1. Secondly, it is necessary to be clear about the A1P1 rights at issue. These include concluded contracts, as well as the marketable goodwill of the Claimants’ businesses linked to such contracts. However, in principle they exclude the hope of future contractual income. Mr Fordham sought to bring such income within the fold on the basis that his clients’ enjoyed relevant legitimate expectations in relation to it, but his failure on the first ground gives the quietus to that attempt.
2. Thirdly, Mr Eadie submitted that the existence of change of law clauses in the Claimants’ contract meant that they could not demonstrate an interference with their contractual rights for A1P1 purposes. I cannot accept that submission. The Claimants’ ability to invoke the change of law clause to adjust the contracts with their clients in relation to the lost value of the LECs does not mean that these contracts have not lost value.
3. These three points having been made, it seems to me that my conclusion on the Claimants’ second ground must apply equally to this, the Claimants’ third ground.

**Disposal**

1. I pay tribute to the clarity and excellence of the parties' written and oral submissions. These have enabled a case which with different legal teams might have required three days to be concluded in two.
2. I have granted permission on all three grounds, but the Claimants’ application for judicial review must be dismissed.