Neutral Citation Number: [2014] EWHC 2377 (Admin)

Case No: CO/1857/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2014

Before :

MRS JUSTICE ANDREWS DBE

- -

Between :

R (on the application of DRAX POWER LIMITED)	**Claimant**
- and -	
SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE	**Defendant**

- -
- -

Tim Ward QC and Duncan Sinclair (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
Martin Chamberlain QC and Oliver Jones (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 1st and 2nd July 2014

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Approved Judgment

Mrs Justice Andrews:

1. This claim for judicial review arises in the context of the Government's policy to increase energy generation from renewable sources. Over the years a "stick and carrot" approach has been adopted to encourage energy generators, such as the Claimant ("Drax") to convert to renewable energy sources. The "stick" takes the form of levies on fossil fuels, such as coal, that make them increasingly unattractive; the "carrot" takes the form of financial incentives to convert.

2. Drax applied for one such incentive, an "Investment Contract" ("IC") for Unit 3 at its power station in North Yorkshire. The IC was worth around £1.3 billion. At the final stage of the application process those within the Department of Energy and Climate Change ("DECC") to whom the Secretary of State had delegated the task of making the decision concluded that Drax had not satisfied the "Key Criterion" (which was a necessary precondition for the grant of an IC) and thus that it was ineligible, despite having reached the opposite view at Phases 1 and 2 of the process. The decision under challenge was communicated to Drax in a letter from DECC dated 22 April 2014. Drax contends that the decision was unreasonable and taken in a manner that was procedurally unfair.

3. For reasons which will become apparent, Drax's claim must be determined expeditiously. The parties therefore agreed directions for a rolled-up permission and substantive hearing, and Phillips J made an order giving effect to those directions on 9 May 2014. Having heard the rival arguments, I am in no doubt that the claim satisfies the threshold for permission to bring judicial review, and grant permission accordingly. I therefore turn to consideration of the claim on its merits.

BACKGROUND

4. All six units at Drax's power station were historically fuelled by coal. However each unit was capable of co-firing, that is, burning both coal and biomass, a form of renewable energy. Biomass is material of recent biological origin, derived from plant or animal matter such as wood, agricultural crops or wastes. It is supplied in the form of pellets, but unlike coal, there are significant difficulties in storing large quantities on site. Therefore, in order for a generator to use biomass there must be a regular and reliable chain of supply of sufficient material, and the supply and logistics operation has to be almost continuous.

5. It is self-evident that the amount of energy that an electricity generator is able to generate from biomass will depend on the amount of such fuel that is supplied to it. Thus if a co-firing unit is converted to burning only biomass, the amount of energy it will be able to produce will depend on the amount of biomass it is able to source, and thus on the continuity and reliability of its supply chain. In order to make long-term commitments for supply, suppliers need a corresponding commitment by their purchaser to take regular quantities of product from them, and confidence that they will be paid. Likewise, investors in such a project need to believe that there is a prospect of some return on their investment before they will commit their money, and prospective lenders need to have comfort that the credit rating of the borrower is sufficient to take the commercial risk.

6. In 2002 the Government introduced a scheme called the Renewables Obligation ("RO") which required electricity suppliers to source an increasing proportion of their electricity from renewable sources. The RO became the main financial mechanism for encouraging the deployment of large-scale renewable energy generation. Each licensed electricity supplier was required to produce a certain number of renewables obligation certificates ("ROCs") in respect of each megawatt hour of electricity that it supplied to customers in the UK during a specified period. ROCs are issued by Ofgem to electricity generators on the basis of their output of eligible renewable energy. There is a market in ROCs, which are sold by the generators to electricity suppliers with or without the associated renewable electricity. The ROCs therefore provide financial support by way of a top up to the income that the electricity generator receives from sales of electricity into the wholesale market.

7. There are two major drawbacks to the RO. The first is that the price of the ROCs is entirely market driven, so there is no certainty as to the amount of additional income they will raise for an energy generator like Drax. The second drawback is the political and regulatory risk of the scheme being amended or withdrawn at any time. The lack of a stable and secure income stream is a disincentive to making or obtaining long-term commitments.

8. In 2011, as part of its proposals for wider reform of the electricity market, the Government announced its intention to move from the RO to a scheme based on Contracts for Difference ("CfDs"). The CfD is a long-term private law contract with a Government-owned limited liability company, under which an "eligible generator" using renewable energy sources will be paid the difference between the estimated market price for electricity ("the reference price") and an estimate of the long-term price needed to bring forward investment in a given technology ("the strike price"). In other words, it is a form of hedge against electricity price volatility. The scheme is to be funded by a levy on electricity suppliers. The CfD regime was given formal effect by the Energy Act 2013 ("the 2013 Act"). The RO is to run in parallel with the CfD regime until March 2017.

9. The advantages of a CfD over the RO are, first, that it creates greater certainty in respect of the price that can be obtained by the generator for renewable energy, and therefore provides a predictable level of income in comparison to the RO. Secondly, as a long-term private law contract, it is not subject to the same political and regulatory risks. Thus the CfD regime substantially reduces the commercial risks associated with conversion, and encourages investment in low-carbon generation. The Government intends that the stabilisation of revenue under CfDs will increase the rate of investment and lower the cost of capital, thereby reducing costs to consumers.

10. At the same time as announcing the CfD regime the Government also announced that in April 2013 it would introduce a tax on the use of fossil fuels to generate electricity ("the Carbon Price Floor").

11. In order to avoid the risk of an investment hiatus in the period leading up to full implementation of the CfD regime, the Secretary of State decided to issue an early form of CfD – the IC – to generators who met specific criteria. An IC is defined in Schedule 2 of the 2013 Act, paragraph 1(1) as a contract with an electricity generator which:

> *"(a) is entered into by the Secretary of State … on or before the earlier of 31st December 2015 and the date on which a definition of an "eligible generator" comes into force by virtue of section 10(3)…*
>
> *(b) includes an obligation for the parties to make payments under the contract based on the difference between a strike price and a reference price in relation to electricity generated; and*
>
> *(c) is laid before Parliament in accordance with sub-paragraph (5)."*

The current expectation is that the definition of an "eligible generator" will come into force on 1 August 2014, and that will therefore be the deadline for entry into an IC.

12. Paragraph 1(5) provides that the IC must be laid before Parliament with a statement under sub-paragraph (6):

> *"(a) that the Secretary of State considers that the payments falling within sub-paragraph 1(c) which would be made under the contract would encourage low carbon electricity generation,*
>
> *(b) that the Secretary of State considers that* ***without the contract there is a significant risk that the electricity generation to which the contract relates will not occur or will be significantly delayed****, and*
>
> *(c) summarising the regard the Secretary of State has had, in deciding to enter the contract, to the matters set out in subsection (2) of Section 5."*

The matters under s.5(2) include climate change targets and the security of supply of electricity to consumers.

13. Drax's power station has been accredited under the RO since 2003 as a power station capable of co-firing each of its six coal units with biomass. Following the Government's announcement of its intention to introduce the Carbon Price Floor, the Drax Board decided in 2012 that it would be economically desirable to move to becoming a predominantly biomass fuelled generator. The plan was to convert three of its units, Units 1, 2 and 3, by the second quarter ("Q2") of 2014. This decision was followed by an external fundraising exercise, as confirmed in an Equity Placing Notice issued on 25 October 2012. At the time when the decision was made, Drax only expected to obtain Government support under the RO, because anyone with an existing RO accreditation was not then eligible for support under the new regime.

14. However, as a result of a policy change in around November 2012, existing RO accredited co-fired units that planned to convert to full biomass became eligible for an IC or CfD, unless and until they actually converted (at which point they would be locked in to the RO). This change came too late for one of Drax's units, Unit 2, which

converted before the application process for ICs opened. However Drax did apply for ICs for its second and third planned conversions, Unit 3 and Unit 1 respectively. The application in respect of Unit 1 was successful, and in due course it received an IC. Drax makes no complaint about DECC's rejection of a subsequent application in respect of Unit 4. This case is solely concerned with the unsuccessful application in respect of Unit 3.

The process for awarding ICs

15. The "Final Investment Decision Enabling for Renewables" process by which ICs were to be awarded ("the Process") was launched in March 2013. The basis on which the Secretary of State would select applicants for the award of an IC and the framework of the Process were set out in three documents entitled Update 1- Invitation to Participate (dated 14 March 2013), Update 2- Investment Contract Allocation (dated 27 June 2013) and Update 3- Contract Award Process (dated 4 December 2013). The indicative timetable in Annex A to Update 1 envisaged the award of ICs in the Autumn of 2013. However, that had slipped to March 2014 when Update 2 was released. By the time Update 3 was issued, it was envisaged that DECC would not be sending out final draft versions of the ICs until March 2014, and there was no clear indication as to when the ICs would actually be awarded, though by then it was established that the earliest that a successful applicant would receive payment under an IC was April 2015.

16. The Process was competitive, and thus DECC had to adopt a position of neutrality; it could not appear to favour any one applicant over another. As the budget for ICs was limited, only the top-ranking projects from each technology type would be successful. Bearing in mind the substantial amounts of money involved, and the statutory requirements of the nature and terms of the statement that the Secretary of State had to make to Parliament at the time of laying the ICs before it, it is hardly surprising that the Process was a rigorous one and that the applications were the subject of thorough and repeated scrutiny.

17. In simple terms, the Process fell into three stages. Phase 1 required applicants to satisfy "Qualification Criteria" which entitled them to participate. Paragraph 36 of Update 1 stated that DECC would assess the submissions against the qualification criteria on a pass/fail basis, and notify applicants of their qualification status. An applicant who failed to meet the Qualification Criteria would drop out at that stage.

18. An applicant who passed would then proceed to Phase 2, at which projects would be scored and ranked against "Evaluation Criteria" aimed at assessing their technical and financial deliverability. The applicant had to continue to satisfy the Qualification Criteria at the Phase 2 stage, and to notify DECC if there were any material changes. All projects which continued to meet the Qualification Criteria and met the minimum threshold against the Evaluation Criteria would be denoted "Qualifying Projects". At the third and final stage of the Process, each applicant with a Qualifying Project would make a "Binding Application" for an IC. DECC would then re-assess their applications against the Qualification and Evaluation Criteria and determine the projects to which ICs would be awarded.

19. It is important to note that at each stage of the Process it was made clear to the applicants, including Drax, that any previous decision as to whether a particular

project met the Qualification or Evaluation Criteria prior to the final decision to award an IC was provisional, and could not give rise to any legitimate expectation of such an award. Thus for example:

i) Approval at Phase 1 was stated to be "*non-contractual, non-legally binding, and will not fetter the future exercise of discretion of the Secretary of State in any way.*"

ii) The Status Letter issued to Drax following Phase 1 stated that "*This Qualification and Status Letter is not intended to fetter the exercise of the Secretary of State's discretion in any respect; it is not intended to be legally binding or to give rise to any legally enforceable rights or obligations and does not represent a commitment by the Secretary of State to issue an Investment Contract to you… it should not be relied upon as so doing."*

iii) Update 2 contained a virtually identical statement to that in the Status Letter.

iv) The letter issued to Drax on 19 December 2013 following Phase 2 stated that "*this letter should not be relied upon as a representation that you will or will not be awarded an Investment Contract or that your provisional ranking and affordability position will remain unchanged. It is not intended to fetter the exercise of the Secretary of State's discretion in any respect; nor is it intended to be legally binding or to give rise to any legally enforceable rights or obligations."*

v) The letter from DECC of 7 March 2014 inviting Drax to make a Binding Application reiterated that "*this letter should not be relied upon as a representation that you will or will not be awarded an Investment Contract or that your qualification status, provisional ranking and affordability position will remain unchanged. It is not intended to fetter the exercise of the Secretary of State's discretion in any respect; nor is it intended to be legally binding or to give rise to any legally enforceable rights or obligations.*" In addition Drax's attention was drawn to "*the requirement in paragraph 25 of Update 3 that a qualifying project will need to continue to satisfy the Qualification Criteria in Update 1… up to the point of Investment Contract signature.*"

20. There was no "minded to" stage in the Process whereby DECC would indicate its likely decision and the candidates would be given a final opportunity to make representations about it. However, the Process did enable DECC to seek and obtain clarification from applicants of the information they had provided, for example, by asking for a written explanation (as DECC did with Drax on three occasions). DECC could also ask for supporting evidence. For example, paragraph 37 of Update 1 contained an express reservation by DECC of the right to request evidence to support the information provided by an applicant before determining whether a project met the Qualification Criteria. If an adverse decision was made, applicants were entitled to be provided with the reasons for the rejection, but there was no right of appeal.

21. Under Phase 1, applicants were required to demonstrate that

> *"without an Investment Contract there is a significant risk that the electricity generation to which the Investment Contract*

> *relates will not occur or will be significantly delayed."* ("the Key Criterion")

This reflects the language of the statement that the Secretary of State must make when the IC is laid before Parliament under Schedule 2 of the 2013 Act. Thus it is not surprising that the Key Criterion had to be fulfilled at all stages up to and including the date of signature of the IC. The Key Criterion necessarily involves considering the counterfactual, that is, what the position would be if an IC were not awarded, and comparing the two situations.

22. The phrase "*the electricity generation to which the Investment Contract relates*" is at the heart of the Key Criterion. In the case of a generator who is switching a unit from 100% fossil fuel to 100% biomass, the electricity generation to which the IC relates is plainly the whole output from the unit once converted. In the case of a unit which is already co-fired, however, the generator is already obtaining sufficient supplies of biomass to produce some of the output of electricity from the unit, without an IC. The purpose of the IC is to facilitate a situation in which the entire output from that unit is fuelled by biomass. So the "*electricity generation to which the Investment Contract relates*" must mean the output from the unit that is currently being produced by burning coal.

23. Thus if the unit is co-fired, the applicant must demonstrate a significant risk that without the IC, he will not be able to bring the unit up to the same generating capacity as before the conversion; or alternatively (as was Drax's contention) that there is a significant risk that if he goes down the RO route or waits for the CfD regime to incept, it will take him significantly longer to obtain sufficient biomass supplies to be able to operate the unit continuously to its full capacity. In other words, he has to show that there are sound reasons for concluding that establishing a sufficiently reliable chain of consistent supply of enough biomass pellets to completely replace the coal (and thus produce the same output as the co-firing unit was producing) would be likely to happen significantly faster with an IC than it would under the RO (or if he waits for a CfD).

24. It is unnecessary for the applicant to show that, without an IC, he would not convert the unit at all, or that he would postpone the conversion. Of course, a decision made by the board of an applicant company that it would make no sense economically to convert until they could be sure that the converted unit would be able to operate at full capacity in the medium to long term would be strong evidence, but it could never be the sole basis for concluding that the Key Criterion was or was not satisfied. The impact of the introduction of the Carbon Price Floor on a generating company's business might well lead it to decide that it would make more economic sense for it to convert to biomass (even if that meant having to operate the unit at less than full capacity for some time) than to continue to burn coal. The key issue is whether, on conversion, that unit will be able to operate as it did before, and, if it would not, what would be the comparative impact of an IC, the RO or a full CfD on whether, and if so when, it would be able to operate in the same way as it did before the conversion.

25. At the Phase 1 and Phase 2 stages DECC assessed Drax as fulfilling the Key Criterion. In a letter sent by DECC on 19 December 2013 after Phase 2, Drax was told that Unit 3 was provisionally ranked joint first of the six biomass conversion Qualifying Projects and joint first out of the sixteen Qualifying Projects overall. It was

only at the final stage that DECC concluded that Drax did not fulfil the Key Criterion and thus was ineligible for an IC. From Drax's perspective it had given exactly the same reasons throughout the Process for demonstrating a significant risk that without an IC, the electricity generation to which the IC related would be significantly delayed. However, DECC maintained that there had either been a material change or (to put it at its lowest) the original application had been ambiguous, and DECC had reasonably understood it in a different sense from that which Drax intended.

26. When Drax's position was clarified at the final stage of the Process, DECC was no longer satisfied on the material before it that the Key Criterion was fulfilled. Its reasons were set out under three bullet points:

> "
>
> - *It no longer appears from your submissions that the actual conversion of the Unit 3 plant itself is at significant risk of delay without an investment contract. This is in contrast to your submissions at Phase 1 and Phase 2 which indicated that conversion of Unit 3 depended on securing the rights to sufficient sustainable biomass.*
>
> - *Your recent submissions do not explain in a satisfactory manner how the alleged delays in fuel supply chain investment caused by the absence of an investment contract would prevent or delay generation. For example if Drax is making the case that, without an investment contract, Unit 3 may convert but may not operate at full capacity, your submissions do not identify the amount of generation that might be delayed or the point at which delay might occur.*
>
> - *Your recent submissions do not explain why, in the absence of an investment contract, the delay referred to in your clarification letter could not be avoided by converting the plant under the Renewables Obligation (RO). This is in contrast to your submissions at Phase 1 and Phase 2 which indicated that a private law contract was important in enabling sufficient fuel to be sourced for Unit 3."*

27. One of the complaints made by Drax is that the Process was unfair because DECC never gave it the opportunity to address its concerns or to provide the evidence which DECC said was lacking, in particular as regards the amount of generation that might be delayed or the point at which delay might occur. On behalf of DECC, Mr Chamberlain QC submitted that even if there was any force in that argument (which he denied), DECC's evidence establishes that the further information that Drax has provided in the course of these proceedings, which it would have produced had it been given the opportunity, would have had no impact on the outcome of the decision. It seems, therefore, that the issue at the heart of this claim is whether the decision reached by DECC was unreasonable in the public law sense on one or more of the

grounds set out by Lord Greene MR in the well-known passage in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 at 229. Those grounds include, but are not confined to, irrationality.

The information upon which the decision was based

28. Although it will be necessary to consider what Drax said to DECC in the course of the Process, in order to address the question whether DECC had all the information before it that it needed to make a proper evaluation, it does not matter whether there was an earlier misunderstanding. Nor does it matter that Drax's application got through Phases 1 and 2. The crucial issue is whether DECC's decision to reject the Binding Application on the grounds of non-compliance with the Key Criterion, for the reasons that it gave in the rejection letter, is susceptible of judicial review. What matters, therefore, is what was said by Drax in (or in clarification of) the Binding Application, read in conjunction with the information previously supplied to DECC.

29. The information required at Phase 1 was set out in paragraph 52 of Annex B to the Invitation to Participate. It included a letter from the board of the applicant company responsible for making the investment decisions and arranging the financing of the project, to be signed by authorised signatories, stating that there is a significant risk that without an IC the electricity generation to which the IC relates will not occur or will be significantly delayed, explaining the reasons for this statement, and stating the extent of such delay. The applicant was also required to state the timing of scheduled commissioning of the Unit, both with and without an IC, with supporting evidence. The letter had to warrant that the information provided in it was true and accurate. Thus DECC required the applicant's management to give a written explanation of how much delay they expected to occur if they were not awarded an IC, and why, and to back that up with a warranty.

30. Drax submitted its Phase 1 application for Unit 3 on 30 May 2013. It appended, among other things, its Regulatory News Service announcement of 25 October 2012 that it had committed to convert Unit 3, among others, to biomass. That announcement pre-dated the policy change which led to co-fired units becoming eligible for CfDs and ICs, and thus it should have been apparent to DECC that Drax intended to convert Unit 3 even under the RO. In its application, Drax stated that subject to receipt of an IC by October 2013, its current plan was for Unit 3 to be taken offline for the final conversion works during Q2 2014 and start generating as a fully converted biomass unit around a month later.

31. So far as the Key Criterion was concerned, the covering letter signed by Ms Dorothy Thompson, Drax's Chief Executive, stated that there was a significant risk that the renewable generation from the second and third converted Drax units (Units 3 and 1 respectively) would be significantly delayed in execution. There were a number of reasons for this; however the most significant ones related to the need to secure and deliver to Drax the required sustainable biomass feedstock on the right timescales and at enduringly competitive prices.

32. The application itself went into considerable detail in explaining why access to sufficient sustainable biomass in pellet form was one of the key risks to the project. Unit 2, which by then had converted, was already accounting for most of the available output from existing pellet plants (in Europe). Drax explained that under the RO co-

firing support regime, incremental feedstock volumes could have been deployed progressively with little detrimental impact on the operation or economics of the power station or units. However, the execution of a full unit conversion regime required a unit's worth of biomass to be contracted and delivered to Drax, with a steep ramp up, and then on a continuous, predictable and evenly phased basis. The additional volume of pellets required to supply each converted unit was around 2.3 million tonnes of biomass per annum (a significant proportion of the world total pellet production, 17 million tonnes per annum in 2012.) This would require the establishment of a worldwide supply chain infrastructure through long-term contracts under which Drax would guarantee to take specified quantities of pellets from the suppliers. The two key financing obstacles identified by prospective supply chain partners were longevity in contract commitment, and UK political risk (this reflected the identified drawbacks of the RO that the CfD regime was designed to address.)

33. Drax would have to source the requisite supplies from new development projects for pellet processing, using new bespoke port facilities in North America. Drax believed that it may well have to inject debt and/or equity into such projects in order for them to proceed, because access to finance for such projects was very difficult. Moreover, the funds that Drax had to raise for the conversion of Unit 2 had led to a downgrade in its credit rating, and Drax considered that it was essential to be able to hold the current rating in order to be able to hedge the plant's output and source biomass in the commodity markets. An IC could be granted 9-12 months earlier than a normal CfD, and this would be critical in developing the supply chain.

34. Drax summarised its position by stating that an IC for Unit 3 would:

> *"*
>
> - *Create the necessary confidence in the UK renewables support regime at both Drax and through the biomass supply chain both in the UK and elsewhere in the world to underpin the investments required;*
>
> - *Facilitate the signing of long-term pellet contracts in 2013 to secure the full biomass supply requirements for the converted unit;*
>
> - *Bring forward the upstream supply chain investments in pellet capacity and other necessary infrastructure, and*
>
> - *Make the contribution of the renewable generation from Drax to the HMG 2020 targets more certain and secure.*
>
> *In contrast, not granting an [IC] would mean a potential delay of at least 18 months in execution at this crucial stage. This would risk damaging potentially fragile supply chain confidence in the UK regime and creating a hiatus that will result in higher risk and significantly more than the 9-12 month delay in waiting for a normal CfD."*

35. In essence what Drax was saying was that an IC would create the necessary certainty to enable it to make the necessary investments to secure the continuous fuel supplies that it needed to run Unit 3 on biomass alone in the medium to long term. Without that certainty, i.e. under the RO regime, it would take Drax far longer to build up the

consistency of supply to reach that position; and although the same degree of certainty could be provided by a CfD, the delay in waiting for one would be potentially damaging to the confidence of potential suppliers and investors who would put their current plans on ice. This in turn would create a knock-on delay in establishing the necessary supply chain, over and above the time it took Drax simply to get the CfD.

36. By a letter dated 19 June 2013, DECC sought clarification of why it was that Drax contended that a 9-12 month delay in waiting for a formal CfD would mean a potential delay of at least 18 months in the execution of the project. Shortly after that request was made, Update 2 was published, which indicated that the ICs were now expected to be issued in March 2014, around 6 months later than originally indicated. Drax expressly took that slippage into consideration in its response, which was sent on 1 July 2013. It stated that subject to the revised timetable and the receipt of an IC by March 2014, Unit 3 could be delivered within Q2 to Q4 of 2014.

37. In answer to the specific question about delay, Drax said that waiting for a CfD would cause developers to "*mothball plans to build pellet plants*" and that these abandoned projects would "*take some time to revive once a formal CfD was entered into… a reasonable estimate is to add at least another 6 months to the timeline*". Drax also provided a revised timeline that showed that Drax would take its first delivery of pellets for Unit 3 in July 2013, to allow a degree of stock building ahead of conversion, and that by April 2014 Drax would have a sufficient stock of biomass to convert Unit 3. Since it was then expected that the IC would only be awarded a month before conversion, that indicated that Drax did not need the IC prior to July 2013 in order to obtain sufficient biofuel to run Unit 3 in the short term – the point that Drax was making was that it needed the IC to enable it to invest in building up the long-term supply chain to keep Unit 3 generating at full capacity once it was converted.

38. The evidence from DECC is that they understood Drax to be saying that, although technically feasible, the conversion of Unit 3 could not go ahead unless and until they had secured sufficient sustainable biomass fuel supplies. There are statements in the Phase 1 application that are open to that interpretation, although it was not what Drax intended to convey, and a more careful analysis of the totality of the information provided to DECC would have made this clear. If DECC was labouring under that misapprehension, it is a little surprising that the DECC internal assessment document for Phase 1 (last considered on 23 July 2013) summarises Drax's position accurately in these terms:

> *"Developer states that IC will enable them to access additional funds earlier <u>to make the required investments to guarantee the fuel supply</u> (compared to the RO). Without an IC there could be a potential delay of at least 18 months in execution."* (emphasis added).

In context the "delay in execution" referred to must be a reference to the execution of the supply chain contracts, and not to the conversion of Unit 3. This is to be compared with the comments in the same document relating to Unit 1, which make a specific reference to the timing of the <u>conversion</u> of that unit:

> *"Developer states that the development of the pellet supply chain is the critical element on the timing of the conversion of Unit 1."* (emphasis added).

39. It is possible that the misunderstanding arose from an email sent by Mr Love of Drax on 19 July 2013 in response to a second request by DECC for clarification as to why Drax said that not getting an IC would cause the same delay for Unit 1 as for Unit 3. In that email Mr Love said:

> *"…it is the issues with development of the pellet supply chain that are critical to the timing of our conversions (which we have explained in detail both in our application, and in the supplementary response) and it is this issue which will cause the 15-18 month delay. Failing to act promptly will undermine our ability to place the necessary full-chain contracts for the delivery to Drax for the full volume of pellets (2.3-2.5mt/yr) required for each of these converted units. So the implications of not getting an [IC] and waiting perhaps 9-12 months for a normal CfD will add an additional period we estimate to be of around 6 months to the time it will take us to put in place all the contracts for the pellets necessary for either unit – i.e. 15-18 months total delay for each…"*

40. On the basis of all the information supplied, DECC assessed the project as passing the Qualification Criteria. When Drax submitted its Phase 2 application for Unit 3 on 6 September 2013, Paragraph 48 of Update 2 required each applicant to resubmit the information and statements provided at Phase 1 in the same form as for Phase 1, highlighting where circumstances relevant to its Phase 1 application had changed and confirming that it continued to meet all the Phase 1 Qualification Criteria. It stated that in the event of material changes, DECC would re-run an applicant's Phase 1 qualification assessments for the affected criteria.

41. Drax's covering letter, again signed by Ms Thompson, stated that:

> *"as confirmed in the re-submission of our Phase 1 application (attached as Annex A of the submission) the board still considers that securing an [IC] for [Unit 3] will significantly improve our ability to execute our plans to convert this unit to biomass and to maximise renewable output from this unit in a timely manner".*

The covering letter went on to say that the IC would underpin the investment in engineering projects to improve the reliability and increase the maximum output of units running on biomass, and to secure and to deliver to Drax the required sustainable biomass feedstock on the right timescales at a reasonable price. Increasingly for the second, and even more so for the third unit conversions, Drax would be dependent on successful new developments, as opposed to existing proven operational facilities, to meet its overall biomass requirements.

42. The Phase 2 application itself demonstrated the contracted and pipeline position for all biomass supplies for each unit conversion, including in a chart. The resubmitted

Phase 1 application, with tracked changes, indicated that subject to receipt of the IC by March 2014 the current plan was for Unit 3 to be taken off line for final conversion works and start generating as a fully converted biomass unit in the period 1 April - 31 December 2014. It also confirmed that Unit 3 had not generated converted ROCs, and therefore met the Qualification Criteria in this regard.

43. The fact that generators who had the choice were required to elect between either the RO or the CfD regime at the point of conversion of the relevant unit would have posed no difficulty for Drax if an IC had become available before the date on which it planned to convert Unit 3. However, once there was slippage beyond that date, given that Drax had already placed orders for more biofuel in anticipation of converting, it would be faced with the dilemma of what to do with the larger quantities of biofuel already on order. Drax did not want to find itself being treated as having already converted (and thus locked in to the RO) because it was burning a larger percentage of biofuel in Unit 3. Therefore in November and December 2013 Drax entered into discussions with DECC with a view to finding out what would happen if Unit 3 was ready to generate as a converted unit in Q2 2014 before State Aid clearance had been received (for the IC). Drax enquired whether it was possible for it to burn the biomass and accrue payments under a future IC; however the Government had decided that differential payments under ICs would only become due from 1 April 2015. DECC's proposed solution was that Drax should move to an "enhanced co-firing regime" under which it burned a larger quantity of biomass until 31 March 2015.

44. In late January 2014 DECC confirmed that Drax would not be able to accrue CfD payments if it converted Unit 3 in April 2014. Drax had already been notified of its provisional top scoring against the Evaluation Criteria under Phase 2 by a letter dated 19 December 2013. Drax therefore took the decision that Unit 3 would operate as an enhanced co-firing unit under the RO until April 2015. This meant that the Target Commissioning Date ("TCD") for Unit 3 would be changed to April 2015. The sole reason for this change in the TCD was to preserve the eligibility of the Unit to be awarded an IC. However, in accordance with Update 3, this change to the TCD triggered an obligation on Drax to explain any potential impact on the Qualification Criteria and Evaluation Criteria.

45. DECC sent Drax an email on 21 February 2014 noting that the TCD for Unit 3 would fall outside the TCD range specified at the time of the Phase 2 application and thus that it was a material variation from the parameters set out in paragraph 26 of Update 3. They asked for an explanation of any potential impact this change to the TCD had on the application of the Qualification Criteria and Evaluation Criteria to the project. They specifically stated that the explanation should include an explanation of how the project continued to satisfy what DECC called "the investment hiatus requirement" (i.e. the Key Criterion). They said the information should be submitted at the point of the Binding Application, but if Drax was able to provide it in advance, the team would aim to assess it as soon as possible.

46. Drax provided that written explanation on 10 March 2014. The explanatory "eligibility update" said this:

> *"We confirm that the proposed change in the TCD will not have any potential impact on the Qualification Criteria or the Evaluation Criteria for the Drax Unit 3 project. <u>In particular,</u>*

> *the justification for the award of an Investment Contract was to support the need for timely investment in the development of the capacity of the longer-term sustainable biomass supply chain, which remains exactly as set out in our Phase 1 and 2 submissions."* (emphasis added).

A revised timeline was attached which extended the period of conversion (but not the date of the first supplies of fuel), and added a period of enhanced co-firing.

47. On 21 March 2014 DECC provisionally confirmed that the change to the TCD would not affect the project's qualification or evaluation scoring. However DECC made it clear that they had not reassessed the project's compliance with the Key Criterion. That reassessment would take place based on Drax's response to the questions in the relevant section of its Binding Application (entitled "investment hiatus"). DECC's letter stated that "*each application should therefore state clearly the reasons why the unit conversion project concerned is at risk of delay or cancellation in line with the Phase 1 qualification criterion"*. Of course, that is not an accurate paraphrase of the Key Criterion, as the focus is not on the unit conversion project itself, but on the renewable energy to be generated by the converted unit.

48. Meanwhile, Drax had received a final version of the draft IC and an invitation to make a Binding Application, which had to be submitted on the form set out in Annex E to the invitation letter. The Binding Application was made on 25 March 2014. It certified that for the reasons set out in the response to question 8 of Schedule 1, the Applicant considered that if it were not awarded the IC there would be a significant risk that the electricity generation to which it would relate would not occur or would be significantly delayed. Drax's response to question 8 began with this unequivocal statement:

> *"As set out in our Phase 1 and Phase 2 submissions, the need to secure and deliver to Drax the required sustainable biomass feedstock on the right timescales and at enduringly competitive prices is essential to support the conversion to biomass of Unit 3 and generation from that Unit."*

It went on to refer to the contracted and pipeline position for biomass supplies provided in the Phase 2 submission and updated in the email of 10 March 2014. It also referred again to the contractual certainty from a private law IC providing the necessary increased confidence that Drax's biomass supply and logistics chain was looking for in order to make the investment it needs to guarantee delivery of sufficient volumes of sustainable biomass to fuel the electricity generation from this unit. There are also references to concerns of the suppliers about the concentration of credit exposures to Drax, and their reluctance to commit to increased volumes without additional comfort around Drax's creditworthiness.

49. DECC's review team initially picked up on the fact that the statements made at Phase 1 and Phase 2 about the estimated length of the delay had not been expressly repeated, and in an email sent on 1 April 2014 to Drax, this was pointed out. The email also said that DECC noted that there were no alternative statements in the responses which addressed the likelihood of non-occurrence or the likelihood and extent of any delay to the conversion. It therefore asked:

> *"Please therefore clarify in respect of your binding application for Unit 3 whether, by referring to the statements made in your Phase 1 and Phase 2 submissions, you continue to consider those statements concerning the significant risk of delay and the minimum 18 months delay to be the case, and if so clarify how, in respect of Unit 3, this delay continues to arise."*

50. Drax supplied the requested clarification in a letter dated 4 April 2014. The letter confirmed that not being awarded an IC would result in a significant risk that the renewable generation from Unit 3 would be significantly delayed in execution. Drax said its current estimate of the length of the delay was 12-14 months. This change in timescale was explained on the basis that the likely gap between the award of ICs and CfDs had shortened. Drax said:

> *"Our current assessment is that if Unit 3 were not awarded an Investment Contract on the current timetable in April 2014, we would then have to wait to apply for an enduring CfD before being able to proceed with further investments in the supply chain and transportation infrastructure and contracting for fuel for Unit 3 beyond the short-term. As we have outlined before, security of supply of fuel for the duration of the Investment Contract is uncertain and critical for the overall delivery and viability of the project."* (emphasis added).

Drax pointed out that it would be very vulnerable to slippage in the timetable for application for an enduring CfD:

> *"particularly as regards our ability to progress fuel contracts and pellet plant and infrastructure investments."*

51. The letter went on to explain how the IC would create the opportunity to raise funds against the UK assets of the business without putting Drax's credit rating under pressure, and why it would take Drax longer to raise finance against its US assets. It reproduced the chart of Drax's contracted position for feedstock for Unit 2 from September 2013, which demonstrated how crucial the pipeline supplies are to delivering the future generation from the project (pointing out that the volumes consumed up to 1 April 2015 would be subject to enhanced co-firing support under the RO). The feedstock supply chart marked capacity, the feedstock which had already been contracted, and the feedstock which was needed but which had not yet been contracted. It showed that unless there were firm contracted volumes for pipeline supplies from 2015 onwards, which was now when the planned conversion would take place, Unit 3 would not be able to operate at anywhere near its full capacity.

52. The day before that letter was sent, there had been a meeting between representatives of DECC and representatives of Drax. In the course of that discussion Drax clarified that the actual conversion of Unit 3 would not necessarily be delayed without an IC, but there *would* be a delay to renewable generation because there would be a delay to the unit "running at higher loads long-term." DECC's Mr Pybus observed that Drax needed to "*scotch [the] RO*". One of Drax's representatives, Mr Koss, said in response that the RO alternative was not sufficient to raise finance (a point that Drax had made time and again). The alternative was to use US assets "maybe in future". Mr

Koss said that if Drax was not awarded an IC it would go back to the RO route but that it would be "*hard to get volumes*". The fact that Drax was using the RO as a fallback should have come as no surprise to DECC, since it should have been plain from the discussions about advance payments and enhanced co-firing that Drax was trying to keep its options open whilst making it clear that its preferred route was an IC because of the two major advantages of an IC or CfD over the RO.

53. DECC's internal assessment document demonstrates that on receipt of the 4 April letter, DECC was satisfied that Drax had dealt sufficiently with the counterfactual of waiting for a CfD. However, DECC was concerned by the absence of any express statement about the counterfactual of using an RO. The assessment document stated:

> *"There is no reference anywhere in their clarification statement as to the viability of accrediting under the RO. They do state that on a general basis not being awarded an IC, having been provisionally ranked equal first and deemed affordable, would result in a significant risk that generation would be significantly delayed in execution. However all subsequent statements then related to the CfD as an alternative to an IC. Having revisited their Phase 1 resubmission under Phase 2 it is apparent that in that application they did compare the award of the IC with their equivalent position under the RO and this was taken into account in DECC's assessment and the subsequent pass against the qualification criteria. We recognize that the qualification criteria were not explicit that they had to refer to the RO. But the guidance that was given to reviewers did state that where the assessment of significant risk should take into account the uncertainty caused by the transition to the enduring regime, including where applicable seeking accreditation under the RO. In addition update 1 does clearly state that the objective of [the IC scheme] is to assist developers who find it more challenging to reach FID under the RO during transition to CfDs than originally envisaged.*
>
> *Overall our assessment is that Drax have demonstrated [investment hiatus] compared to the alternative of securing a CfD but there is not [sic] clear evidence of the viability of them accrediting under the RO".*

54. It appears from paragraphs 12 to 15 of an undated "Drax investment hiatus analysis" that those carrying out the assessment within DECC appreciated that short term supplies of biomass did not require further investment. However, because they believed the RO counterfactual had not been addressed in the Binding Application, they thought it was unclear whether the supplies of medium to longer term biomass for Unit 3 "would not be available" if an IC was not awarded and the unit was supported under the RO instead. The analysis stated that because Drax had indicated that they would take "state aid risk" and proceed with their investments for Unit 3 after receiving an IC but before state aid approval is given, it *"may therefore be possible for Drax to make these investments on the strength of the RO support which they are currently obtaining for co-firing, and could obtain for operating as a conversion in future. They do not explain why this is not the case*." Finally, the

assessment said that given that some renewable energy will be produced by co-firing, and that short term supplies of biomass do not appear to be a problem, it is not clear how much generation is likely to be delayed or cancelled.

55. Hugo Robson, DECC's Commercial Director, broke the news to Mr Love of Drax on 14 April 2014 that it was DECC's intention to exclude Unit 3 from the IC process because it no longer satisfied the Key Criterion. Mr Robson refused Mr Love's request to make further representations. On 22 April 2014 DECC told Drax that it believed there were "significant changes" in the Binding Application as compared to the applications at Phase 1 and Phase 2. Reference was made to the absence of mention of the fact that the problems with fuel supplies would prevent the conversion of the plant, and to the lack of an explanation as to why the RO was not a viable alternative. All further requests made by Drax for an opportunity to clarify the position were refused.

56. DECC issued the decision letter on the same day, giving its three reasons for concluding that Drax had failed to satisfy them that it had demonstrated that without an IC there is a significant risk that the electricity generation in relation to Unit 3 will not occur or will be significantly delayed. No point was (or is) taken as to the adequacy of the length of the delay estimated by Drax in its application.

GROUND 1 - REASONABLENESS

57. Drax challenges the reasonableness of the decision that it failed to meet the Key Criterion on the grounds of failure to take into account material considerations, misdirection, lack of transparency, discrimination against Drax, failure to carry out sufficient enquiries, insufficiency of reasons, and *Wednesbury* unreasonableness. Many of these complaints overlap with the procedural unfairness challenge, and essentially concern the introduction of an apparent "new criterion" under bullet point 2 of the decision letter, and the failure to afford Drax the further opportunity to clarify its application after it became apparent that DECC had misunderstood what it was saying at Phase 1 and Phase 2 about when the unit would convert.

58. Submissions were made by both parties as to the standard of review that the Court should apply to a decision such as this, and reference was made to the very helpful commentary in Auburn and others, *Judicial Review, Principles and Procedure* (2013) at paras 17.20-17.26. In my judgment this is not a case in which the Court has to adopt a "light touch" in scrutinizing the reasonableness of the decision, according a wide degree of deference to the decision maker. The decision did not relate to matters of policy or political judgment, nor did it require the exercise of particular technical expertise. It was simply an evaluation of whether, on the information provided, a project satisfied the stipulated pass/fail criteria. However, the standard of judicial review that is applied is unlikely to have an impact upon the outcome of this claim. As Mr Ward QC very fairly acknowledged, in the present case Drax has the difficult task of satisfying the Court that the decision maker, properly informed, could only have concluded that the project did satisfy the Key Criterion. If the decision that it did not was open to a reasonable decision-maker on the information before him, Drax must fail. He submitted, however, that this was a case where among other matters DECC had failed to take into account relevant information, had fundamentally misunderstood or misinterpreted Drax's application, and had misapplied the Key Criterion, all of which led to an irrational outcome.

59. A minister who is charged with taking a decision (or a civil servant to whom that responsibility is delegated) must be equipped with sufficient legally relevant information to enable him to make an informed judgment. There is a critical distinction between things which are so relevant that they must be taken into account, and matters of relevance which may legitimately be taken into account. Only a failure to take into account something in the former category will vitiate a public law decision: R (National Association of Health Stores & Another) v Department of Health [2005] EWCA Civ 154 at [62] and [63].

60. There is an ancillary obligation on the decision maker to *"take reasonable steps to acquaint himself with the relevant information to enable him to answer [the question] correctly"* see Secretary of State for Education and Science v Tameside MBC [1977] AC 1014 per Lord Diplock at 1065B. Although DECC had the power to seek clarification and to call for further evidence in support of what the applicant had said, it was only obliged to exercise that power to the extent that it was necessary in order for it to make a fully informed decision.

61. The decision in this case did not involve the exercise of discretion. Discretion would only arise at the stage when DECC was considering to which of the Qualifying Projects the IC should be awarded. There can only be two possible answers to the factual inquiry whether there was a significant risk that without an IC the electricity generation to which the IC related would be significantly delayed: "yes" or "no". However, a value judgment as to the degree of risk (and the degree of delay) is built in to the question, and there is no yardstick by which to the decision maker was to evaluate "significance". Moreover, there must be an element of value judgment in the assessment of the quality of the required information and any supporting evidence provided by the applicant.

62. These unusual features pose considerable difficulties in the context of a judicial review. A decision made by a public body is usually not susceptible to review on the basis that it is wrong, though in some contexts (e.g. making an incorrect age assessment of a child) such an error may give rise to an error of law because, for example, it would give rise to breaches of statutory duty. Here, though, there is no deprivation of or interference with an established right. In order to be irrational, the decision would have to be, as Lord Diplock put it "*so outrageous in defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"* : Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 410, cited with approval by Lord Mance in Axa General Insurance Ltd v HM Advocate [2011] UKSC 46, [2012] 1 AC 868 at [97].

63. Mr Chamberlain submitted that the decision maker was entitled to take the view that the information produced by Drax was insufficient to satisfy DECC that the Key Criterion had been satisfied (in terms of demonstrating a significant risk that the envisaged delay in generating electricity would occur). It was rational to say to Drax "*you have gone some way towards satisfying the Key Criterion, but what you have told us is not enough to convince us, without supporting evidence*". There was no obligation on DECC to use its powers to require further information or evidence so as to enable an applicant to "shore up a weak application" before taking its decision. Indeed DECC had to remain even-handed so far as all the applicants were concerned. In any event, in the letter of 1 April 2014 and at the meeting of 3 April, DECC had

made it clear to Drax that it had to address the RO counterfactual and Drax, for whatever reason, had failed to do that. It was not good enough to rely on what Mr Koss had said about that at the 3 April meeting, because this was a formal process and DECC could only rely on what was in the application documents or clarification letters, and warranted by Drax's board.

64. Pausing there, it is obviously correct that in its evaluation, DECC was only obliged to consider the information given (and warranted) in the formal application and any formal written response from an applicant to requests for further information. However I do not consider that DECC would be entitled to disregard a correction made to any mistake in its understanding of the material already presented to it, merely on the basis that the correction had been made orally or informally.

65. So far as the misunderstanding was concerned, Mr Chamberlain submitted that if an applicant was saying that its Board had made the commercial judgment that it was not economically viable to convert a unit until the necessary supply chain was in place, that would be a powerful piece of evidence in support of establishing the necessary risk of delay to electricity generation. However if the applicant intended to convert the unit anyway, and could do so under the RO scheme, it would not be good enough for it simply to say that an IC would enable it to operate at full capacity sooner, without providing some supporting evidence, particularly if the applicant had sufficient biomass supplies to operate the unit in the short term. DECC was entitled to view what Drax said about the delay to generation with some scepticism, (particularly since it knew Drax would be burning significant amounts of biomass under the enhanced co-firing regime) and to take the view that without further evidence as to amounts and timescale it was not convinced by the case that it was making out. There was no obligation to give Drax another opportunity to produce that further evidence. It was up to Drax to decide what information it would supply to DECC with its Binding Application and for DECC to evaluate it. If that information fell short of what was necessary to persuade the decision maker, it was not DECC's fault.

THE REASONS FOR THE DECISION

66. In order to determine whether a reasonable decision maker would be entitled to conclude that there was insufficient information to satisfy him that the Key Criterion was met, one has to consider the reasons given for reaching that conclusion. Therefore the starting point for evaluation of Mr Chamberlain's submissions must be the three reasons given in the decision letter. The first bullet point stated:

> *"It no longer appears from your submissions that the actual conversion of the Unit 3 plant itself is at significant risk of delay without an investment contract. This is in contrast to your submissions at Phase 1 and Phase 2 which indicated that conversion of Unit 3 depended on securing the rights to sufficient sustainable biomass."*

That revelation of DECC's misunderstanding of what Drax had said at the earlier stages of the Process is self-evidently not a reason, let alone a good one, for concluding that the Key Criterion is not met. The test is whether there will be a significant risk of significant delay to the electricity generation to which the IC relates, not a risk of delay to the conversion of the unit. I accept that if an applicant

had said that the conversion would be delayed without an IC, that would be a reason in and of itself for concluding that the Key Criterion was met. If it was always planned to convert the unit whichever of the support regimes was adopted, the applicant would have to provide a cogent explanation of why the RO would take significantly longer to enable it to generate the electricity from biomass that was intended to replace the electricity previously generated by burning coal. However it did not need to establish that the entire output from the converted unit would be lost without an IC, only a significant risk that either it would be unable to achieve, or that there would be a significant delay in achieving, the same output from the unit as there was when it was burning both fuels.

67. On Drax's case the timing of the conversion was of little or no significance to the question whether the Key Criterion was satisfied. What mattered was whether there was going to be a sufficient supply structure in place to support the continuous generation of electricity after Unit 3 converted. Drax's case was that it would be able to put that vital supply structure in place much sooner with an IC than with the RO or even a CfD. Mr Ward submitted that once DECC realised that it was, or might have been labouring under a misapprehension as to Drax's case, it was a breach of basic standards of procedural fairness, or a failure to make sufficient enquiries, for DECC not to have put the matter to Drax during the process. I am not persuaded by that argument. The initial misunderstanding about the conversion depending on establishing the supply chain did not operate to Drax's disadvantage. By the time of the Binding Application it was obvious to both parties that Drax would postpone (indeed, had postponed) converting Unit 3 until it knew the fate of its IC application, and why. In any event, the misunderstanding was cleared up at the latest in the course of the 3 April meeting, before the decision was taken. Of course, the fact that DECC believed that Drax had radically changed its position may well have coloured their approach to the application.

68. If DECC had rejected the Binding Application solely on the basis that the envisaged delays in establishing the medium to long term supply chain would not necessarily delay the conversion of Unit 3, the decision could not possibly stand. It would have been tantamount to misinterpreting the Key Criterion as requiring an applicant to demonstrate that there was a significant risk that the conversion would not go ahead without an IC. However, DECC did not make that error. The decision plainly turns on the reasoning in bullet points 2 and 3. Bullet point 1 adds nothing of substance to it.

69. I will next consider the third bullet point, since that is equally easily disposed of:

> *"Your recent submissions do not explain why, in the absence of an investment contract, the delay referred to in your clarification letter could not be avoided by converting the plant under the Renewables Obligation (RO). This is in contrast to your submissions at Phase 1 and Phase 2 which indicated that a private law contract was important in enabling sufficient fuel to be sourced for Unit 3."*

That is both inaccurate and unfair. Whilst it is true that the Binding Application and the letter of 4 April did not explicitly state that the IC would provide increased confidence "*as compared with the RO*", and did not expressly repeat what was said about the RO counterfactual in the Phase 1 application, it was obvious, and should

have been obvious to any reasonably informed decision maker, that Drax was not departing from its previous position in that regard but rather, adopting it.

70. On a fair reading there was no difference between what Drax had said at Phase 1 and Phase 2 about the importance of a private law contract in securing the necessary increased confidence that its biomass supply and logistics chain was looking for (which DECC plainly and correctly understood at the time) and what it was saying about it at the binding application stage. The Binding Application began by saying "*as we stated in our Phase 1 and Phase 2 application…"* and then summarised Drax's case consistently with what Drax had stated previously. On one view that was an incorporation of the Phase 1 and Phase 2 application documents by reference; but at the very least, it was an adoption of everything that had been said in those earlier applications, including what had been said about why Drax could not achieve the same position with the supply chain by going down the RO route.

71. Indeed, it would appear that DECC's team initially understood that to be the case, because the clarification that they sought on this aspect related to the length of the delay, which at Phase 1 and Phase 2 had been addressed in the specific context of the counterfactual of waiting for a CfD. This was because the fundamental premise on which Drax's application was based was that a private law contract was the key to unlocking the necessary investment in the supply chain, and that waiting for a full CfD would cause a significant delay to Unit 3 being able to operate on a continuous sustainable basis. Had there been any room for doubt, the 4 April letter confirmed that Drax was standing by everything that it had said at Phase 1 and Phase 2. The sentence highlighted in Paragraph 50 above can only be interpreted as meaning that Drax could not make the necessary investment under the RO and that the only viable alternative was to wait for a CfD. If, as had been the case at Phase 2, the Binding Application form had required Drax to resubmit in the same form what it had said at Phase 1 and Phase 2, subject to any further necessary tracked changes, it is clear that Drax would have done so; but there was no such requirement, and in the absence of such, an applicant in Drax's position would hardly expect to have to repeat verbatim everything it had said before.

72. As DECC's internal reviewers noted, the Qualification Criteria (including the Key Criterion) did not expressly require a comparison to be made with the RO. Nevertheless the Binding Application did state that:

> *"The contractual certainty from a private law Investment Contract will provide the necessary increased confidence that our biomass supply and logistics chain is looking for in order to make the investment it needs to guarantee delivery of sufficient volumes of sustainable biomass to fuel the electricity generation from biomass conversion of this Unit."* (Emphasis added).

That echoes the language used in the Phase 1 submission in which it was said that "*the contractual certainty from a private law [IC] will provide the necessary increased confidence above and beyond that provided by grandfathered ROCs, that our biomass and logistics chain is looking for*" and (after addressing the drawbacks of a RO) "*private law CfD Investment Contracts will therefore allow us to contract with confidence*". The passage in the Binding Application that I have quoted in this

paragraph can only be understood by a properly informed assessor as contrasting the position with that under an RO. If there had been any uncertainty as to what was meant by "increased confidence" DECC only had to refer back to the Phase 1 and Phase 2 submissions, as directed by Drax in the opening line.

73. DECC did tell Drax at the meeting on 3 April that it needed to "*scotch [the] RO*" but Drax could well be forgiven for taking the view that it had done that consistently from the inception of the Process, and that what it had said in its Binding Application and clarification letter was enough to address that counterfactual (as in my judgment it plainly was).

74. In his evidence, Mr Pybus pointed to the "*apparent willingness of Drax to take State aid risk*", which echoes the point in the internal "investment hiatus" review. That is no good reason for concluding that the Key Criterion has not been met. In the light of the fallback option of support under the RO it is hardly surprising that once it was told it had been awarded an IC, Drax would feel that its position would be sufficiently secure to start making the arrangements for setting up the necessary infrastructure without waiting for the position to be formalised. Indeed Drax had already been able to take some steps to increase the short-term supply of biomass on the back of its success at Phase 1 and Phase 2, which led it to move to the enhanced co-firing regime. However it cannot logically follow that Drax would be willing, let alone able, to make the same commitments if it went down the RO route instead (with no fallback option). On the contrary, it would take Drax longer to build up the necessary long-term supply chain and thus obtain the volumes of biomass required to keep the unit operating at full capacity because there would be less confidence in Drax's creditworthiness, as it had said from the very beginning.

75. DECC's decision maker has assumed a departure from the justification that satisfied the assessors at Phase 1, when there was no such departure, and has therefore unfairly (and incorrectly) concluded that Drax failed to address the RO counterfactual. There has been no suggestion by DECC that the explanation given at Phase 1 and Phase 2 for the fact that an IC or CfD would enable Drax to put the requisite long term supply chain in place quicker than the RO had ceased to be sufficient, or that it would be reasonable to conclude that it had. Such a view would be a surprising one for DECC to have taken, given that the explanation given by Drax reflects the reasons why the Government was introducing the CfD regime in the first place. DECC simply made the fundamental mistake of believing that explanation was no longer being put forward. It <u>was</u> being put forward, and there was no good reason to have thought otherwise. Any doubts on that score were settled at the 3 April meeting.

76. These deficiencies would be enough to make the decision susceptible to judicial review; however, that would not avail Drax if the decision-maker were nevertheless entitled to conclude that the Key Criterion had not been met for the reasons given in the second bullet point. That, therefore, is the critical reason upon which this claim turns. In evaluating it, however, I must act on the working assumption that the decision maker has <u>not</u> made the mistake that he made in bullet point 3, i.e. that he has correctly understood Drax's binding application as addressing the counterfactual of the RO in exactly the same way as it did, to DECC's satisfaction, at Phases 1 and 2.

77. The second bullet point states:

> *Your recent submissions do not explain in a satisfactory manner how the alleged delays in fuel supply chain investment caused by the absence of an investment contract would prevent or delay generation. For example if Drax is making the case that, without an investment contract, Unit 3 may convert but may not operate at full capacity, your submissions do not identify the amount of generation that might be delayed or the point at which delay might occur.*

Mr Ward submitted that this was the introduction of an entirely new criterion, of which no forewarning had been given to Drax. It was no part of the published scheme that applicants would have to satisfy some threshold test as to the quantity of generation that would be accelerated by an IC, or provide a detailed explanation of the precise amount of generation and on what timescale. On the face of it that appears to be a fair criticism.

78. Mr Chamberlain's response was that the reference to the amount of generation that might be delayed or the point at which delay might occur was just an explanation of the kind of additional information or evidence that *might* have satisfied DECC, or, to put it another way, an explanation of why DECC had concluded that the information that was put before it by Drax was insufficient for it to be satisfied that the Key Criterion was met. Yet DECC's Grounds of Opposition complain that Drax had failed to provide "*the detailed and robust explanation required about the amount of generation that would be lost and when"*, which does seem to me to treat that additional information as a compulsory requirement. Whichever way one looks at it, however, DECC's complaint was that Drax had not, or had not sufficiently, explained how the alleged delays in fuel supply chain investment caused by the absence of an IC would delay the generation of electricity. That complaint is patently unsustainable. It is obvious that the less fuel one has to burn, the less energy will be generated.

79. The whole aim of converting a unit is that it will be able to generate the same amount of electricity on biomass alone as it did when it was co-firing; not just for one or two weeks, or one or two months, using any existing sources of supply, but for so long as it remains operational. Drax's factual case, which DECC has not challenged, is that its existing sources of supply were insufficient to keep Unit 3 operating to full capacity beyond the short-term, particularly given the level of biomass consumption by Unit 2. Therefore Drax needed to build up a reliable worldwide logistics and supply infrastructure in order to enable it to maintain that level of output from Unit 3. DECC has (rightly) not suggested that an applicant would inevitably fail to meet the Key Criterion if the unit had access to enough biomass to be able to operate at full capacity upon conversion, albeit only for a short time, but would not have access to the necessary consistent and regular volume of supplies to keep operating at that capacity.

80. For the reasons I have already stated, on a proper interpretation of Drax's binding application, read in conjunction with its Phase 1 and Phase 2 applications, which it reiterated, it would be more difficult (and thus take longer) for Drax to put the necessary infrastructure in place with RO support than it would with a form of CfD because of the enhanced market confidence that the latter type of financial support could bring. Even waiting for a full CfD could cause a delay in implementation of the necessary infrastructure of around 12-14 months compared with an IC. DECC accepts that 12-14 months is a "significant" delay.

81. When Drax's application is properly understood, it is clear that Drax was saying that it could not possibly achieve the same infrastructure under the RO earlier or at the same time as it would under an IC or a CfD, and giving a viable explanation of why that was. It would follow that if there was conversion under the existing RO scheme there would be at least a serious risk of a future hiatus during which the Unit would be generating at the lower capacities dictated by whatever supplies of biomass happened to be available to it at that time. The precise date on which that would arise and the precise impact on capacity are both imponderables depending upon the state of the market and the extent to which the supply chain could be developed in the future without the certainties that an IC or CfD would bring.

82. In my judgment no reasonable decision maker would be entitled to reject that explanation out of hand on the basis that the applicant had not provided statistics or a computer model estimating how much electricity the converted unit would be able to generate without an IC. It is obvious that without biomass, a unit running on biomass alone cannot generate any electricity. It logically follows that if the continuous supply chain of sufficient quantities of biomass to operate the unit to its full capacity for the indefinite future is not already in place, and cannot be put in place without significant further investment, then there will inevitably be a delay in operating the unit to its full capacity on a continuous basis until such time as the infrastructure *is* put in place. The necessary volume of supplies will be impossible to sustain in the medium to long term, and that means that at some point the amount of electricity that the unit can generate will drop to whatever level can be sustained by the amount of biofuel that is available to burn.

83. Drax did not need a graph or chart to illustrate something that is so obvious. However, the chart set out in the letter of 4 April clearly demonstrates that the pipeline fuel (and thus the generation that depended upon it) would be delayed without an IC. The chart distinguishes between fuel that had been "contracted" and fuel which was not yet contracted but required to operate the unit to its full capacity ("pipeline" fuel, which was uncertain). If DECC did not understand the chart, it was incumbent on them to ask for an explanation or for clarification of it, because it was an integral part of Drax's explanation of the need for sufficient continuous supplies of fuel, and the potential impact on the ability of the Unit to generate the same amount of electricity as it had generated before conversion if those supplies were unavailable. If DECC failed to have regard to the chart, they were ignoring legally relevant material.

84. Thus if the premise is accepted that the RO route would engender less market confidence in Drax than an IC or CfD and that it would or could have a significant impact on Drax's ability to raise the necessary finance or investment to put the infrastructure in place, for all the reasons stated by Drax in its various applications, it necessarily follows that going down a CfD/IC route was likely to enable Drax to operate the converted Unit consistently at full capacity much sooner than converting under the RO. That means that without that supply chain and associated logistical infrastructure, the electricity generation to which the IC relates, i.e. the same amount of electricity previously generated by burning coal in the unit, will be delayed.

85. It therefore does not matter whether the unit could operate to 50%, or 60% or even 80% capacity on the basis of the supplies that could be sourced without the IC, or indeed whether it could operate to 100% capacity for 2, 3 or 6 months. "*The electricity generation to which the IC relates*" does not mean the amount of electricity

generation over and above that which the unit would be able to generate if it converted using the RO at any given time. However even if that *were* the meaning of the phrase when applied to a co-fired unit, Drax would still satisfy the Key Criterion. Delay in setting up the continuous supply chain will necessarily impact on the amount of electricity that the unit can generate in future, and will at least give rise to the serious risk that the unit cannot operate continuously at full capacity in the same way as it did when it was burning both coal and biomass. There would inevitably be a difference between the amount of electricity it could generate using the supply chain established under an IC and the amount it could generate using a less reliable infrastructure established more slowly under an RO. The difference in the amounts of energy that could be produced is immaterial. It is the likelihood of a shortfall in energy generation that matters. Likewise the exact date or likely date when the amount of fuel available is going to have an adverse impact upon the ability of Drax to keep the unit running at full capacity does not matter for the purpose of ascertaining whether the Key Criterion is satisfied. Despite Mr Chamberlain's efforts to characterise this case as one of the reasonable evaluation of sufficiency of information and evidence, it was not. It was a case of failure to apply the correct test to the information and evidence that was produced.

86. The only bases upon which a properly informed decision maker, having understood Drax's application, could have concluded that it did not satisfy the Key Criterion would be if it rejected the premise that the RO would engender less market confidence than a CfD or IC, and thus adversely impact on the ability of Drax to put the infrastructure in place, or if it rejected the evidence about how much biomass was needed or would be available to keep the Unit running at capacity; but both those matters were accepted by DECC at Phase 1 and Phase 2 and no reason has been put forward by DECC for changing their minds about them. Moreover, a rejection of those matters played no part in the reasoning behind the decision under challenge. In any event, as I have already pointed out, it was the very fact that the RO had failed to generate sufficient market confidence to underpin investment in renewable energy generation that led the Government to introduce the CfD scheme in the first place.

87. Although a Court will not lightly interfere with a decision of this nature, particularly when such a large sum of money is involved, and despite the attractive simplicity of Mr Chamberlain's submissions, I am driven to the conclusion that the Claimant has succeeded in discharging the onerous burden of proving that the decision was unreasonable in the *Wednesbury* sense and that none of the reasons given by DECC in the decision letter can possibly sustain it. When properly understood, Drax's application did satisfy the Key Criterion and no decision maker, properly informed, who accepted that Drax was telling the truth about the different impact on market confidence of a CfD or IC versus an RO, and about the need to build up the necessary continuous volume of supplies of biomass to fire the unit in future, could have concluded that it had failed to do so or that the information given by Drax was insufficient to satisfy him that it passed the test.

GROUND 2 - PROCEDURAL UNFAIRNESS

88. In the light of that conclusion it is unnecessary for me to dwell upon the second ground of challenge, namely, procedural unfairness. The relevant legal principles

were uncontentious, and an excellent summary of them is to be found in the speech of Lord Mustill in R v Home Secretary ex parte Doody [1994] 1 AC 531 at 560. In essence, what steps must to be taken in order to satisfy procedural fairness will depend on the nature of the process concerned.

89. In the light of the fact that there was no "minded to" stage in the Process there was no obligation on DECC to proceed as if there were; it was incumbent on Drax to put forward all material that it wished to rely upon, and for DECC then to evaluate it. As I have previously stated, DECC would only be under an obligation to seek clarification or seek further evidence to the extent that it was necessary to do so in order to obtain all information that was legally relevant to the decision, i.e. sufficient information to enable it to discharge its duty correctly. If there was uncertainty about what Drax was saying about anything of legal relevance, then it would be unfair to make an adverse decision without first seeking clarification. However there was no obligation to seek clarification or further evidence to remedy deficiencies in the application, provided that DECC was not mistaken in characterising them as deficiencies.

90. Likewise, if DECC had been introducing entirely new criteria at the last stage, then of course it would have been procedurally unfair to have determined the application without giving Drax a proper opportunity to address them.

91. The real problem, in my judgment, was not so much a result of deficiencies in the procedure that was adopted, as a result of the misunderstandings about Drax's supposed change of position and the negative impact that DECC's mistake about Drax's failure to deal with the RO counterfactual obviously had upon the way in which the evaluation of whether it had satisfied the Key Criterion was then carried out. For that reason, I do not consider that the second ground of challenge adds anything of substance to the first.

CONCLUSION

92. In the light of the above findings, the decision must be quashed and a declaration granted to the Claimant that it did satisfy the Key Criterion at the stage of its Binding Application. The matter will have to be remitted to DECC for reconsideration in the light of this judgment.