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THE HIGH COURT

2010 1484 JR

BETWEEN

VIRIDIAN POWER LIMITED AND HUNTSTOWN POWER COMPANY LIMITED

APPLICANTS

AND

COMMISSION FOR ENERGY REGULATION

RESPONDENT

AND (BY ORDER OF THE COURT)

THE ATTORNEY GENERAL

NOTICE PARTY

2011 54 JR

BETWEEN

ENDESA IRELAND LIMITED

APPLICANT

AND

COMMISSION FOR ENERGY REGULATION

RESPONDENT

AND (BY ORDER OF THE COURT)

THE ATTORNEY GENERAL

NOTICE PARTY

JUDGMENT of Mr. Justice Clarke delivered the 9th June, 2011

1. Introduction

1.1 For those of a certain age, the generation, transmission and supply of electricity in Ireland was a straightforward affair. The Electricity Supply Board generated, transmitted and supplied electricity to all customers in this jurisdiction. Northern Ireland operated in its own way. However, there have been a number of significant developments in that market over recent years which provide the background to these connected proceedings. First, there has been a liberalisation in the market for the generation of electricity. The applicants in these respective proceedings ("Viridian" and "Endesa") are independent generators supplying electricity.

1.2 Second, a single market in electricity has been established for the island of Ireland. Both of these developments have led to a mechanism for the supply of electricity into that common all Ireland market. While it will be necessary to look in more detail at that mechanism and how it has evolved, the basic requirement for participation in the Republic of Ireland is that a generator has a licence from the respondent ("the Commission"). The terms of such licenses (together with certain other documentation referred to in the licenses) govern the basis on which generators are permitted to "bid in" to the electricity market. In substance, the application of the "bidding in" mechanism determines the price which generators are paid. It will be necessary to consider that mechanism in more detail in due course.

1.3 However, a dispute has arisen between Viridian and Endesa on the one hand and the Commission on the other hand as to one (admittedly important) aspect of that mechanism. Emission trading allowances (which are sometimes referred to colloquially as "carbon allowances") were issued under the provisions of the European Communities (Greenhouse Gas Emissions Trading) Regulations 2004, which Regulations transpose Directive 2003/87/EC ("establishing a scheme for greenhouse gas emission allowance trading within the community") into Irish law. It will be necessary to refer to those enactments in due course. However, in substance same establish a scheme of carbon allowances. Persons or bodies, such as the generators of electricity involved in these proceedings, who use up the resource of carbon must have a carbon allowance to match their use of carbon resources. A market in those carbon allowances has developed. In circumstances which it will also be necessary to set out in more detail, in most of the early years of that regime much of the carbon allowances available were distributed free.

1.4 Nevertheless generators, such as Viridian and Endesa, were entitled, under the model for "bidding in" to the common electricity market, to include the then current value of any carbon allowances used as part of the price. This was seen to give rise to what some regarded as a windfall gain to generators, some of whom at least would have received a relevant carbon allowance free but were able to charge the current value of that carbon allowance (on the carbon allowance market) into their pricing structure.

1.5 Against that background the Oireachtas enacted the Electricity Regulation (Amendment) (Carbon Revenue Levy) Act 2010 ("the 2010 Act"), which imposed a levy on generators. Viridian and Endesa argue that the "bidding in" mechanism established in their

respective licenses entitles them to include the cost of this levy in their bid in prices. The Commission says otherwise.

1.6 The Attorney General was joined by order of the court on the 16th March, 2011, in her capacity as guardian of the public interest. In particular, the Attorney General is concerned with an argument that the case made by Viridian and Endesa, if successful, would amount to a frustration of the intention of the Oireachtas in enacting the 2010 Act. Against that general outline it is necessary to turn to the specific issues which arise in these connected proceedings.

2. The Issues

2.1 Save for two matters, to which brief reference will need to be made, there is no material difference between the case made by Viridian (including Huntstown Power Company Limited with which it is connected) on the one hand and Endesa on the other hand.

2.2 The first, and perhaps the central, issue which arises in both proceedings concerns the proper interpretation of the licenses under which both Viridian and Endesa operate as electricity generators. It would appear that such electricity generation licenses are in a standard form issued by the Commission. It follows that there is no material difference in the terms of the licence held by each of the applicants. Viridian and Endesa argue that, on a proper construction of the licenses, together with any other documents incorporated by reference into the licensing regime by the licenses, it is permissible to include, in the relevant bidding process, the costs of the levy imposed under the 2010 Act. The Commission has issued directions ("the Directions") under Condition 15(7) of the respective licenses requiring Viridian and Endesa not to include the cost of the levy in their bids. On the basis of the interpretation which Viridian and Endesa seek to place on the licenses it is said that those directions are invalid as being incorrect and should be quashed. On the basis already identified the Attorney General supports the Commission in disputing the contention of Viridian and Endesa under this heading.

2.3 A second, and connected, question concerns the standard of review which the court should apply in considering the first question. Viridian and Endesa assert that the license, and any other relevantly connected documentation, should be objectively interpreted. On that basis it is said that the court should assess the competing constructions put forward and determine, as a matter of law and as a matter of construction, what the proper meaning of the relevant documentation is. On that basis it is said that the appropriate standard to be applied is one of correctness. On the other hand the Commission, placing reliance on certain English authority, suggests that a degree of deference should be shown by the court to the interpretation which has been placed on the relevant documents by the Commission.

2.4 The first two questions, therefore, are concerned with whether, either on the basis of correctness or allowing for an appropriate deference towards the Commission, it can be said that the Commission's interpretation is wrong so that the directions are, in turn, invalid.

2.5 The third issue concerns an allegation on the part of Viridian and Endesa that the Commission, in reaching the conclusion which gave rise to the Direction, took into account irrelevant factors. It may well be that there is a connection between whether that issue arises and the answer to the second question concerning the standard of review. If, as Viridian and Endesa assert, the standard of review is one of correctness, then the Commission's view is either objectively right or wrong. In either event it is hard to see how the considerations which led to the decision to make the Directions are of any materiality. On the other hand if, contrary to the submissions of Viridian and Endesa, the Commission retains some discretion in the matter, then it may well be that the court is entitled to assess what factors could properly, as a matter of law, be taken into account in exercising that discretion and whether the Commission confined itself to taking into account only such relevant factors.

2.6 Before going on to deal with the regulatory regime, I should briefly touch on the two distinctions which arise in the Endesa proceedings. As the record numbers set out above reveal, the Endesa proceedings were taken somewhat later in time and in circumstances where the Commission now argues that same should not be entertained by reason of delay. There is, therefore, a delay issue in the Endesa proceedings only.

2.7 Second, there is one factual distinction between the two cases. Endesa came into the market place by acquiring existing generation plants at a time when those plants already had the benefit of carbon allowances. On the evidence it is clear that Endesa included a calculation as to the benefit of those carbon allowances in the price paid for the plants in question. In that sense it is said that Endesa has not, in fact, had the benefit of any free carbon allowances.

2.8 As all of those issues have as their central focal point the regulatory regime within which electricity generation takes place, I propose to turn firstly to a description of that regime.

3. The Regulatory Regime

3.1 The first matter to consider is the position of the Commission. The Commission was established by s. 8 of the Electricity Regulation Act 1999 ("the 1999 Act"). The Commission's functions are defined in s. 9 of the 1999 Act and include regulatory functions which had previously been entrusted to a Minister of the Government. Paragraph 9 of Schedule 1 to the 1999 Act (which is made binding on the Commission by s. 8(3) thereof) reads:

> "Subject to this Act, the Commission shall be independent in the performance of its functions."

3.2 Since 1st November, 2007, there has been a single market for wholesale electricity on the island of Ireland. It will be necessary to turn to the practical workings of this market in due course. As regards the legal framework, the Electricity Regulation (Amendment) (Single Electricity Market) Act 2007 ("the 2007 Act"), made provision for a cross-border regulatory framework bringing together the Commission and its counterpart in Northern Ireland, the Northern Ireland Authority for Utility Regulation ("the Utility Regulator"). (Collectively the "Regulatory Authorities").

3.3 The Regulatory Authorities are both represented on a committee called the Single Electricity Market Committee ("SEM Committee") which supervises the Single Electricity Market. As a matter of Irish law, the SEM Committee is a committee of the Commission. Section 4 of the 2007 Act inserted a new s. 8A into the 1999 Act. Section 8A(1) provides:

> "There shall be a committee of the Commission to be known as the Single Electricity Market Committee or as the SEM Committee."

Section 8A(4) provides that:

> "Any decision as to the exercise of a relevant function of the Commission in relation to a SEM [Single Electricity Market] matter shall be taken on behalf of the Commission by the SEM Committee."

3.4 Schedule 1A to the 1999 Act, as inserted by s. 19 of the 2007 Act, provides that the members of the SEM Committee are appointed by the Minister for Communications, Energy and Natural Resources (the "Minister"), with the agreement of the authorities in Northern Ireland and after consulting the Commission. In Irish law, the SEM Committee is, therefore, a body which decides on certain matters in place of the Commission (which then implements these decisions). However, it is not a separate person in law, so that it is common case that the Commission remains the proper respondent for these proceedings. In passing, it should be noted that there are parallel provisions in the law of Northern Ireland, making the SEM Committee a committee of the Utilities Regulator, comprising the same people as the SEM Committee established under the laws of this State. In theory, therefore, there are two committees but they act as a single body.

3.5 Section 7 of the 2007 Act inserted a new s. 9BA into the 1999 Act, which provides that the Commission has an additional function, namely, to "establish and facilitate the operation of the Single Electricity Market, including a Trading and Settlement Code in relation to that market". The Trading and Settlement Code sets out the detailed rules and procedures concerning the sale and purchase of wholesale electricity in the single market.

3.6 Section 9 of the 2007 Act inserted a new s. 9BC into the 1999 Act, listing the "principal" objectives of the Minister, the Commission and the SEM Committee in respect of their respective roles in the Single Electricity Market. The principal objective is described in s. 9BC(1) as follows: "to protect the interests of consumers of electricity in the State and Northern Ireland supplied by authorised persons, wherever appropriate by promoting effective competition".

Under s. 9BC(2):

> "The Minister, the Commission and the SEM Committee shall carry out their respective functions referred to in subsection (1) in the manner which each considers is best calculated to further the principal objective, having regard to:
>
> (a) the need to secure that all reasonable demands for electricity in the State and Northern Ireland are met,
>
> (b) the need to secure that authorised persons are able to finance the activities which are the subject of conditions or obligations imposed by or under this Act or the Internal Market Regulations or any corresponding provision of the law of Northern Ireland,
>
> (c) the need to secure that the functions of the Minister, the Commission, the Authority, and the Department in relation to the Single Electricity Market are exercised in a co-ordinated manner,
>
> (d) the need to ensure transparent pricing in the Single Electricity Market, and
>
> (e) the need to avoid unfair discrimination between consumers in the State and consumers in Northern Ireland."

3.7 Section 10 of the 2007 Act inserted a new s. 9BD into the 1999 Act, which provides that:

> "The Minister, the Commission and the SEM Committee shall have regard to the objective that the performance of any of their respective functions in relation to the Single Electricity Market should, to the extent that the person exercising the function believes is practical in the circumstances, be transparent, accountable, proportionate, consistent and targeted only at cases where action is needed."

3.8 The Minister may issue "general policy directions" to the Commission (s. 10A of the 1999 Act as inserted by s. 7 of the Energy (Miscellaneous Provisions) Act 2006 (the "2006 Act")), but he is not entitled to do so when this would materially affect, or would be likely to materially affect, the Single Electricity Market or in respect of specific operators or in relation to "the performance of the functions of the Commission in relation to individual energy undertakings or persons". See s. 10A(6) of the 1999 Act, as inserted by s. 11 of the 2006 Act. It does not appear that the Minister has issued a policy direction under s. 10A in relation to bidding practices in the Single Electricity Market.

3.9 Thus, in substance, the SEM is, as pointed out, in theory, two separate committees of, respectively, the Commission and the Utility Regulator, but consists of the same personnel and operates as a single body. Having analysed the overall structure of the regulatory bodies, it is next necessary to turn to the manner in which operators in the Republic of Ireland are licensed.

3.10 Under s. 14 of the 1999 Act, certain activities (including electricity generation) require a licence from the Commission. Viridian and Endesa, as has been pointed out, hold such licences.

3.11 Participating electricity generators in Ireland are required, under the terms of Condition 14 (contained in Part II, Section C) of their electricity generation licences to comply with the Trading and Settlement Code. The SEM Committee is responsible for governance of the Trading and Settlement Code on behalf of the Regulatory Authorities. Condition 15 of the Licence (contained in Part II, Section C of the licence) sets out the bidding rules which Viridian and Endesa must follow when they offer wholesale electricity for sale.

3.12 It follows that the key condition of the licence which governs the bidding process is to be found in Condition 15 which is in the following terms:-

"<u>Condition 15: Cost-Reflective Bidding in the Single Electricity Market</u>

> 1. The Licensee shall ensure that the price components of all Commercial offer Data submitted to the Single Market Operation Business under the Single Electricity Market Trading and Settlement Code, whether by the Licensee itself or by any person acting on its behalf in relation to a generation unit for which the licensee is the licensed generator, are cost-reflective.
>
> 2. For the purposes of this Condition, the price component of any Commercial Offer Data shall be treated as cost-reflective only, if, in relation to each relevant generation unit, the Schedule Production Cost related to that generation unit in respect of the Trading Day to which the Commercial Offer Data submitted by or on behalf of the Licensee apply (*sic*) is equal to the Short Run Marginal Cost related to that generation unit in respect of that Trading Day.
>
> 3. For the purposes of paragraph 2, the Short Run Marginal Cost related to a generation unit in respect of a Trading Day is to be calculated as:

(a) the total costs that would be attributable to the ownership, operation and maintenance of that generation unit during that Trading Day if the generation unit were operating to generate electricity during that day;

minus

(b) the total costs that would be attributable to the ownership, operation and maintenance of that generation unit during that Trading Day if the generation unit was not operating to generate electricity during that day.

the result of which calculation may be either a negative or a positive number.

4. For the purposes of paragraph 3, the costs attributable to the ownership, operation and maintenance of a generation unit shall be deemed, in respect of each relevant cost-item, to be the Opportunity Cost of that cost-item in relation to the relevant Trading Day.

5. The Commission may publish, and from time to time by direction amend, a document to be known as the Bidding Code of Practice, which shall have the purposes of:

(a) defining the term Opportunity Cost;

(b) making provision, in respect of the calculation by the licensee and other generators of the Opportunity Cost of specified cost-items, for the treatment of:

(i) the costs of fuel used by generators in the generation of electricity;

(ii) the value to be attributed to credits issued under the Emissions Trading Scheme established by the European Commission;

(iii) variable operational and maintenance costs;

(iv) start-up and no local costs; and

(v) any other costs attributable to the generation of electricity, and

(c) setting out such other principles of good market behaviour as, in the opinion of the Commission, should be observed by the Licensee and other generators in carrying out the activity to which paragraph 1 refers.

6. The Licensee shall, in carrying out the activity to which paragraph 1 refers, act so as to ensure its compliance with the requirements of the Bidding Code of Practice and any directions issued under it."

3.13 It will be seen that a series of connected requirements are to be found in Condition 15. In order to understand those provisions, it is necessary to say something briefly about the way in which the bidding process actually works. Leaving aside, for the moment, how bids are to be calculated, it is my understanding (and I did not understand the parties to disagree) that bidding takes place on a daily basis. In other words, each operator puts in for each day a bid as to the price at which it offers to sell electricity into the market. It is an important aspect of that scheme that operators are not at large as to the price at which they "bid in" to the scheme. Rather, the method of calculating the price is fixed in accordance with the licence and certain other provisions to which it will be necessary to turn shortly. However, it seems that for each half-hour period within a day, a separate consideration is given to the bids that are to be accepted. Obviously, the amount of electricity required varies from time to time throughout a day, and indeed, from day to day and time of year to time of year. Thus, the amount of electricity which is needed will vary, depending on demand. It follows that the amount of electricity which has to be actually "purchased" into the system will correspondingly vary. On the basis of the bids made for each day, it is possible to rank the bidders in ascending order of price. The capacity or amount of electricity which each bidder can make available at that price is also known (it is possible for a bidder, as I understand it, in certain circumstances, to bid in different quantities of electricity at different prices, but this variation is not material to the issues which I have to decide). Obviously, at times of higher demand, it is necessary to go further down the list of bidders to ensure a sufficient supply to meet that demand. At times of low demand a lower number of (obviously cheaper) suppliers are required to meet the relevant demand.

3.14 However, it is important to point out that the price actually paid to all operators in respect of any half-hour period is the same. Thus, if, at a time of high demand, it is necessary to go very far down the list in order to meet that demand, then the price generally paid will be higher, reflecting the price bid in by the most expensive operator whose supply is, nonetheless, necessary to meet that demand. For each half-hour period, there is, therefore, a marginal price reflecting the price of the most expensive operator whose supply is, nonetheless, necessary to meet the anticipated demand in that period. Operators whose prices are less than the marginal price for any half-hour period will, of course, gain an added benefit in that they will be paid over and above their bid in price being the difference between the marginal price and their own bid in price. As I understand it, this difference is referred to as the intra-marginal rent.

3.15 In addition, it may be necessary to "tweak" the amount of electricity actually supplied. While the half-hourly basis of determining the marginal price is based on, doubtless, reasonably accurate estimates of the amount of demand for the half-hour in question, it may well be that actual demand turns out to be different so that either some of those who were successful in the bidding process for that half-hour are not actually required, or those who failed in the bidding process for that half-hour may, nonetheless, be called on to supply. There are specific provisions as to how the costs associated with both the lack of being called on when successful in the bidding process and being called on when unsuccessful in the bidding process are to be dealt with.

3.16 There are, doubtless, further subtleties to the process which are not set out in that brief discussion, but same seems sufficient for the purposes of dealing with the issues which arise in this case. However, it will be obvious from that description that a key element of the payment of any operator will be the price at which that operator bids in to the process. That price determines its ranking for the purposes of being called on for supply in the first place. That ranking generally, in turn, determines the price paid. As pointed out earlier, the system is not a free bidding system, but rather is one where the price to be bid in is determined by the terms of the licence. Against that background, it is necessary to return to the text of Condition 15 which I have already cited. However, before doing so, I should also note in passing that further payments are made to operators under the scheme which are designed to

ensure that there is adequate generating capacity available for the island of Ireland. The last thing that any effective system would want is that there has to be electricity outages because demand exceeds available supply. I will briefly return to this issue in due course.

3.17 However, returning to Condition 15, it is first of relevance to note that the "Commercial Offer Data" referred to at Condition 15.1, is, in effect, the detailed "bidding in" price. In substance, Condition 15.1 requires that the price component of the "Commercial Offer Data" is to be "cost-reflective".

3.18 However, Condition 15.2 defines "cost-reflective" in terms which require the "Commercial Offer Data" to be equal to "Short Run Marginal Cost". Thus in substance, the combined effect of Conditions 15.1 and 15.2 require that the amounts bid in are equal to the "Short Run Marginal Cost".

3.19 However, "Short Run Marginal Cost" is itself a defined term under Condition 15.3 which provides that same is to be calculated by subtracting the total cost that would be attributable to the ownership operation and maintenance of the plant if same was not operating from the total costs attributable to the ownership, operation and maintenance of the same plant if it was operating.

3.20 However, that requirement is, in turn, qualified by Condition 15.4 which requires that, for the purposes of 15.3, the relevant costs are to be deemed "in respect of each relevant cost item, to be the Opportunity Cost of that cost item…". In addition, Clause 15.5 permits the Commission to publish a Bidding Code of Practice ("BCOP") for the purposes of defining the term "Opportunity Cost" and making provision in respect of the calculation by generators of the Opportunity Cost of specified cost items.

3.21 In substance, therefore, Conditions 15.1 to 15.4 require that the bidding price be the difference between the Opportunity Cost of all relevant items in the event of the plant operating less the Opportunity Cost of the same items in the event of the plant not operating. Opportunity Cost is not itself defined in the licence, but the licence itself does permit Opportunity Cost to be both defined in the BCOP and requires same to be calculated in accordance with the provisions of the BCOP. In that context, it is necessary to turn to the BCOP.

3.22 First, it should be noted that para. 5 of the BCOP provides that words and expressions used in the BCOP are to have the same meaning (unless the context requires otherwise), as in the license.

3.23 The definition of "Opportunity Cost" and its calculation are addressed in paragraphs 6 to 12 of the BCOP. Paragraph 6 provides that, when calculating the Short Run Marginal Cost, constituent cost-items are to be valued at their "Opportunity Cost". This essentially repeats the relevant Licence provision. It further provides that a reasoned explanation of the calculation of opportunity cost must be capable of being furnished to the Commission (or the Utility Regulator) on request.

3.24 Paragraph 7 of the BCOP provides as follows:-

> "The Opportunity Costs of any cost-item shall comprise the value of the benefit foregone by a generator in employing that cost-item for the purposes of electricity generation, by reference to the most valuable realisable alternative use of that cost-item for purposes other than electricity generation."

3.25 Paragraph 8 of the BCOP addresses "the value of the benefit foregone". Paragraph 8 reads:-

> "In calculating the value of the benefit foregone in employing a cost-item for the purposes of electricity generation, the following principles shall, unless it can be demonstrated to the satisfaction of the Authority or the Commission (as appropriate) that there is good cause not to, be applied:
>
> (i) where there exists a recognised and generally accessible trading market in the relevant cost-item, the Opportunity Cost of that item should reflect the prevailing price of the cost-item, which may be for immediate or future delivery or use as appropriate to the circumstances of the relevant generator, having regard to:-
>
> (a) costs the relevant generator would incur in offering that cost-item for sale, or acquiring that cost-item, on a recognised and generally accessible trading market;
>
> (b) reasonable provision for the variability of the prevailing price of a cost-item on a recognised and generally accessible trading market;
>
> (ii) where no recognised and generally accessible trading market exists in the relevant cost-item the Opportunity Cost of that item should reflect the costs which would be incurred by the relevant generator in replacing that cost-item; and
>
> (iii) reasonable provision for increased risk to plant and equipment as a result of the operation of a generation set or unit may be included."

3.26 The real dispute between the parties derives from the proper interpretation of certain aspects of Condition 15 of the licence and the relevant provisions of the BCOP. However, while dealing with the appropriate regulatory regime, it is also convenient to deal with the statutory basis for the scheme of carbon allowances and the levy.

3.27 Directive 2003/87/EC establishes a framework for capping the amount of greenhouse gases which may be emitted by certain activities within the EU. It is not necessary for the purposes of these proceedings to examine the directive in detail except to say that it requires electricity generators which are subject to the regime, such as Viridian and Endesa, to obtain allowances to cover the greenhouse gases which are produced when a relevant electricity generation station is operated.

3.28 Such allowances can be purchased on the open market, but a large proportion were required to be issued free to operators. Article 10 of Directive 2003/87, as originally adopted, provided that, for the years 2005-2007, all Member States were to allocate 95% of allowances "free of charge" and that this figure was to be 90% for the years 2008-2012, ending on 31st December, 2012.

3.29 Those electricity producers which are subject to the regime, as major producers of greenhouse gases, are among the beneficiaries of these free allowances. I agree with the submissions of counsel for Viridian and Endesa that this was an explicit choice of the Community legislature, and that Ireland is not free to depart from this decision.

3.30 Directive 2009/29 amends Directive 2003/87 so as to provide that, from 1st January, 2013, allowances are to be allocated by

auction. However, the free allocation must continue until the end of 2012; see in particular Article 3 of Directive 2009/29. I now turn to the levy.

3.31 The 2010 Act was signed into law by the President on 30th June, 2010, and came into force immediately. It requires electricity generators (such as Viridian and Endesa) to pay a levy, from 1st July, 2010, based on the amount of emission that they produce ("the Levy").

3.32 The 2010 Act inserts new sections 40B to 40M into the 1999 Act. Section 40B defines the Levy by requiring generators to pay to the Commission a levy based on carbon emissions calculated by multiplying the amount of emissions "E" of each operator (in tonnes of carbon dioxide equivalent) by the average price "P" of the allowance for one tonne of carbon dioxide equivalent, further multiplied by a percentage "X" which currently stands at 65% but can be varied.

3.33 It is accepted that Viridian and Endesa cannot generate electricity at their plants without emitting greenhouse gases. Accordingly, the levy means that, for every tonne of carbon dioxide equivalent used by Viridian and Endesa in generating electricity, they must surrender one carbon allowance under the emission trading regime (which may have been purchased or allocated for free) and also pay 65% (at present) of the market price of a carbon allowance for one such tonne.

3.34 Against the background of that statutory and regulatory regime, it is next necessary to turn to a brief consideration of the facts. I have already outlined the practical way in which the bidding in process works. It is, therefore, unnecessary to go into any great detail on the facts save in two respects.

3.35 First, the form of the standard licence issued to operators such as Viridian and Endesa was preceded by a detailed process conducted by the Commission. Various consultation documents and the like were circulated and meetings with interested parties held. It is said on behalf of the Commission that the process concerned provides the context in which the licences were entered into. That much is undoubtedly true. It is, however, further said on behalf of the Commission that that context is of significance in approaching questions concerning the interpretation of the licences. That question is more controversial. However, it is necessary to set out a brief history of that consultation process which forms the backdrop to the argument as to the extent to which it is appropriate to have regard to that process in the controversial issues of construction which lie at the heart of these proceedings.

3.36 Second, it will be recalled that an additional limb of the case which Viridian and Endesa seek to make concerns the matters taken into account, it is said, by the Commission in deciding to issue the Directions. That issue turns on various communications which were put in evidence. As pointed out earlier, one of the consequences of the model of bidding which I have outlined is that all of the Opportunity Costs (calculated in accordance with the BCOP) of production are to be included on the basis of the difference between such Opportunity Costs when production takes place and when it does not. As is also clear from the scheme of carbon allowances, a significant portion of those carbon allowances were given out free for the period up to the end of 2012. However, those carbon allowances, even though given out free, have a value for they are necessary to allow the legitimate use of carbon. As pointed out earlier, there is a market in carbon allowances. Therefore, on a day to day basis, any particular volume of carbon allowances can, instead of being used for, for example, the burning of fossil fuels in the generation of electricity, simply be sold on that market. As pointed out earlier, the basic building blocks of the "bidding in" regime require the calculation of the Opportunity Cost of any item which is taken, in accordance with para. 7 of the BCOP, to be the value of the benefit foregone by using that item by reference to the most valuable realisable alternative use of same. Paragraph 8 requires that, where there is a recognisable market in the item in question, such alternative use value be valued in accordance with the current cost in that market. The combined effect of both of those matters is that the use by an electricity generator of a carbon allowance is taken to have an Opportunity Cost being the value, at the time in question, of the relevant amount of carbon allowances on the market for carbon allowances. Put colloquially, an electricity generator has the choice of using any particular unit of carbon allowance to actually produce electricity or to sell that carbon allowance on the market. If a relevant generator chooses to produce electricity, then that same generator loses the opportunity of selling the carbon allowance on the market at its going price. This will be so even though the unit of carbon allowance in question was obtained free. In other words even though the generator received it free, the generator could sell it on the market and make a profit by so doing. By not taking that option and using the carbon allowance in question to generate electricity, the generator in question incurs an Opportunity Cost being the loss of the opportunity to sell the carbon allowance in question on the market.

3.37 It, therefore, followed that the regime put in place by the Commission, acting through the SEM, for bidding in prices into the common electricity market in Ireland allowed, by its express terms, a generator to include the benefit foregone by using a carbon allowance in its bidding in price with that benefit foregone being calculated by reference to the market price of the carbon allowance in question at the relevant time. In substance it followed that generators were entitled to include the current value of carbon allowances in their bidding in price even though they might not, in many cases, have paid anything for the carbon allowance in question. It is clear, as I have pointed out, that that was considered in government and regulatory circles, to be a windfall gain. It is also clear that there was a desire to see if all or some of that windfall gain could be clawed back.

3.38 In that context, there were various communications between interested parties on the governmental and regulatory side which forms the basis of the allegation on behalf of Viridian and Endesa that inappropriate considerations were taken into account by the Commission in issuing the Directions. I, therefore, turn to the review of the facts which will, for the reasons already pointed out, concentrate on the consultation process and the communications to which I have just referred.

4. The Facts

4.1 The notion of opportunity cost as a means of determining the Short Run Marginal Cost was developed by the Commission in consultation with generator licensees principally during the period of 2006 and 2007 through a series of consultation exercises. The first such exercise was the consultation paper entitled "Market Power Mitigation in the SEM" (AIP/SEM/02/06) which was published in February, 2006. The rationale for bidding in Short Run Marginal Cost was further explained in a consultation paper entitled "Market Power Mitigation in SEM – Bidding Principles and Local Market Power" (AIM/SEM/73/06) which was issued in July of the same year. Thereafter, a decision paper entitled "Bidding Principles & Local Market Power: Decision Paper" (AIP/SEM/116/06) which was published on the 8th September, 2006, dealt with the issue of real resource costs for the purposes of calculating Short Run Marginal Cost.

4.2 On foot of these a consultation draft of the Bidding Code of Practice (Proposed Bidding Code of Practice in the SEM – Consultation Paper (AIP/SEM/07/198)) was published on the 18th May, 2007.

4.3 Condition 15 was thereafter incorporated into all relevant licences and the BCOP was made on the 30th July, 2007, which was published as "The Bidding Code of Practice – A Response and Decision Paper" (AIP/SEM/07/430).

4.4 The SEM Committee's view on carbon allowances followed in a paper entitled "Bidding the Opportunity Cost of Carbon Allowances

– A Decision Paper" (SEM/08/32) dated the 27th March, 2008. A further paper entitled "The Treatment of Carbon" (AIP/SEM/123/06) was issued on the 15th June, 2008.

4.5 Prior to the introduction of a carbon levy concerns were expressed and proposals discussed by members of staff within the Department of Communications, Energy and Natural Resources (the "Department"), amongst others, over what was viewed as a windfall gain by electricity generators due to the free allocation of carbon allowances and their subsequent bidding in. Attention will now turn to that series of discussions and correspondence.

4.6 In email correspondence between the Department and the Commission dated the 18th February, 2010, the issue of the forthcoming Carbon Revenue Levy Bill was discussed and in particular the potential bidding in of the Levy by generators. The Department expressed the view that the Levy should not impact upon system costs, provided the SEM Committee agrees with their interpretation that the Levy could not be considered an additional short run cost. The email concluded with a note that further meetings and discussions would be required to settle the issue.

4.7 The documentation included an internal email dated the 18th March, 2010, which enclosed a note on the Carbon Levy for the Committee, wherein it appears that attempts were made to interpret the principles so as to support the proposition that the Levy could not be bid in. It was noted that there is a divergence of views on the issue of the carbon levy and that there was a possibility that generators would provide alternative views, namely that the Levy could be bid in. The proposition that the Levy could arguably be included or excluded was ventilated in further email communications within the Commission between the 18th and 19th March, 2010, which resulted in the production of an updated SEM Committee Memo dated 19th March, 2010, addressing the proposed formula to be implemented following the introduction of the carbon levy in the Republic of Ireland.

4.8 The SEM Committee Meeting minutes dated the 25th March, 2010, record that the Committee was updated on the proposed carbon windfall tax. It was thereafter agreed that some modification of the BCOP, or a transparent guidance note for industry participants on the Committee's interpretation of the BCOP would likely be required so as to ensure that the tax was not passed through, which would be contrary to the government's intention in introducing the Levy.

4.9 The Commission considered proposals by Ignacio Pérx-Arriaga, of the Committee, which outlined alternatives to the carbon levy in late March and early April 2010 but these were ultimately rejected in a formal response sent by letter dated 12th May, 2010. The Commission indicated that it would solicit legal advice on the appropriate process to follow regarding the potential modification to the BCOP or a transparent guidance note which would clarify to industry participants that the code does not allow the Levy to be included in generators' bids. It was noted that the Committee's approval would be sought prior to the publication of either the modification or the guidance note.

4.10 The SEM Committee Meeting minutes dated 27th May, 2010, record that the Committee considered the Carbon Revenue Levy Bill, legal advice on the matter and a letter dated the 10th May, 2010, from the Department of Communications, Energy and Natural Resources setting out the progression of the Bill through the legislative process. The letter noted that one of the objectives of the legislation was that the Levy would not affect the operation of the wholesale electricity market, given that generators would still be including the same opportunity cost value for their carbon in their bids as they then did. It continued by stating that the proposed Levy would simply take back some of the windfall proceeds that generators earn from the inclusion of carbon in their bids before concluding that the issue of the composition of generators' bids is a matter solely for the SEM Committee.

4.11 The minutes record that the while the Committee were mindful of their previous decision not to change the BCOP to allow generators to bid less than the full opportunity costs of card in light of the view that it was a matter for government to seek to recover windfall gains. The Committee nevertheless determined that, in line with its principal statutory objective, consumers should not have to pay for the cost of the Levy as they were already paying for the opportunity costs of carbon through end-customer tariffs.

4.12 The Committee responded to the Department's letter on the 17th June, 2010, setting out their position following their meeting, noting that the structure of the Levy was liable to legal challenge and resolving to keep the Department informed of any developments.

4.13 The Electricity Regulation (Amendment) (Carbon Revenue Levy) Act 2010 was implemented into law on the 1st July 2010.

4.14 By a letter dated 15th July, 2010, Endesa wrote to Mr. Paul Bell of the SEM Committee Market Monitoring Unit informing that they intended to include the cost of the Levy in their offers as of the 19th July, 2010. In a response dated the 29th July, Mr. Bell, citing the minutes from May 2010, stated that the Committee had taken the view that final consumers of electricity already pay for the cost of carbon within the end-consumer tariffs and should not in addition have to pay for the cost of the Levy. Accordingly, Endesa were advised that should they fail to respect this position the Committee would exercise its powers as necessary to protect the interests of final consumers.

4.15 In its response Endesa, amongst other things, noted that at that point no decision of the SEM Committee prohibiting the inclusion of the cost of the Levy in generator offers had been published nor had any decision to modify the BCOP to disallow the inclusion of the cost of the Levy been publicised. In light of which Endesa indicated their intention to include the cost of the Levy in its offers as of the 10th September, 2010.

4.16 A draft direction by the Commission for Energy Regulation taken by the SEM Committee pursuant to s. 8A(4) of the Electricity Regulation Act 1999 was thereafter emailed to Endesa on the 2nd September, 2010, directing that the price components of all Commercial Offer Data submitted do not include any amount in respect of the Levy paid pursuant to s.40D of the 1999 Act as amended by the 2010 Act. A detailed statement of reasons was annexed to the draft direction. Endesa replied disputing the Committee's vires to make such a direction, questioned its rationale and drew attention to and placed reliance on the terms of Condition 15 of its licence agreement which it said could not be reconciled with the prohibition of the inclusion of the Levy. Endesa concluded that noting that as the draft direction amounted to a revision of the Licence and the BCOP the Committee was obliged to engage in a consultative process with market participants. It also stated that it intended to include the cost of the Levy as from 1st October, 2010.

4.17 By letter dated 27th September, 2010, the Commission issued a Direction pursuant to paragraph 7 of condition 15 contained in part II, section C for the generation licence granted on the 5th January, 2009, to Endesa which was in substantially the same terms as the draft direction. In addition, however, the Committee noted the criticisms of Endesa which followed the circulation of the draft and in particular the commercial burden of the prohibition on the inclusion of the Levy and transparency concerns over the decision making process. The Direction addressed these points by noting that Endesa was the only generator who had indicated its intention

to include the Levy with the implication that the Direction would not have any wider impacts on bidding behaviour. While it was also recognised that the inability to include the Levy may prove financially burdensome for some generators, this was nevertheless attributed to the imposition of the Levy and was not as a result of either the condition 15 or the BCOP.

4.18 On the 30th September, 2010, Viridian wrote to the SEM Committee addressing the minutes of the 30th May. They expressed the view that the position of the Committee was inconsistent with the Licence and the BCOP and noted that, in the absence of a reasoned direction, it was their intention to include the cost of the Levy from the 8th/9th October, 2010. In their response of the 4th October, the Committee set out their view of condition 15 and the BCOP and noted that, should Viridian fail to confirm that it would refrain from including the Levy, it would likely issue a direction to Viridian under condition 15(7) of the Licence requiring them so to do.

4.19 In a letter dated 5th October, 2010, Viridian responded to this correspondence from the Committee. Viridian noted that as no formal direction had issued it intended to include the costs of the Levy in Commercial Offer Data from the 9th October, 2010. The rationale was thereafter set out.

4.20 On the 8th October, 2010, the Committee issued a Communication on the inclusion of costs of the carbon levy in commercial offer data within the SEM. On foot of indications from a number of generators that they intended to include the costs of the Levy in their Commercial Offer Data and their submissions, the Communication set out the Committee's view on the correct interpretation of paragraph 3 of condition 15 and on the application of the SEM Generator Licence and the BCOP generally, namely that the Levy should not be included. The Committee thereafter proposed to insert a provision in the BCOP to that effect.

4.21 On the same date, Directions were issued to the Viridian companies by the Commission which terms were substantially identical to those issued to Endesa. The respective directions naturally differed in their address and account of the series of correspondence between Viridian and Endesa and the Commission. One point of difference was Viridian's concern that other generators would not bid in the cost of the Levy which would then prompt Viridian to issue formal complaints against them. The Committee acknowledged that there may be *bona fide* uncertainty in the market as to the correct application of the Levy and accordingly resolved to take appropriate steps to publicise the position with market participants.

5. The Standard of Review

5.1 The starting point has to be to recall that what I am asked to do in these proceedings is to quash the Directions given by the Commission. The Directions are based on a view which the Commission holds as to the proper interpretation of the licenses and the BCOP. The question which arises under this heading is as to whether it is sufficient for Viridian and Endesa to establish simply that the Commission is wrong in its interpretation or whether, as the Commission argues, it is necessary that the Commission's interpretation, which is implicit in the Direction, is irrational in *O'Keeffe* terms (see *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39).

5.2 Viridian and Endesa place reliance on the long line of authorities in the environmental field which make it clear that documents in that field which affect the rights and obligations of parties are to be objectively construed. Such authorities include the cases of *Readymix Éire* (unreported judgment of the Supreme Court, 30th July, 1974); *Tennyson v Dun Laoghaire Corporation* [1991] 2 I.R. 527; *Gregory v Dun Laoghaire Rathdown County Council* (unreported judgment of the Supreme Court, 28th July, 1997); and *Kenny v Dublin City Council* [2009] IESC 19. Counsel for the Commission does not dispute that line of authority as representing the law in relation to the proper approach to the construction of documents such as planning permissions, development plans, Environmental Protection Agency Licenses and the like. The dispute, however, is as to whether that line of authority governs a situation such as that with which I am concerned in these proceedings.

5.3 The Commission places reliance on cases such as *R. v. Director General of Electricity Supply Dispersal Prisons and Ors* (Times Law Reports 18 December 1995) from which, it is said, the United Kingdom courts can be seen to have developed a principle that distinguishes between what is described as "hard edged" and "soft edged" questions of construction. On the basis of this principle, it is said that where the construction of a document such as a licence may be said to be "hard edged" then the court must construe the document objectively and apply it accordingly. On the other hand where the document may be said to have soft edges (that is where it is capable of more than one reasonable construction), then it is said that the regulator is free to adopt a reasonable construction even if there is another reasonable construction open. In those circumstances it is argued that the court should defer to the interpretation of the regulator provided it be reasonable and even if the regulator's interpretation might differ from the interpretation which the court would, on balance, put on the document in question. Counsel for Viridian and Endesa points out, correctly so far as I am aware, that that line of authority has never been the subject of judicial consideration in this jurisdiction. It follows that it is necessary for me to consider from first principles whether such an approach forms part of Irish law.

5.4 It is, perhaps, important to start by a consideration of the reasons underlying the doctrine of judicial deference. Why do courts defer to decision makers in the sense of declining to overturn the determinations of those decision makers except in particular and clearly defined circumstances? It seems to me that there are two principal bases on which a court should defer to a decision maker. The first, and perhaps most important, is that the law gives to the decision maker in question the legal entitlement to make the decision under challenge. In this context the law may be either public law or private law. In the public law field, a statute may confer the power of making a certain category of decision in a particular statutory regime on a body created by the relevant statute or on whom the power is expressly conferred by the statute in question. Likewise, in the private field, persons may agree that decisions of a certain type are to be made by arbitrators or, for example, disciplinary bodies designated in the rules of sporting organisations. In both of those cases the parties have contracted that decisions of a particular type will be taken by a designated person or body. (The rules of a sporting organisation are, of course, a contract between all members of the organisation in question). The reason why the courts defer to decision makers across a whole range of areas is, therefore, because the law confers the decision making power in question on the relevant person or body. Public law gives the power to make planning judgments to planning authorities, private law gives to the disciplinary body designated by a major sporting organisation the power to determine breaches of the rules of the sport concerned. The primary reason why the courts should be slow to interfere in the decisions of such bodies (even if the court considers them to be wrong) is because the law has decided that it is the relevant body and not the courts which is to make the decision in question. The courts are only concerned, therefore, with the lawfulness of the decision and not with whether it is correct.

5.5 There is, in addition, perhaps a second basis for deference which stems from the nature of the decision in question. Where, and to the extent that, a decision of an expert body requires the exercise of a high level of expertise (which the courts do not possess) in a particular field, then there may be an added reluctance on the part of the courts to attempt to "second guess" the expert judgment of the body concerned. However, that additional level of deference only applies to those aspects of the decision making process in question which involve the exercise by the expert body of its particular expertise.

5.6 However, it seems to me that the first port of call in any analysis of the proper approach of the courts to a controversy arising

from a decision of a relevant body is to analyse what type of decision is in question and what the legal basis for the decision maker having the power to make the decision in question actually is.

5.7 A planning authority who believes that a development has been carried out in contravention of a planning permission is, of course, entitled to make a decision to bring proceedings before the courts seeking enforcement in one of a number of forms. However, the planning code does not give any special status to the view which a planning authority may take of the terms of a planning permission already granted. The jurisdiction to decide whether there has, in fact, been a breach of the Planning Acts is conferred on the courts whether the proceedings be civil or criminal. That jurisdiction involves the courts deciding on the facts but also may involve the courts in an exercise of interpreting relevant planning documents so as to decide whether the facts disclose a breach of the Planning Acts. The point is that relevant planning bodies are, as a matter of law, given the power to decide on the content of development plans, planning permissions and the like. Those same bodies are not given the power, as a matter of law, to definitively interpret those documents. It follows that, when a planning authority decides to grant or refuse a planning permission or determine the content of a development plan, the relevant authority is exercising a role which the law confers on it and not on the courts. It follows, in turn, that the courts will not interfere with such a decision unless it is legally wrong by reason of procedural mishap, wrong considerations or on the basis of *O'Keeffe* irrationality. On the other hand, a decision as to whether there has been a breach of a planning permission is not a power given to planning authorities, as a matter of law, but rather is a power conferred on the courts. It follows that, in those circumstances, the courts do not give any particular weight to the views of the planning authority although if it be a party to proceedings (such as the applicant for an order under s. 160 of the Planning and Development Act 2000 (as amended) or the prosecuting authority in summary criminal proceedings), the court will obviously listen to any arguments and evidence put forward. However, the interpretation of any relevant planning documentation that may be material to a decision as to whether there has been a breach of the planning code is a matter for the court because the jurisdiction to decide whether there is a breach is given to the courts and no jurisdiction to interpret such documents in a binding way is given to planning authorities.

5.8 It seems to me to follow that the key question that needs to be asked with some precision is as to the exact decision making role which the law confers, in the relevant context, on, on the one hand, a non-court decision maker and, on the other hand, the courts. If the law confers the particular decision making power on a body other than the courts, then it follows that the courts must accord a significant level of deference to the determinations of the decision maker in question. If, on the other hand, no such decision making power is conferred on the person or body in question, then the courts should decide all relevant issues of law and fact necessary to determine the case. It is, in my view, crucially important to recall that the fact that a decision maker may have significant powers in a particular area (for example a regulator within the field of regulation entrusted to the regulator in question) does not necessarily mean that every decision taken by such a regulator is a decision which the law confers on the party in question. The analysis of the position in planning is illustrative of that point. The law confers, to a large extent, decisions on the merits of the grant or refusal of planning permissions and the terms on which same might be granted, on planning authorities. The law does not confer any particular status on the interpretation which a planning authority might place on a planning permission once granted.

5.9 It seems to me, therefore, that the starting point for a consideration of whether the court should defer to a decision maker (and thus impose a test of *O'Keeffe* irrationality) or should make its own assessment (and thus impose a test of correctness) depends on whether the law confers the decision making role on that precise question on either the decision maker or the courts.

5.10 The real question as to the standard of review depends on analysing the legal basis for making the decision under challenge.

5.11 I am not sure that the English authorities cited on behalf of the Commission go quite as far as the Commission suggests. However, if, and to the extent that, there may be a suggestion that the law in England and Wales requires the courts to accord deference to a regulator in the interpretation of licenses granted by that regulator where there may be more than one reasonable interpretation open as to the meaning of the licence in question, then I do not regard such a principle as being persuasive as forming part of the law in this jurisdiction. Rather, in my view, the question which the court must ask itself is as to whether, in all the circumstances, the law confers on the regulator in question any role in interpreting its own measures. If the law does confer such a role then, of course, the courts must accord the views of the relevant regulator in exercising its decision making power as to the interpretation of its own measures all appropriate deference. If, however, the law does not confer such a role, then I do not see any basis for the court according deference to the views of the regulator in question for the underlying basis for the giving of deference in the first place is not present.

5.12 Finally, it is important to note that the basis on which the law may confer a particular decision making role on a specified decision maker can arise in a number of circumstances. First, the substantive law (whether public or private) can directly confer such a role on a particular decision maker. However, the manner in which the decision maker exercises the role in question can, in my view, in itself reserve to the decision maker some degree of further flexibility of interpretation or application. Thus, the terms of a permission or licence may be such as allow, either expressly or by necessary implication, some further role to the decision maker. The substantive law may, of course, limit the extent to which it may be permissible for the decision maker to retain such power. The so called "Boland Principles" in the planning field is a case in point (see *Boland v An Bord Pleanála* [1996] 3 I.R. 435). Precisely because the planning process involves significant public participation, it has come to be accepted that a planning authority, in granting a planning permission, cannot retain to itself the right to make further decisions as to the detail of the development concerned except where the matters which require further consideration meet the Boland test of being genuinely matters of detail rather than being matters of significant substance. A planning authority may, on that basis, for example, retain the right to agree a colour scheme for the external painting of a building but not the right to allow for the addition of a significant number of extra storeys to the same building. However, that limitation stems from the overriding legal regime within which the planning authority operates. There is no reason in principle why a document, such as a licence, by which a statutory body exercises a public law power, cannot retain to the statutory body the power to make further decisions or interpretations in accordance with the provisions of the licence in question. It is only if the retention of such added flexibility is in itself in breach of the overriding statutory power being exercised that the retention of such flexibility would be impermissible. Provided, therefore, that the retention of flexibility is itself lawful having regard to the overall statutory regime, there is no reason why a licence, in its terms, may not retain some flexibility to the licence grantor.

5.13 It seems to me to follow that the question of the standard of review turns, therefore, on an analysis of the legal basis for the making of the decision in question. I turn to that issue.

6. The Legal Basis for the Decision

6.1 As pointed out it is necessary to analyse the legal basis on which the decision in question was taken. The Directions under challenge are stated, in their terms, "to have been made pursuant to paragraph 7 of Condition 15 contained in Part II, Section C" of the generation licence granted to respectively Viridian and Endesa. Viridian and Endesa are directed to the effect that they should "ensure that the price components of all Commercial Offer Data submitted…do not include any amount in respect of the levy…".

6.2 Condition 15.7 permits the Commission to issue directions "for the purposes of securing that the Licensee…complies with this

licence and with the Bidding Code of Practice". In passing it should be noted that the 1999 Act itself provides (in ss. 23, 24 and 25) for the giving by the Commission of directions or determinations. However, the directions under challenge in this case do not purport to be statutory directions of that type. Rather, the Directions are, on their terms, given as a result of the power contained in Condition 15.7 to which I have just referred. There does not seem to me to be any reason in principle why a licence of the type with which I am concerned cannot retain to the Commission power to give such directions. However, Condition 15.7 directions are required to be for the purposes of securing that the licensee complies with the licence and the BCOP. There is nothing in the language of that provision, in my view, which suggests that it confers any decision making power on the Commission to determine what is, in fact, necessary to comply with the licences. Obviously, as a matter of practicality, before the Commission would consider exercising its power of direction under Condition 15.7, the Commission would have to consider that there is a need to give a direction. However, there is nothing in the language of Condition 15.7 which suggests that the Commission is given any power of interpretation of the licence.

6.3 There are many other provisions of the licence which do confer a degree of discretion on the Commission. For example Condition 12.1 requires the licensee to provide the Commission with information "as the Commission may consider necessary in the light of the Condition or as it may require for the purpose of performing the functions assigned or transferred to it by or under the Act". Clearly a condition such as Condition 12.1 confers a specific decision making role on the Commission as to the level of information which it might reasonably require. There is a limitation. The information must be necessary in the light of the terms of the licence or the Act. However, provided that the Commission had a reasonable and rational basis for considering the provision of a certain type of information as being necessary for those purposes, it seems to me that a court should not second guess the Commission's view. The reason for this is that the licence itself expressly confers on the Commission an entitlement to decide what is "necessary".

6.4 The other terms of Condition 15 concerning the way in which the "bid in" price is to be calculated do not confer, in their terms, any discretion on the Commission save to the extent that the Commission is, of course, given power to publish the BCOP which affects the definition and calculation of Opportunity Cost and which is also entitled to set out principles of what is described as "good market behaviour" which, "in the opinion of the Commission" should be observed by all licensees. Again, in that respect, the licence itself makes clear that an express decision making power is retained by the Commission. If the Commission were to include in the BCOP measures designed to achieve appropriate good market behaviour, then the standard of review of any such decision on the part of the Commission would be reasonableness rather than correctness precisely because the licence itself gives to the Commission such a decision making power.

6.5 There is nothing in the terms of the licence, in my view, which confers on the Commission any power of interpretation over the terms of the licence itself. There are, as I have pointed out, certain provisions of the licence which do confer on the Commission a further decision making power in the areas specified. However, subject to the entitlement to include a definition of Opportunity Cost and measures designed to value Opportunity Cost, the bidding in provisions contain no such entitlement to make further decisions on the Commission. It will be necessary, in due course and as pointed out earlier, in approaching the question of the proper interpretation of Clause 15.1, to deal with an issue raised on behalf of the Commission which sought to place reliance on various consultation and other similar documents published by the Commission in advance of determining the precise regime to be applied and the extent to which those documents may be taken to be an aid to the construction of the licences. Subject to that point, it seems to me that there is nothing in the licences from which it can be inferred that the Commission is to be given any power of interpretation over the terms of the licences which is material to this case. In those circumstances it seems to me that, again subject to the point just mentioned, the proper standard of review is that of correctness. Against that background it is now necessary to turn to the question of the proper construction of Condition 15.1.

7. The Construction of Condition 15.1

7.1 At paragraph 105 of its written submissions the Commission proposed that the proper approach to the interpretation of the licence and the BCOP must, in broad terms, be to give meaning to the words in the light of their context. As a statement of general principle, I fully agree with that proposition. As has been pointed out in many judgments, the proper approach to the construction of any document which is designed to govern legal rights and obligations is to give effect to the document concerned having regard to the words used but taking the words used in context. In this regard the cases of *Analog Devices BV & ors v Zurich Insurance Company & anor* [2005] IESC 12 and *Danske Bank A/S trading as National Irish Bank v McFadden* [2010] IEHC 116 are of note.

7.2 One of the most important parts of context is to consider the nature of the document itself. Is it a contract, or a patent, or a planning permission or a set of relatively informal rules for a small organisation? As again has been pointed out in many judgments we do not likely assume that people make mistakes in important legal documents, most particularly those which may have been prepared with the assistance of legal advice and, at least in some cases, as a result of a detailed negotiating process. It is for that reason that the starting point for the proper construction of any document designed to affect legal rights has to be the text of the document itself. To do otherwise is to fail to give adequate recognition to the fact that the document is the means by which relevant parties have chosen to give effect to the determination of the rights and obligations concerned.

7.3 In the case of a negotiated contract, that proposition is obvious. However, it seems to me that, at least in general terms, the same principle applies to the grant by a statutory body of a licence. Electricity generators chose to become involved in the undoubtedly very substantial expenditure required to become suppliers in the Irish market on the basis of a licensing regime that is to be found in the standard form licence which is at the heart of these proceedings. The licence itself is a detailed document running to 71 pages with many definition sections and the like and bearing all the hallmarks of having been carefully drafted with legal assistance. There is every bit as much reason to treat the words used in a licence such as that with which I am concerned seriously, as there is to so treat the language which contracting parties choose to include in a negotiated written contract.

7.4 That is not to say that a slavish or pedantic attitude to the language used is to be adopted. All language has to be seen in context. The context is necessary to understand what a reasonable person, who had some legitimate interest in the meaning of the document concerned and who had a reasonable knowledge of the sort of matters which are addressed in the relevant document, would understand it to mean. All documents intended to effect legal rights and obligations are to be construed in that way. It is the meaning which a reasonable and informed person would give to the language used having regard to the context in which the document was produced including the nature of the document itself.

7.5 However, it is important to emphasise that it is to the meaning that such a person would give "to the language used" that the court must direct its mind. It is not for the court to take some broad view of the general context in which the document came to be finalised and to import into the document matters taken from that general context which the party or parties to the document have not chosen to include. If there are aspects of the general context which are intended to affect the legal rights and obligations concerned, then they should be included in the document itself. General context is an aid to construction but it is not an excuse for imposed amendment or the inclusion of what, in substance, are terms or provisions which are not to be found in the text.

7.6 There is no doubt that a detailed discussion process, involving the publication of documents and drafts, was quite properly engaged in by the Commission before it determined on the precise regulatory regime which was to be incorporated into the licences with which I am concerned. However, it must be remembered that it was the Commission who chose to formulate the standard form licence in the way in which it did. The terms having been so determined, generators chose to apply for licences on the basis that their licence would be in that form. The respective rights and obligations of all parties crystallised in a document of that form. In those circumstances what went before can only be an aid to the construction of the document where its terms may be ambiguous or (perhaps) clearly wrong and leading to absurd results.

7.7 In that context it is, in particular, appropriate at this stage to note the argument raised on behalf of the Commission to the effect that some of the documents which were published in advance of the finalisation of the regime and the terms of the licence might be taken to suggest that the scheme was a framework, thus implying a degree of flexibility. Indeed, there are some aspects of the standard licence which reflect such a flexibility. I have already referred to some of those as examples. There are others. However, where the terms of the licence, in respect of any particular aspect of the matters regulated by it, are precise and clear, it does not seem to me that any general indication of flexibility can require that such detailed and precise terms are construed in any way other than by applying the ordinary rules of construction to same.

7.8 It is in that context that it is necessary to turn to the text of Condition 15.1. As pointed out earlier, the provisions of Conditions 15.1 to 15.4 seem clear in their terms. The price components of the commercial offer data (that is the "bidding in" price) must be cost reflective (Condition 15.1), but the meaning of cost reflective is determined by Condition 15.2 which requires the bidding in price to be equal to the "Short Run Marginal Cost". Condition 15.3 in turn defines Short Run Marginal Cost as being the total costs of ownership, operation and maintenance if used for generation less the same costs if not so used. However, again, the relevant costs are deemed to be the Opportunity Cost of each cost item (Condition 15.4). Each of the terms used are, therefore, defined within the licence itself. Given that the licence goes to the trouble of defining those terms, then it seems to me that what those terms might be understood to mean by an informed observer is not a relevant consideration. Where parties chose to define terms in a legally effective document, then the terms mean what they say.

7.9 In substance, the combined effect of Conditions 15.1 to 15.4 is that the "bidding in" price is to be the difference between the Opportunity Cost of each cost item attributable to ownership, operation and maintenance in the event of the plant being used for generation on a relevant day less the Opportunity Cost of the same matters in the event that the plant was not so used. There seems to me to be no room for doubt as to that question of interpretation at least. Furthermore, the provisions of Conditions 15.1 to 15.4 incorporate (through Condition 15.5) the definition of Opportunity Cost from the BCOP and also permit the BCOP to determine the treatment of costs for the purposes of the calculation of Opportunity Cost.

7.10 I am concerned, of course, with whether the levy fits into that definition. There is no dispute on the facts but that the levy is directly proportionate to the amount of emissions and thus, is directly proportionate to the amount of electricity generated. There is no doubt, therefore, that on a day when there is no generation the levy is zero. It follows that, irrespective of the proper interpretation of Opportunity Cost in the light of the BCOP, the costs attributable to ownership, operation and maintenance on a day when no electricity is generated do not include the levy for the levy does not arise on such a day. The real question turns, therefore, on whether it can be said that the levy is a cost of ownership, operation and maintenance for the purposes of the licence on a day when electricity is generated. As pointed out, Condition 15.4 requires such costs "in respect of each relevant cost item" to be the Opportunity Cost as defined (by virtue of Condition 15.5) by the BCOP. In truth, the issue between the parties comes down to one of whether the levy meets that definition.

7.11 Opportunity Cost is defined in para. 7 of the BCOP in respect of any relevant cost item by reference to the value of the "benefit foregone of a generator in employing that cost item for the purposes of electricity generation, by reference to the most valuable realisable alternative use of that cost item for purposes other than electricity generation". Viridian and Endesa argue that the value foregone by the levy is the monetary value of the levy itself. In substance, the Commission's case is that the levy is not a cost item "for the purposes of electricity generation". That seems to me to be the real question. The term "Opportunity Cost" is defined in the BCOP. It, therefore, means what the Commission has chosen to define it as meaning. In those circumstances it does not seem to me that the detailed economic evidence tendered on both sides is of any real relevance. If a term such as Opportunity Cost were used without definition it might well be that, as an aid to its construction, the way in which skilled economists might view the term would be highly relevant to its interpretation. It would, in that context, be a technical term with a technical meaning which would inform how a skilled observer would interpret the words used. However, that is not the case here. The Commission has chosen to define the term in the BCOP. It, therefore, means what is says in the BCOP not what any external observer might take it to mean.

7.12 However, before leaving the expert evidence it is appropriate that I should comment on one aspect of the expert evidence tendered on behalf of the Commission. I should say that the evidence on which I am about to comment was not relied on by counsel for the Commission. However, in the course of the evidence the expert concerned expressed the view that, if it were to transpire that the construction urged on behalf of Viridian and Endesa were to prevail because of what was described as a "narrow legalistic approach", it would be regrettable. It does need to be made clear that giving proper force to legally binding arrangements entered into by any parties is a fundamental aspect of the rule of law. Regulators, no more than anybody else, are bound by the rule of law and are not above the law. What would truly be regrettable would be if regulators were allowed to depart from the legally binding arrangements which they have put in place simply because the consequences of those legally binding arrangements did not, any longer, suit the relevant regulator. As analysed in some detail earlier in this judgment it is, of course, open to regulators to build into any legally binding measures which they adopt (such as licences) any permissible degree of flexibility which they believe prudent. The courts will give full effect to any such legitimate flexibility within the terms of the legal measures adopted. However, to allow a regulator to depart from legally binding measures would be wholly inappropriate. It is important to re-emphasise that while evidence along the lines indicated above was before the court, the Commission did not in any way seek to assert that the case which it wished to make was based on inviting the court to depart in any way from the terms of the licence as properly interpreted. Rather, the Commission's case was that the proper interpretation of the licence as it stood (and in its context) was as I have indicated.

7.13 That the levy is a cost in the ordinary sense of that word can hardly be doubted. It is not possible to generate electricity using fossil fuels (as Viridian and Endesa do) without incurring the levy which is directly proportionate to the amount of fuel used and, thus, to the amount of electricity generated. The levy is, undoubtedly, therefore, a cost attributable to the operation of the plant. If the terms of the licence stopped at that point there could be little doubt but that the levy would be a cost of operation when the plant is used which is absent when the plant is not used and, thus, could be "bid in". However, Condition 15.4 requires that such costs be deemed to be the Opportunity Cost of any relevant cost item. The real question is as to whether the levy has an Opportunity Cost as defined in the BCOP for if it has not, then it is not the sort of cost which the definition in the licence and the BCOP allows to be included in the calculation.

7.14 However before addressing that core question I should note that much mention was made in the course of the hearing and in the

affidavit evidence filed (including the expert evidence) of terms such as real resource costs, public, private and social costs. That those terms formed part of the thinking of the Commission in determining on the regime to be applied cannot be doubted from that evidence, and the documents which were published by the Commission in the run up to a final decision being taken on the structure of the regime concerned. However, the important point to note is that those terms did not find their way into the licence. The Commission decided on the terms of the licence. The Commission chose not to include terms such as real resource cost in the licence. The legal rights and obligations of all parties crystallised when the Commission issued licences in the form in which it did. To attempt to import terms and concepts which were undoubtedly "in the ether" as the Commission formulated its proposals into a formal licence where the Commission chose not to include those terms would, in my view, be to place the cart before the horse. It would be to place context in front of the terms of the legally binding document. There is nothing, therefore, in my view in that evidence which could legitimately lead, in the circumstances of this case and in respect of the terms whose construction I have to determine, to moving away from the definitions of the terms in issue as set out in the licence and the BCOP.

7.15 That leads to the key question. Taking the definition of opportunity cost as set out in the BCOP and the other provisions of the BCOP which define the way in which opportunity costs should be calculated, does the levy amount to an opportunity cost in the sense in which that term is used in the licence? If it is not an opportunity cost then, working backwards through the various conditions to which I have referred, it ultimately is not taken to be a cost of operation and thus cannot be taken into account in calculating the price to be bid in.

7.16 I should touch at this point on one argument made on behalf of Viridian and Endesa. It is said that the BCOP cannot, as it were, define out of existence something which is truly a cost. However the licence allows, in express terms, the term Opportunity Cost to be defined and explained in the BCOP. Unless, therefore, the Commission were to act in an irrational way in fixing the definitions and provisions of the BCOP in relation to opportunity cost it seems to me that those definitions and provisions do definitively determine what are to be treated as Opportunity Costs for the purposes of the licence. That is so because the licence says it is so. Like the licence, the BCOP is to be objectively construed. There was no challenge to the BCOP itself. If it were to be said that the definitions and provisions contained in the BCOP were impermissible by virtue of the terms of the licence, then that would amount to an assertion that, at least in that respect, the BCOP itself was invalid. In any event, it does not seem to me that the terms of the BCOP which define opportunity cost and specify how it is to be calculated are outside the contemplation of what the licence permits.

7.17 The principal definition provision of the BCOP concerning Opportunity Cost is to be found in paragraph 7. That paragraph speaks of "employing" a cost item for the purposes of electricity generation. It seems to me that counsel for the Commission was correct when he suggested that the wording of that paragraph necessarily implies that the cost item is an imput into electricity generation. It is only imputs that are "employed" in the generation of electricity. A levy which arises incidental to the generation of electricity is not, in itself, employed for the purpose of electricity generation, neither is it a tax or levy on other items which are themselves "employed" in electricity generation. In that regard it differs from excise duties on fuels or employer taxes or levies. The fuel or the labour concerned is employed. A tax on that fuel or labour is a cost of that employment. The levy is not employed. The levy simply arises incidental to electricity generation. In those circumstances, it does not seem to me that the levy is the sort of expenditure which has an Opportunity Cost in the sense in which that term is defined in the BCOP.

7.18 It follows that I have come to the view that the Commission is right in the interpretation which it has placed on the licensing regime so far as the bidding in of the levy is concerned. However lest I be wrong in that view, it is appropriate to turn to the question of whether the existence of the 2010 Act might alter what might otherwise be taken to be the normal or ordinary construction to place on the licence. That raises the arguments put forward by counsel on behalf of the Attorney General to which I now turn.

8. The Position of the Attorney General

8.1 As pointed out earlier, the Attorney General was joined in her capacity as the protector of the public interest. The context in which the Attorney General was joined arose from the suggestion on the part of the Commission that a finding in favour of Viridian and Endesa would amount to a frustration of the intention of the Oireachtas in enacting the 2010 Act. The Attorney General made submissions in support of the position adopted by the Commission in that regard although carefully and properly refrained from making submissions on any of the other aspects of the case which involved disputes between commercial entities and their regulator. It seems to me that, in substance, two questions arise. First, what is the intent of the legislator? Second, to what extent is that intent material to the question which I have to decide?

8.2 For reasons which I hope will become clear, it seems to me more appropriate to address the second question first. For those purposes I will assume that it is possible to glean from the legislation an intent on the part of the Oireachtas that the windfall gain to which I have earlier referred should, at least in significant part, be taken away from generators by the imposition of the levy. If that be the intent, then it follows as a matter of fact that allowing the claim made by Viridian and Endesa in these proceedings would prevent the levy from achieving that end for, as a matter of practicality, allowing Viridian and Endesa to "bid in" the cost of the levy would mean that, in substance, the levy would, to a significant extent, be passed on to consumers rather than borne by generators. In addition, it should be pointed out that there would be other practical effects of the success of these proceedings. As pointed out there is a single all Ireland market in electricity. The levy applies only to generators in the Republic of Ireland. There is no equivalent levy placed on generators in Northern Ireland. The effect of generators in the Republic of Ireland being permitted to "bid in" the levy would, obviously, be to increase by a material margin the price at which Republic of Ireland generators would bid in to that market. It necessarily follows that it is likely that the ranking order on any given day will be affected because all Republic of Ireland generators (or at least those using fossil fuels) will bid in at a higher price. However, Viridian and Endesa argue that that is simply a knock-on effect of the decision by the Oireachtas to impose the levy and should not be treated as being, in substance, any different from any other difference between relevant taxation regimes North and South (for example, any difference between taxes which might from time to time apply on fuel or taxes on levies applicable to employment).

8.3 However, it seems to me that the key issue which arises under this heading is as to whether the terms of the levy legislation could conceivably be material in interpreting a licensing regime which was already in place prior to the 2010 Act being passed by the Oireachtas. Subject to constitutional limitations, there is no reason in principle why legislation may not, in an appropriate case, alter existing legal relationships. However, it seems to me that where the Oireachtas wishes to alter existing legal relationships it should do so in express terms. If I am wrong in the interpretation of the licence which I have set out and if the proper interpretation of the licensing regime under which Viridian and Endesa held their licences, prior to the enactment of the 2010 Act, was one which entitled them to "bid in" any levy which might be imposed as a cost of operation of a generator then, if it has been the intention of the Oireachtas to change that situation, the legislation could have said so. Even if there was doubt as to the interpretation of the licensing regime then legislation could have made appropriate provision for alteration to the terms of the licence "for the avoidance of doubt" thus preserving any argument which the Commission might wish to make that the provision was unnecessary. However, the legislation does none of those things. It simply imposes a levy. If, therefore, the intention of the Oireachtas was to take away the windfall gain to which reference has already been made, the Oireachtas did so not by purporting to take away the windfall gain as such but simply by imposing a levy and leaving it open as to whether that levy could be "bid in".

8.4 Even if, therefore, the Oireachtas legislates on the basis of a mistaken view as to the proper interpretation of existing legal rights and obligations, such legislation cannot be taken to amend those existing rights and obligations unless the Oireachtas purports so to do. However, the levy solution as a means of taking away most of the windfall gain only works if the interpretation placed on the licensing regime by the Commission is correct. If, therefore, the Oireachtas had in mind that it wished to, in substance, reverse most of the windfall gain by means of the levy, then that plan of action was only workable on the basis of the Commission's view of the licensing regime. The consequence of the Oireachtas legislating on the basis of an incorrect view of existing rights and obligations cannot be to change those rights and obligations but simply results in there being potentially unexpected or unanticipated consequences of the measure concerned.

8.5 For those reasons it does not seem to me that the 2010 Act can have any effect on the proper interpretation of the licence. It follows that, if I am wrong in the interpretation which I have placed on the licence having regard to its terms, and if, therefore, the correct interpretation is as Viridian and Endesa assert, the 2010 Act could not alter that interpretation.

8.6 Again, lest I be wrong, it is necessary to deal with the delay point in relation to Endesa. I, therefore, turn to that delay question.

8.7 The Direction to Endesa was dated the 27th of September, 2010. The proceedings brought by Endesa were not commenced until the 24th of January, 2011 It follows that there was a delay of approximately four months between the Direction which is sought to be quashed in the Endesa case and the commencement of the Endesa proceedings.

8.8 By way of explanation for the delay it is said on behalf of Endesa that it, as a significant generator of electricity in a number of jurisdictions, did not lightly decide to challenge the regulator and required to take careful advice and give careful consideration to the issues before determining on such a course of action.

8.9 In addition, it is pointed out on behalf of Endesa, correctly in my view, that, in circumstances where there was already pending before the courts a challenge to the Direction and in circumstances where any such challenge, if successful, would necessarily require the regime to be changed in relation to all affected generators in the Republic of Ireland, no prejudice could conceivably arise. Given the way in which the licensing regime operates so that the price "bid in" by each respective generator has an effect on all others (by affecting the ranking on each day and, thus, whether any individual generator will be required to produce in respect of any half hour period and the price at which generation during that half hour period is to be paid), it follows that there is a very large connection between the position of each generator. It would, therefore, be inconceivable that a different regime could apply in one case and not in another. This is not the type of case where the court could countenance the quashing of an order in one case, but leave stand an order sought on identical grounds in another case, simply because of delay on the part of the latter applicant.

8.10 In all the circumstances, it does not seem to me that any delay on the part of Endesa could have been a barrier to the grant of relief. To the extent that it may be necessary I propose extending the time for Endesa's application.

9. Wrong Considerations

9.1 In substance the case made by Viridian and Endesa under this heading was that the Commission was motivated in making the Directions by a desire to assist the government and the Oireachtas in reversing the so-called windfall gains. For the reasons which I have already set out, I am satisfied that the proper basis for the court considering the Directions is by applying a test of legal correctness. If the Commission is correct in its interpretation of the licence and the BCOP, then it follows that the Directions do no more than require Viridian and Endesa to do what the respective licences already require them to do.

9.2 It would be a sensible measure for the Commission to adopt, in these circumstances, to give an appropriate direction to all generators so as to ensure that there was conformity between all licensees in the Republic of Ireland (or at least those who use fossil fuels and are, thus, exposed, to the levy) as to the manner in which they must "bid in" to the market.

9.3 There obviously are sound reasons why it would be wholly inappropriate to allow that market to be distorted by some operators bidding in the cost of the levy and others not. Therefore, if the Commission is correct in its interpretation, the fact that it issued a direction based on that view could not, in my view, be challenged. It would only be in the circumstances where the Commission had some role in interpreting its own licences, which role had to be afforded appropriate deference by the courts, that there would be any decision in the real sense of the word to which judicial review principles were to be applied. For the reasons which I have already sought to analyse there is, in my view, no such decision on the facts of this case. The Commission is either right or it is wrong. That matter is to be objectively determined. There are not, therefore, any factors that are properly taken into account for there is no decision to which any such factors are to be applied.

10. Conclusion

10.1 For the reasons set out I am, therefore, satisfied that the proper approach of the court is to determine on an objective basis and applying the ordinary principles applicable to the construction of documents having legal effect, the true meaning of the licences. Applying that approach, I am satisfied that the correct construction to place on the licences is one which does not permit Viridian and Endesa to bid in the amount of the levy. It follows that, in issuing a direction which precluded Viridian and Endesa from so doing, the Commission correctly interpreted the licence and directed Viridian and Endesa to take steps which were required to ensure compliance with the licence and the BCOP.

10.2 Given that I have concluded that the Commission's interpretation of the licence is correct and that the Directions merely, therefore, direct Viridian and Endesa to do what the licence requires them to do, there do not seem to be to be any "considerations" which properly arise in the context of the making of the Directions. On that basis, it does not seem to me that it can be said that the Commission took into account any inappropriate considerations for it was not, in truth, making any decision but rather was directing parties to do something which, for the reasons which I have set out, I am satisfied they were obliged to do in any event.

10.3 It follows that the applications must be dismissed.