Case No: FS-2018-0000014

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**
**FINANCIAL SERVICES AND REGULATORY LIST**

The Rolls Building
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Fetter Lane
London EC4A 1NL

**[2018] EWHC 2748 (Ch)**

Friday, 5 October 2018

BEFORE:

**MR JUSTICE ZACAROLI**

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BETWEEN:

**GAS AND ELECTRICITY MARKETS AUTHORITY**

Claimant

- and -

**NPOWER DIRECT LIMITED & OTHERS**

Defendants

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**MS J SIMOR QC** (instructed by GEMA) appeared on behalf of the Claimant

**MR D SINCLAIR** (instructed by Eversheds LLP) appeared on behalf of the Defendants

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**JUDGMENT**

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(Official Shorthand Writers to the Court)

1. MR JUSTICE ZACAROLI: This is an application by the Gas and Electricity Markets Authority ("GEMA") for an injunction to enforce compliance with a Provisional Order made by it under section 25 of the Electricity Act 1989 [and the equivalent materially similar provision of the Gas Act 1986]. I will refer only to the provisions of the Electricity Act, but the same conclusions apply equally to the Gas Act. The application was brought on urgently in the applications court yesterday morning.

2. The Provisional Order was made as a result of a decision by GEMA that Npower had breached the terms of a condition of its licence (Licence Condition 32A), imposed on it by a Direction dated 31 August 2018. The Direction relates to concerns of the Competition Markets Authority that lack of engagement with customers leads to significant financial detriment, estimated at £1.4 billion, and is an obstacle to fair competition. After extensive consultation into the issue, the Competition Markets Authority proposed that Ofgem introduce a Licence modification, providing it with power to direct licence holders to undertake testing and trialling. In January 2017, Ofgem introduced Licence Condition 32A, which imposes on suppliers the obligation to comply with a direction from Ofgem to undertake a trial to test consumer engagement measures. This was to be for a limited period, until 31 December 2022.

3. By 32A.7, a supplier is not obliged to comply until selection criteria are published. Those were published on 30 January 2017. Essentially those criteria relate to whether the supplier has enough customers and whether the burden is proportionate for that particular supplier. Between February and April 2018, pursuant to a direction given to Scottish Power, a trial was run in relation to 50,000 of its customers. The result was that a significant proportion of customers switched to other suppliers. Ofgem wished to undertake a further trial to see whether that was a one-off or whether it could be replicated, and replicated in a scaled-up trial involving a total of up to 200,000 customers.

4. On 12 July 2018 the current trial was proposed. Npower was informed that suppliers would be selected on the following basis. Two suppliers would be chosen from those with more than 500,000 customers on a standard variable tariff. Each would identify 100,000 eligible customers. The trial would commence in September 2018, with initial communication letters then being sent. The trial would be completed in December 2018. Npower made representations to Ofgem, including in an email dated 18 July, that it should not be chosen, including because it had volunteered for an earlier trial and was to be involved in an exercise with Ofgem relating to something called the "disengaged customer database" which had been delayed to the back end of the year. Nevertheless, it was chosen and was formally told of this on 1 August 2018, when it was sent a draft Direction. The Direction followed the terms previously indicated: 100,000 customers with the trial commencing in early September and, importantly, initial communication with customers by 20 September (or such later date as might subsequently be indicated by the Authority).

5. I note that on 31 July there was a communication between Npower and Moorhouse Consulting, which I understand to have been acting on behalf of GEMA, where Moorhouse Consulting explained that all "big six" suppliers had been involved with earlier trials and that the earlier trial that involved Npower was the smallest, involving a population of only 1,200. Npower responded saying that they now better understood

the size of other trials and thus the selection of Npower looked fair when looking just at trials and that it was unlikely that the trials and database work would clash, "…hence, we will get on with the trial."

6. On 10 August Npower emailed Ofgem with concerns about the trial, in particular focussing on the numbers involved. It considered that 100,000 customers should be viewed as more than a trial and expressed concern that it would suffer a significant financial detriment. It suggested a trial of 10,000 to 30,000 customers. That number would, of course, have not satisfied the scaling-up objective of the trials. They concluded the email, "We will of course comply with the SLC 32A," but asked to discuss as a matter of urgency the number of customers. On 20 August Ofgem provided a further and more comprehensive response as to why 100,000 was the necessary number and not something smaller. It said:

> "To take this option to the next level, we need to understand whether such a service is scalable. To do this we need to understand two things: (1) can call centres deal with the increase in the volume of the customers they will need to interact with; (2) what is the market appetite for bidders on the collective switch auction at larger volumes. Taking that all into consideration, we came to the conclusion that we need to ramp up the numbers to circa 200,000 customers. To limit the impact on the chosen supplier, we took the decision to split that between the two suppliers."

7. On 31 August 2018 Npower sent a long email to Ofgem to put their concerns in writing in relation to the trial. These included concerns over proportionality and that the trial fell outside the legitimate aims in SLC 32A. But, on the same date, the actual Direction (intimated in draft at the beginning of the month) was served on Npower. The dates for steps in early September had not changed. In particular, the obligation to send initial letters to customers was to be undertaken on 20 September. Npower commenced complying with the Direction but continued to object.

8. On 7 September Ofgem provided a fuller response to the concerns expressed by Npower on 31 August. On 14 September there was a meeting at which Npower indicated it was not comfortable with 100,000 customers, that half that number would be acceptable and they were not willing to proceed with the larger number.

9. On 18 September GEMA provided a further and fuller explanation of the proportionality of the decision to conduct the trial with 100,000 customers. In essence, this repeated the point that this was necessitated by the objective of testing whether the Scottish Power results could be upscaled. On 19 September Npower informed Ofgem that while it was, without accepting that Ofgem's direction was itself lawful, prepared to run a trial with 50,000 customers, it would not run a trial with 100,000 customers. It set out reasons, having taking counsel's advice, as to why the decision to give the direction was unlawful. These included that the direction could not be ordered under SLC 32A, that Ofgem had not followed its own guidance, that Ofgem had not considered proportionality at all, in breach of public law, and that Article 1 of the first protocol to the Human Rights Act was engaged.

10. Accordingly, although Npower had complied with the preliminary steps required by the Direction, they refused to comply with the obligation to send initial letters to customers on 20 September. In light of that failure, Ofgem exercised its power under section 25 of the Electricity Act and issued a provisional order requiring compliance with the obligation to send the initial customer letters by the extended deadline of 26 September. Npower failed to do that so, on the following day, Ofgem issued this application for an injunction.

11. On 2 October Npower issued a claim form seeking relief under section 27(1) of the Act to quash the Provisional Order. It is important to note that at no point did Npower seek to challenge the Direction or selection criteria as unlawful. It could have done so (in relation to selection criteria) in July 2018 and (in relation to the Direction) immediately upon the Direction being made on 31 August 2018. It would have had to do so by way of an application for judicial review. It could have applied for interim relief, as necessary, in those proceedings pending a final determination.

12. I turn to the legal basis for the injunction. By section 25(1) of the Electricity Act 1989:

> "Subject to subsections (2), (5) [and other irrelevant subsections] and section 26 below, where the authority [i.e. GEMA] is satisfied that a regulated person is contravening, or is likely to contravene, any relevant condition or requirement, it shall by a final order make such provision as is requisite for the purpose of securing compliance with that condition or requirement."

Thus, one option is to make a final order. In that event, however, there are procedural hoops to be gone through, including giving the supplier 21 days to make representations or objections, which must then be taken into account by Ofgem before making the final order.

13. Section 25(2) provides alternatively for a provisional order. It reads:

> "Subject to subsections (4A) to (5A) below, where it appears to the authority -
>
> (a) that a regulated person is contravening, or is likely to contravene, any relevant condition or requirement; and
>
> (b) that it is requisite that a provisional order be made,
>
> it shall (instead of taking steps towards the making of a final order) by a provisional order make such provision as appears to it requisite for the purpose of securing compliance with that condition or requirement."

I note that both subsections (1) and (2) are mandatory: the authority "shall" make the orders in the relevant circumstances. That is reinforced by subsection (5A), which

provides for circumstances (irrelevant for today's purposes) when the authority shall not be *required* to make a final or provisional order.

14. Section 25(3) provides guidance as to what the authority should in particular have regard to in deciding whether a provisional order is requisite. Subparagraph (a) reads:

> "... to the extent to which any person is likely to sustain loss or damage in consequence of anything which, in contravention of the relevant condition or requirement, is likely to be done, or omitted to be done, before a final order may be made ..."

Then subparagraph (b) reads:

> "... to the fact that the effect of the provisions of this section and section 27 below is to exclude the availability of any remedy (apart from under those provisions or for negligence) in respect of any contravention of a relevant condition or requirement."

Subsection (a), therefore, directs attention to the need to impose an order immediately rather than waiting, in order to prevent damage to third persons through contravention in the meantime. That is not itself an issue here. Subparagraph (b) directs attention to the fact that the only remedy for ensuring compliance with the direction is through the process in section 27, which, so far as Ofgem is concerned, is limited to enforcement by an injunction which is dependent upon there being a provisional or final order in the first place.

15. Turning to section 27 itself, subsection (1) reads:

> "If the regulated person to whom a final or provisional order relates is aggrieved by the order and desires to question its validity on the ground -
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> (a) that its making or confirmation was not within the powers of section 25 above; or
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> (b) that any of the requirements of section 26 above have not been complied with in relation to it,
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> he may, within 42 days from the date of service on him of a copy of the order, make an application to the court under this section."

By subsection (2), on such an application the court may, if satisfied of various matters, quash the order or any provision of the order. By subsection (3) it is clarified that:

> "Except as provided by this section, the validity of a final or provisional order shall not be questioned by any legal proceedings whatever."

By subsection (7):

> "Without prejudice to any right which any person may have by virtue of subsection (5) above to bring civil proceedings in respect of any contravention or apprehended contravention of a final or provisional order, compliance with any such order shall be enforceable by civil proceedings by the authority for an injunction or for interdict or for any other appropriate relief."

16. It is common ground before me that, but for the application issued under section 27(1), there would be no grounds to resist the injunction sought in this case. In particular, none of the factors that are taken into account in considering an application for an injunction under the equitable jurisdiction of the court arise in the case of a statutory right to an injunction. This is best explained by Lord Hoffmann in *Bristol City Council v Lovell* [1998] 1 WLR 446, at pp.453E-454A:

> "The question is therefore whether the judge had a discretion. It is however very important to be clear as to what kind of discretion we are talking about. The fact that the statutory remedy is an injunction naturally brings to mind the fact that an injunction is traditionally said to be a discretionary remedy. This is true not only of interlocutory injunctions, where the discretionary nature of the remedy is obvious, but also of final injunctions. An injunction granted under section 138(3) is a final mandatory order. So that suggests that we are concerned with the discretion to grant or refuse a final injunction. In my view, however, that kind of discretion has nothing to do with the case. The reason why an injunction is a discretionary remedy is because it formed part of the remedial jurisdiction of the Court of Chancery. If the Chancellor considered that the remedies available at law, such as damages, were inadequate, he could grant an injunction to give the plaintiff more effective relief. If he did not think that it was just or expedient to do so, he could leave the plaintiff to his rights at common law. The discretion is therefore as to the remedy which the court will provide for the invasion of the plaintiff's rights. It is hard to see how such a discretion can have any application to the enforcement of the right to buy. There is no question of leaving the tenant to his remedy at common law. Unlike the equivalent Scottish statute (see section 66(2) of the Housing (Scotland) Act 1987 and *Cooper's Executors v. Edinburgh District Council*, 1991 S.C.(H.L.) 5 ) the Act of 1985 does not bring into existence a deemed contract. It misses out the contractual stage of normal conveyancing and creates a statutory right to a conveyance. The only remedy provided for the enforcement of this right is an injunction. It is not necessary to decide the point, but I rather doubt whether there is a right to damages at all. The purpose of the statute is to enable tenants to buy their dwelling houses, not to allow landlords to retain the houses on paying the tenants a sum of money. While, therefore, I would not wish to exclude the possibility that there may be a case in which it would be proper to refuse an injunction, I cannot think of an

example. So in my view the fact that an injunction is traditionally a discretionary equitable remedy is a red herring."

See also *Dance v Welwyn Hatfield District Council* [1990] 1 WLR 1097, at pp.1105-1106 and *Taylor v Newham London Borough Council* [1993] 2 All ER 649, at p. 655E-G.

17. I accordingly accept the submission of Ms Simor QC on behalf of GEMA that, the statutory criteria in section 25(2) and (3) having been established, there is no defence to the application for an injunction. But the matter does not end there because *Lovell* also makes it clear that, even though there may be no defence to the application for an injunction, the court is entitled, indeed required, to manage its own proceedings in a way that achieves justice. The matter is again expressed clearly by Lord Hoffmann at 454B-E:

> "The discretion with which we are concerned in this case is of an altogether different nature. It has nothing to do with the fact that the remedy claimed by Mr. Lovell happens to be an injunction. It is the administrative discretion of the court to regulate its business and to decide when and in what order it will hear the cases which come before it. In the present case, District Judge Bolton exercised his discretion to refuse to hear Mr. Lovell's interlocutory application in advance of the trial. The same question would have arisen if Mr. Lovell and the council had commenced separate proceedings and Mr. Lovell's application had come on first. Would the court have had a discretion to adjourn his application until it had heard the council's claim for possession? The court has an inherent jurisdiction to regulate its business, but the power of the county court to adjourn proceedings is codified in Ord. 13, r. 3(1) of the County Court Rules :
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> > 'The court may at any time and from time to time, upon application or of its own motion, by order adjourn or advance the date of the hearing of any proceedings.'
>
> This would appear to confer a broad discretion which can be exercised in order, among other things, to ensure that related cases are heard in the order which justice and convenience requires. Obviously the discretion must be exercised judicially and not for the purpose of defeating the policy of the statute or the rights which it confers upon the tenant."

18. Ms Simor contends that because the court in *Lovell* was concerned with two sets of proceedings within a single court, Lord Hoffmann's reasoning is distinguishable. She also points out the question there (and in the other cases referred to by Lord Hoffmann) was different because it involved two competing applications: one for possession against the tenant; the other an application for an injunction pursuant to a statutory provision relating to the tenant's right to buy. I do not think either point is sufficient to distinguish the broad principle set out by Lord Hoffmann. The mere fact that the section 27(1) proceedings are in the Administrative Court whilst this injunction application is in the Chancery Division, although creating logistical complications,

cannot oust the inherent jurisdiction to deal with applications in a way that is just and convenient whether by staying the proceedings in one court while they continued in another or transferring proceedings as between courts.

19. Further, while the factual circumstances are different, it seems to me that the principle set out applies with even greater force where an application for an injunction to enforce an order made pursuant to a statutory provision is faced with a counter-application to quash the order on which the injunction is founded. Accordingly, I accept Mr Sinclair's submission on behalf of Npower that the court must go on to address the question whether it is appropriate to reach a decision on the injunction application now or whether it should be adjourned to be dealt with after, or at the same time as, the section 27 claim. That involves essentially an exercise of discretion in a case management context, balancing the interests of the claimant and the defendant, similar to, though not identical with, the balancing exercise undertaken on an application for an injunction under the equitable jurisdiction. I need do so against the following background.

20. First, if Npower is required to comply with the Provisional Order then it is a practical certainty that it will suffer some loss, and potentially a significant loss. If the number of customers that choose to switch to an alternative supplier follows the trend in the Scottish Power trial then this is likely to be in the region of £30 million. As against that, however, there are two points. First, the fact that some damage will be suffered by any participant in the trial was a necessary consequence of the trials from the outset. Whoever is to participate will suffer that loss. Second, Npower's principal objection has been to the number of customers in the trial, evidenced by its acceptance, albeit without giving up wider objections, of a trial with 50,000 customers. In a trial with 50,000 customers it would still have suffered (on its estimation) significant, albeit smaller, losses.

21. The second material background point is that it is Ofgem's case that if no injunction is ordered so that the initial letters to customers do not go out, by the latest, Monday of next week then the trial is rendered worthless and will not be continued. In other words, there is no option available to me of putting off this question to come on with the section 27 application because that will itself represent defeat on this application for Ofgem.

22. Nor is it possible to take a third option, that being to require Npower to comply with the Direction in the short term pending an urgent determination of the section 27(1) application within a matter of days. That is because Npower would be exposed, I am told, to the risk of significant loss the moment it takes the next step in the process, that is, sending the initial letters to customers, all of which will be sent immediately.

23. Accordingly, I have to decide the issue one way or the other now. That necessarily means that the time for reflection on the submissions made is more limited than would otherwise be desirable.

24. Against those background points, I take into account the following factors. First, as to the merits of the section 27 application, Ms Simor accepted that if I were to conclude

that a decision to make the Provisional Order was itself unlawful on public law grounds (for example, if it could be demonstrated that it was made in bad faith, was irrational or based on irrelevant considerations) it would be open to me to refuse the injunction on that ground. But, she submitted, if I could not reach that conclusion then the fact of the application under section 27(1) was irrelevant. She submitted that the right to an injunction was not suspended or affected by an application under section 27(1) and that that was supported both by the wording of the statute (had Parliament intended it, it would have said so) and by the policy behind it. Provisional Orders, she said, are for urgent cases and are normally complied with. The remedy of injunction was made available for obvious reasons of speed. Parliament could not have intended that a supplier could frustrate enforcement by lodging an appeal over which the court has no control, noting it could be abandoned the moment that a supplier succeeded in thwarting the Provisional Order.

25. At the other extreme, I am satisfied that the injunction cannot be derailed just because an application under section 27(1) is made. Mr Sinclair did not, in fairness, put the point that high but did submit that I could only grant the injunction if I was satisfied that the section 27 application is hopeless.

26. I do not accept the test is as harsh as Ms Simor would have it. I do not accept that the wording of the statute requires that an injunction is to take precedence over an appeal. The fact that Parliament could have but did not provide for that is not determinative. The section is simply silent on the precedence between an application under section 27(1) and an application for an injunction. Nor do I accept that the policy behind the legislation requires precedence to be given to an injunction. Whether it is appropriate to grant an injunction in the face of a challenge to the Provisional Order must, in my judgment, depend upon the specific circumstances.

27. In a case where there was no sufficient urgency that the Provisional Order be enforced then the appropriate course may well be to delay reaching a conclusion on the injunction until the attack on the Provisional Order had been concluded. But this case falls between the two opposite extreme positions adopted by the parties, largely because I consider there is a significant degree of urgency.

28. GEMA stresses the following grounds of urgency. First, a market-wide cap is due to be introduced in January 2019, but on a temporary basis. While the cap is in place the nature of the market will be fundamentally different so the comparison with a Scottish Power trial would be impossible. GEMA needs to complete this trial before the introduction of the cap so that it has the evidence necessary to make decisions as to whether it should introduce market-wide customer switching provisions as an alternative to the cap in the future. Secondly, the timing of the trial is now at the very end of the possible window, because customer behaviour in the period immediately before Christmas changes (as it was put, switch rates fall in December) so that, again, a like-for-like comparison with the Scottish Power trial is damaged.

29. Npower challenges the suggestion there is urgency. However, I am persuaded on the basis of the evidence I have seen that the trial is urgent. This is reinforced by the stance taken by GEMA that in the absence of letters being sent today (or Monday at the latest) the trial would in fact be abandoned. GEMA has confirmed in response to a

request from Npower made after the hearing, in an email today, that the latest the letters can be sent out is Monday, 8 October. Npower complains that the introduction of the cap as a reason for the trial taking place this autumn was only revealed to them in evidence served in this application. That does not, however, address the fact that the matter is urgent. I will address in a moment the contention that Npower should not be criticised themselves for not having acted with urgency in September because they did not then appreciate the urgency imposed by the cap.

30. Accordingly, I conclude that I should examine the merit of the section 27 application a little more closely as part of the overall balancing exercise, alongside the conduct of the parties to date and the balance between, on the one hand, damage to Npower and, on the other, the frustration of the public purposes if an injunction was not granted. Looking, then, more closely at the merits of the section 27(1) application, I do have real doubts as to the ability to challenge the Provisional Order in the circumstances of this case under such an application. The statutory test in section 27(1) is whether the making of the provisional order was "not within the powers of section 25".

31. Mr Sinclair submitted that Parliament intended by this that the order could be quashed if it is flawed by any errors rendering the decision ultra vires in judicial review terms. In other words, this is a kind of statutory judicial review. I accept that submission, which I did not understand to be seriously disputed. There are three components to that challenge. First, as to Ofgem's decision that there has been contravention. There can be no challenge to that in the present case. Secondly, as to whether the procedural steps have been complied with. Again, there is no challenge made to that. Third, and most importantly, as to Ofgem's decision that it was requisite to make a Provisional Order. As to that, I consider that the focus is on the decision to make a provisional, as opposed to a final, order. I say that because if a final order had been made then the only preconditions would be (i) that there had been a decision that there was contravention and (ii) that the procedural steps had been undertaken. There would be no additional requirement of a decision that it was requisite that an order be made. I do not discern any credible attack on the vires of a decision based on the fact that it was a provisional rather than a final order.

32. The only difference between a provisional and final order, as I have noted, is the time required to consult with the supplier in the case of a final order. Two points are relevant here. First, there had already been extensive engagement over many weeks, during which objections from Npower were made and responded to in relation to the Direction. Second, the urgency of ensuring the trial was completed by December made the final order route inappropriate in the circumstances of this case. Instead, Npower's attack is in reality on the Direction itself, including, as I have noted, that there were insufficient reasons or that the reasons have since changed. It is said that, whereas the original decision was to conduct a single trial of 200,000 customers, split between two suppliers, GEMA now wanted to conduct two separate trials, one before and one after the price cap was introduced. It is also said that there was a failure to address the proper legal test of proportionality by reference to the legitimate aims of GEMA.

33. Mr Sinclair submitted the only way to attack a Direction was via application under section 27(1) to quash the Provisional Order. I do not accept that. The Direction could have been challenged by a judicial review application at any time after it was made,

including before the Provisional Order was made. Nor do I accept that once the Provisional Order was made, the only route of challenge was section 27(1). True it is that section 27(3) provides that the only route of challenge to the Provisional Order is via section 27(1), but that does not preclude a judicial review challenge to the Direction. The point can be tested by considering that if the Provision Order is successfully quashed, that would still leave the Direction in place. Comparison with the Final Order regime is again apposite here. The power to make a Final Order is conditional only on it appearing to the authority that a contravention has occurred, subject to any procedural requirements having been implemented. There is no equivalent wording about it being "requisite" to make the order. Accordingly, it is very difficult to see how a challenge to the Final Order could ever be used as a means of challenging the underlying Direction.

34. I do not think that merely because an urgent, ie provisional, order is made, this provides a basis for using a section 27(1) application to challenge the Direction. It so happens that this case involves a Direction rather than a licence condition and one that was closely followed by a Provisional Order, but that would not by any means always be the case. In other cases a Provisional Order might be used to require compliance with a licence condition that has long been in force (an example given by Ms Simor was a claims handling regulation) or a Direction that was more than three months old. In either case the condition or direction could no longer be challenged by judicial review, and it would be surprising if Parliament intended, by section 27(1) (by a side wind) to have abrogated the time limits for judicial review applications in relation to the condition or direction respectively. Accordingly, I consider the better view is that section 27(1) is limited to challenging the lawfulness (in the public law sense) of a decision to impose a Provisional Order and is not appropriate for mounting a judicial review challenge of the Direction or licence condition itself.

35. In any event, in circumstances where the substance of Npower's complaint is directed at the Direction itself, it is relevant to have regard to Npower's conduct from the beginning of August, when the Direction was produced in draft, and more particularly from 31 August, when it was actually made. I have already referred to this in some detail when considering the factual background. In short, notwithstanding that Npower had known since at least the beginning of August what the Direction would look like, and importantly the timetable required by it, and notwithstanding that it set out its concerns as to its lawfulness in early September, it took no step to seek judicial review of it once it was made. It then simply allowed the time for compliance to pass, putting it in deliberate breach, again without taking any steps to challenge it. It then allowed the extended deadline provided for in the Provisional Order to pass without taking steps to challenge that. Finally, it was not until some days after GEMA issued an application for an injunction to enforce the Provisional Order (as to which it is accepted there is no defence absent a section 27(1) challenge) that it launched its application. Importantly, if it had taken steps to challenge in early or even mid-September and done so with urgency, including seeking interim relief from the Administrative Court (where the application would have been made), there would have been time for a full, albeit expedited, hearing of its application without running up against the deadline beyond which the trial ceases to be possible.

36. Npower said that it should not be criticised because the real urgency of this matter was not clear to it until after the injunction was issued. That may be correct in the sense that GEMA identified the impending imposition of the cap as a reason for urgency only in evidence filed in support of the injunction. However, Ofgem's timetable, including critical steps being undertaken in early- to mid-September, was known to Npower since July. Compliance with regulatory requirements is a matter of importance in itself, and the fact that those requirements specified dates on which matters should be done created urgency. Moreover, the fact that a cap was to be imposed in January has been public knowledge for some time, and the impact of the cap on the ability to run a comparable study with the Scottish Power trial is self-evident.

37. I did canvass in the hearing the possibility that the fact that the cap is about to be introduced is, even now, something which means this trial would be distorted so as not to be a comparable trial with the Scottish Power trial. However, that is something that I am only in the position to speculate about, there being no evidence at all to that effect. It would be wrong for me to rely on such speculation over the considered views of Ofgem as to the worth of the trial that it has put in place.

38. I make it clear that it is no part of my reasoning to suggest that Npower has acted improperly in the sense of making a section 27(1) application for the purpose solely of seeking to delay enforcement.

39. Drawing together these points, I summarise the principal factors as follows. (1) Npower is essentially seeking to challenge the direction, not the Provisional Order. In addition to the fact that a section 27(1) application would not achieve that, there has been an opportunity to challenge the Direction since at least the beginning of September, whereas the application has been made only following the issue of the injunction application and in circumstances where it is practically impossible for it to be heard in a timescale that would allow the trial to continue. (2) The public policy in ensuring the trial was undertaken. Ofgem is required to undertake proper trials before implementing any permanent measures. As pointed out by Ms Simor, if it did not then suppliers would have cause to complain if and when permanent measures were implemented. (3) The public policy of ensuring that regulatory orders are complied with, as opposed to allowing the time for their compliance to pass by and then challenging them retrospectively after injunctive proceedings have been commenced. (4) The certainty of loss caused to Npower in having to undertake the trial, albeit recognising that loss was always an inherent consequence of the trials being implemented at all. (5) The fact that to refuse an injunction would, in the circumstances existing today, cause the collapse of the trial.

40. Taking account of these factors and the others I have mentioned already in this judgment, I conclude that the balance comes down in favour of determining the injunction application, notwithstanding the recent issuing application to quash the Provisional Order. In those circumstances, given it is accepted that, absent the section 27(1) application, there is no defence to the statutory claim for an injunction, I propose to make the order sought by GEMA.

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