

THE BULB LITIGATION

JR OF SUBSIDY DECISIONS FOLLOWING THE CA RULING

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Brick Court Chambers
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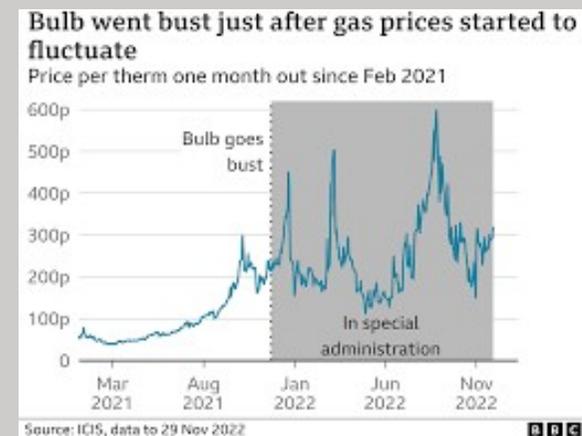
HOW THE CLAIM AROSE

- *2021 - +400% increase in wholesale energy prices*
- *Bulb – founded 2013*
- *2018 = UK's largest renewable energy supplier*
- *2018 = UK's 7th largest energy supplier with 1.5 million customers*



HOW THE CLAIM AROSE

- *Smaller energy companies collapse*
- *Energy Supply Company Administration Order (ESCA) under Energy Act 2011*
- *S. 95 Energy Act – objectives include that ESCA becomes unnecessary due to rescue/transfer*
- *Bulb run by Joint Energy Administrators (Teneo)*
- *Sales process run by Lazard*



KEY FEATURES

- Claims brought by competitors
- Risks taken – not a one-way bet
- Fact-heavy JR – Div Ct (Singh LJ & Foxton J) = 80 paras analysis and fact-finding
- Transitional period pre-Subsidy Control Act 2022
- TCA implemented by s. 29(1) EU (Future Relationship) Act 2020



KEY FEATURES

- *Lipton v BA CityFlyer* [2024] UKSC 24 at paragraphs 79 -80
- *Heathrow Airport Limited v HMRC* [2021]EWCA Civ 783 per Green LJ
- Role of Zacaroli J in relation to the Energy Transfer Scheme



DIVISIONAL COURT – STANDARD OF REVIEW

Article 366(1)(b):
subsidies must be: “...
proportionate and
limited to what is
necessary to achieve
the objective.”

“light touch” review with
enhanced margin of
appreciation to the
decision maker

Review not re-taking of
decision on merits

CA – STANDARD OF REVIEW

Rival Positions

- Appellants – Article 366 = “outcome obligation” including principle of proportionality
- S/S – Respondent’s Notice: conventional JR including rationality

Key questions

What TCA requires of UK in terms of substance

What TCA requires of UK in terms of standard of review

Different uses of proportionality (para 67)

CA – STANDARD OF REVIEW – 5 REASONS

- S. 29(1) EUFRA
- S. 165 Energy Act 2004
- Article 372(1) & (3) of the TCA (system of review does not require the UK to widen the scope or grounds of review of decisions beyond those available under existing law)
- Article 373(2) and the remedy of recovery: where the Subsidy Control Principles have been applied “in a manner which falls below the standard of review applicable in that Party’s law”
- Article 4 of the TCA: nothing in the Treaty establishes an obligation to interpret its provisions in accordance with the domestic law of either party

RESULT = CONVENTIONAL PRINCIPLES OF JR

CA – STANDARD OF REVIEW – RELEVANCE OF SCA 2022

- *Cape Brandy Syndicate v Inland Revenue* [1921] 2 KB 403
- *Commissioners of Inland Revenue v Hang Seng Bank Ltd* [1991] 1 AC 306, 324
- *News Corp UK & Ireland Ltd v HMRC* [2023] UKSC 7
- s. 70(1) & (5) of the SCA 2022
- Grounds = error of law, procedural fairness, rationality (CA para 90)



RELEVANCE FOR THE FUTURE

- Bulb proceedings unique
- BUT reliance on SCA 2022
- Holy Grail – hard-edged error of law/breach of procedural fairness
- CAT institutionally more inclined to intervene?



QUESTIONS?