Neutral Citation Number: [2026] EWHC 336 (Admin)

Case No: AC-2025-LON-004411

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2026

Before :

MR JUSTICE LINDEN

- -

Between :

The King (on the application of INTELLIGENT LAND INVESTMENTS GROUP PLC)	**Claimant**
- and -	
GAS AND ELECTRICITY MARKETS AUTHORITY	**Defendant**

- -
- -

Duncan Sinclair and Christopher Moss (instructed by **TLT LLP**) for the **Claimant**
Joseph Barrett KC, Rupert Paines and Barney McCay (instructed by **Office of General Counsel, OFGEM**) for the **Defendant**

Hearing date: 12 February 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 18 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE LINDEN

Mr Justice Linden :

Introduction

1. This was a "rolled up" hearing of the Claimant's application for permission to claim judicial review, with consideration of the substantive merits of the Claim to follow in the event that permission was granted. The hearing was ordered by Swift J on 8 January 2026 on the grounds that there is a degree of urgency.

2. For the reasons set out below, I have concluded that permission should be refused.

Relevant background/context

3. The Claimant is an investor in renewable energy assets, and the Defendant is the independent regulator of gas and electricity markets in Great Britain, established under the Utilities Act 2000. The Defendant is a non-ministerial government department, and the Office of Gas and Electricity Market ("Ofgem") carries out a range of its functions under delegated authority.

4. The Claimant challenges the rejection, on 22 September 2025, of its application to the Government's Long Duration Energy Storage Cap and Floor Scheme ("the Scheme") for financial support for a pumped storage hydro project. Long duration electricity storage ("LDES") is a type of energy storage technology which holds and discharges electricity generated from renewable sources over long periods of time and at scale. The purpose of the Scheme, which forms part of government strategy to achieve net zero greenhouse emissions by 2050, is to incentivise the development of LDES assets which, historically, have faced obstacles to investment. Under a cap and floor scheme, the private sector is incentivised to develop LDES assets through the provision of a guaranteed minimum income from the project (the floor) in return for a limit on the revenues which may be received (the cap). In this case the intention of the Claimant was to sell the asset once it had qualified under the Scheme.

5. In 2024, the Department for Energy Security and Net Zero ("DESNZ") published its Clean Power 2030 Action Plan which emphasised the importance of developing LDES to achieving net zero electricity generation by 2030. DESNZ decided that Ofgem would be tasked with delivering the Scheme on the basis that it would be able to do so within a relatively short time frame. The need to do this has been emphasised throughout the development and implementation of the Scheme.

6. On 11 March 2025, DESNZ and Ofgem published a Technical Decision Document (the "TDD") which confirmed key details of the Scheme, including how it would operate, when the application windows would open and what the eligibility criteria would be. The TDD explained that the Scheme award process would involve three stages:

    i) Stage 1: an assessment against the eligibility criteria (the "Eligibility Stage");

    ii) Stage 2: a project assessment which would involve a cost benefit assessment (the "Project Assessment Stage"); and

    iii) Stage 3: a post-construction review following which Ofgem would set the final cap and floor levels for LDES.

7. The TDD also explained, amongst other things, that the policy objectives of the Scheme and, in particular, the deliverability of clean power by 2030 depended on final decisions about eligibility being made by the third quarter of 2025, so that the award process could proceed to Stage 2 and awards could be made by the second quarter of 2026. Moreover, once the Stage 1 application deadline had closed, there would be *"...no automatic right for applicants to update or expand upon their submitted application"*.

8. Stage 1 opened on 8 April 2025 and closed on 9 June 2025.

9. On 8 April 2025, Ofgem published the Eligibility Criteria Assessment Framework ("ECAF"), which set out the principles governing the Eligibility Stage. The ECAF stated that section 3 of the document outlined the minimum information which applicants were required to provide for the purposes of the assessment, and that projects would be assessed against the criteria set out in that section. [2.3] of the ECAF required all applicants to complete the required Application Form and to "explain in the Application Form, clearly and sufficiently, how the project meets the eligibility criteria". One of the eligibility criteria was "Deliverability", and section 3 of the ECAF stated that this criterion would be assessed, amongst other things, by reference to "financing plans". Those plans had to include "*a financial model for the project, including revenue projections for the project and project rates of return under plausible outturn scenarios"*.

10. At [2.7] of the ECAF, applicants were informed that their compliance with the assessment criteria would be evaluated on a binary pass/fail basis. Applicants which did not complete the Application Form, or which submitted an Application Form that was not fully complete, "may be removed from the eligibility assessment process" ([2.5]). It was stated in bold that a project would not be considered eligible to proceed to Stage 2 if it scored a "fail" in any single area of the evaluation under the eligibility criterion of "Deliverability" ([2.9]) and that to pass the Eligibility Stage, an application "must meet requirements of every eligibility criterion. Only applicant projects that meet (or pass) all eligibility criteria will be eligible to proceed to the …Project Assessment Stage" ([2.10]).

11. [2.11] of the ECAF stated that the deadline for submitting applications was Monday 9 June 2025, and [2.13] said that:

> "After the application date, applicants will not have the automatic right to update or expand their submitted applications. However, applicants must still fully engage with any requests for further information issued by Ofgem. In addition, every applicant is required to keep Ofgem informed by email about material developments and changes that may impact project deliverability by the applicable deadline (of 2030 or 2033)."

12. It is not in dispute that, as Mr Hayward-Grant (Deputy Director responsible for LDES at the Defendant) says in his first witness statement:

> "..by the time the Claimant submitted its Application, it was clear to the Claimant (and to all other interested parties)….. that:
>
> a. Ofgem intended to progress the Scheme at speed, in the public interest; and

> b. Given that, applicants were expected to act competently and efficiently to avoid steps that might cause delay to the progress of the Scheme. … *I do not consider that there could be any doubt whatsoever about the requirement to provide all relevant information in the application, on time*." (emphasis added)

13. At 18.50 on 9 June 2025, i.e. after business hours on the last day of the Stage 1 application window, the Claimant submitted its application which related to a proposed pumped hydro storage project in Balliemeanoch in Scotland ("the Application"). It is common ground that the Application did not include a financial model, and so did not comply with the requirements set out in the ECAF. What it did have was:

    i) A placeholder for a link to a financial model;

    ii) A revenue forecast model which was not a financial model; and

    iii) A screenshot which was said to be an extract from a financial model, but which showed only one part of such a model and, because it was a screenshot, did not show the underlying formulae which were necessary to enable assessors to check the headline numbers.

14. It is now common ground that these defects in the Application were the result of an error. There was a financial model in existence but it had not been properly included with the Application.

15. Mr Sinclair submitted that it would have been abundantly clear to Ofgem from the Application that the Claimant had prepared a financial model. The Application summarised the key points from the full model. It made express reference to the financial model and it provided a screen shot from that model. It would also have been obvious to Ofgem that, as a result of a clerical error, an incorrect link to an existing financial model had been provided. However, I accept Mr Barrett KC's submission that this is not necessarily the case. It was apparent to Ofgem that there were defects in the Application but the reason why no financial model was included would not be known or obvious to Ofgem at the time when it was submitted. It was possible or even likely, on the face of the Application, that it had simply been omitted as a result of a clerical error but, for example, it was also possible that the financial model was not complete by the deadline and the Claimant was attempting to "buy time", particularly given that the Application was submitted at the last minute.

16. On 5 August 2025, the Defendant issued a "Minded to Decision" ("MTD"). This informed the Claimant that Ofgem was minded to reject the Application because insufficient evidence had been provided to demonstrate that the Claimant's project satisfied the eligibility criteria set out in the ECAF. The 'Deliverability' criterion and, in particular, the "financing plans" sub-criterion were not satisfied. Two reasons were identified, the first of which was the key one for present purposes. This was that:

> "The application does not include a full financial model which limits our ability to assess the robustness of the commercial case. Screenshots and assumptions, while helpful, do not provide sufficient transparency or granularity to evaluate financial viability with confidence"

17. Secondly, there was a lack of detailed evidence of market engagement or any structured plan for investor outreach and this reduced confidence in the ability of the project to secure the necessary capital within the required timeframe.

18. The MTD letter invited the Claimant to make representations within 7 days and said:

> "We will take any representations received in this period into account when finalising our decision. As set out in paragraph 2.13 of our Eligibility Criteria Assessment Framework, applicants do not have an automatic right to update or expand their submitted applications upon closure of the application window. Please ensure that any representations made are limited to raising concerns with our minded to position on the basis of the application as submitted prior to closure of the application window. When finalising our decision, we will not take into account any additional documentation that introduces new material regarding eligibility that was not properly included at the date of the original application submission…".

19. Mr Hayward-Grant explains that this strict approach to the deadline was based on Ofgem's experience of an earlier scheme. There was also a larger than expected number of applications. The applications were substantial and complex, and they required detailed and careful assessment by Ofgem. There was also a need to ensure that applicants were treated consistently and fairly, and to avoid some applicants being given more time than others without proper justification or otherwise having an opportunity to influence the assessment process by being able to provide information which was supplemental to what had originally been specified by Ofgem. And there was a need to keep the overall process within the envisaged timescales.

20. However, there was not an absolute rule against the submission of information after the cut-off date:

> "For example, as mentioned in the ECAF documents, Ofgem envisaged that it would take account of information supplied in response to queries that it raised on applications. Second, as reflected in the "minded-to" decisions themselves, Ofgem reserved a residual discretion to consider additional information provided that it could not be characterised as such that it should have been "properly included" in the application. For example, a scenario in which a local planning authority informed an applicant after the 9 June 2025 cut-off date that information previously provided by it to the applicant – and used in support of the application - was incorrect. Such information would be clearly relevant to the application, but could not properly have been included by the applicant in its application. We would also have been willing to consider information if (depending on the circumstances) the failure to comply with the deadline was either caused or contributed to by: (i) fault on the part of Ofgem, or (ii) any external or objective circumstances outside of the Claimant's control."

21. The Claimant responded in writing on 8 August 2025. Its letter addressed all of the Defendant's concerns. In relation to the lack of a detailed financial model the Claimant explained that it had prepared a financial model but the link which had been included in the Application was for the revenue forecast rather than the financial model. The letter apologised for this error and attached the financial model. The Claimant also stated and evidenced (and there is no issue about this) that the financial model had been finalised on 7 June 2025, two days before the deadline. The Claimant said:

> "We would ask that you consider this evidence which was not provided due to an unfortunate and unintentional typing error. This model is clearly referred to in our response as is presented exactly as was at 7th June."

22. The 8 August letter went on to address and disagree with Ofgem's concern relating to the Claimant's ability to secure the necessary capital for its project within the necessary timeframe.

23. By letter dated 22 September 2025 ("the Decision"), Ofgem notified the Claimant of its decision having "carefully reviewed the representations" made. It said:

> "After careful consideration, we are of the opinion that Eligibility Criteria of Deliverability has not been met for the reasons already outlined in the minded to decision letter. After consideration of your representations, we acknowledge the clarification provided, including the submission of a financial model and references to prior investment experience, the following *remain* the reasons for insufficient evidence at this stage:
>
> > Incomplete Financial Model *at Time of Submission*: The financing plans sub-criterion specifically requires a financial model to be submitted. The absence of a full financial model in the application limited our ability to assess the robustness of the commercial case. The late submission of this material, while noted, has not been considered in the eligibility determination. As set out in section 2.13 of the ECAF, applicants do not have an automatic right to update or expand upon submitted applications. *We have therefore made our assessment on the basis of the documentation properly submitted by the deadline of 9 June 2025 to maintain fairness, transparency, and confidence in the scheme's outcomes*." (emphasis added)

24. The Decision also gave, as reasons for concluding that the Deliverability criterion had not been satisfied "Insufficient Evidence of Market Engagement and "Lack of Assurance on Capital Securing Timeline": the additional concerns expressed in the MTD. However, in subsequent correspondence, on 4 November 2025, Ofgem stated that the second and third reasons were supplementary reasons. Ofgem did not reach a view on whether they alone would have been sufficient to lead to rejection of the Application.

25. Mr Hayward-Grant explains that the Claimant's representations were indeed carefully considered, but Ofgem decided not to accept the late submission of the financial model for a number of reasons including:

> "The Claimant had been given a fair and equal opportunity to comply with the Eligibility Stage application deadline, and had been informed prior to the submission of its Application of the importance of providing a complete application and of the consequences of not doing so. The sole reason for the Claimant's failure to comply with this deadline was its own fault or carelessness…
>
> Other bidders would have spent significant time and effort before the deadline ensuring that their applications were complete and compliant. It would be unfair to the other bidders seeking to be awarded LDES C&F if the Claimant was given an

additional opportunity, and time, to submit additional material after the deadline had already expired."

26. Given the need to adopt a consistent approach as between bidders, there was also the risk that a softer approach to the deadline, which permitted a wider range of arguments as to why errors should be correctable and/or information admitted late, would result in a greater drain on Ofgem's resources available for the rest of the assessment process. It would also risk delay when a key objective was to deliver the Scheme in a relatively short timescale.

27. Mr Hayward-Grant's evidence is that 171 applications were received at Stage 1, which very greatly exceeded expectations. Ofgem indicated that it was not minded to accept 116 of these, and in 105 cases this was because of insufficient or missing required supporting information. There were 22 cases where applications were accepted in the light of representations made in response to the "minded to" decisions, but in none of these cases did Ofgem permit the introduction of new material which ought to have been included with the original application. The cases in which Ofgem changed its mind were where it was persuaded that it had not properly understood the material which had been submitted by the 9 June deadline. 77 applications therefore passed Stage 1 of the process and 94 failed. 4 applications were subsequently withdrawn and 73 are therefore currently being assessed as part of Stage 2 of the process.

28. On 30 October 2025, the Claimant sent a pre-action protocol letter to Ofgem, which required a response within two working days. Ofgem responded on 4 November 2025. A week later, on 11 November 2025, the Claimant sent a further letter to which Ofgem responded on 17 November 2025.

29. On 18 November 2025, Stage 2 applications were submitted in respect of the 73 projects which remained in the award process. The process of reviewing these applications is substantial and resource-intensive undertaking. It involves four different areas of assessment (economic assessment, costs assessment, strategic assessment, and financial assessment) and multiple complex technical documents submitted by applicants.

30. It was not until 27 November 2025 (i.e. two months after the 22 September decision), that the Claimant commenced proceedings in the Administrative Court. It was in these circumstances that Ofgem took a point on delay in its pleadings, albeit ultimately this was not pursued by Mr Barrett given that his principal point is that the Claim has no realistic prospects of success and given that Ofgem had very fairly indicated, in correspondence, that there was no need for interim relief. Provided there was a decision on the Claim before the end of this month, and if the Claim succeeded, it would be reasonably practicable to add the Claimant's bid to Stage 2 of the process.

31. On 16 December 2025, Mould J gave directions for an abridged timetable in which to file the Summary Grounds of Response and any Reply. As I have noted, on 8 January 2026, Swift J ordered the "rolled-up" hearing.

The grounds of challenge

32. The Claimant's pleaded challenge to the Decision is on two grounds:

i) Ground 1 is "procedural unfairness including a failure to hear the Claimant (consider its submissions) before taking a final decision";

ii) Ground 2 is "failure to make proper inquiry and to take into account clearly material factors, contrary to public law and the aims of the [Scheme]".

33. I note that Ground 2 is a process irrationality challenge. There is no (outcome) rationality challenge to Ofgem's substantive decision to refuse to consider the Claimant's financial model on the grounds that it was not submitted within the 9 June deadline. Mr Barrett's position was that such a challenge would have been bound to fail in any event on the basis that decisions arising from the conduct of award processes of the sort under consideration in the present case are subject to judicial review challenge only on limited grounds, essentially comprising bad faith and abuse of power: see e.g. *R (Gamesa Energy) v National Assembly for Wales* [2006] EWHC 2167 at [63] and [77]-[79] *Dukes Bailiffs Ltd v Breckland Council* [2023] EWHC 1569 (TCC) at [108] and, moreover, this was a case of the exercise of discretionary power in the context of a complex technical scheme: compare *R (London and Continental Stations and Property Ltd) v Midland Main Line Ltd* [2003] EWHC 2607 (Admin) at [27]-[34]. However, Mr Barrett accepted for the purposes of the present case that the public law duties of procedural fairness and of reasonable enquiry applied to Ofgem in making the Decision.

The Claimant's arguments

34. Under Ground 1, the Claimant's case is summarised at [42] of its skeleton argument as follows:

> "The Defendant has breached the requirements of procedural fairness by ignoring the representations made to it in the process, including the provision of the Financial Model by the Claimant promptly following the MTD."

35. This contention was put on the basis that there was a right to be heard: see *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531 at 560, and that Ofgem had unlawfully fettered its discretion: see *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610.

36. Under the subheading "Conspicuous unfairness in procedure" Mr Sinclair also referred to *R (ex p Camelot) v National Lottery Commission* [2001] EMLR 3 at [67], *R v The Legal Aid Board Ex p. Donn & Co* [1996] 3 All E.R. 1, *Harrow v LSC* [2011] EWHC 1087 (Admin) at [31] and *Working on Wellbeing Ltd t/a Optima Health v Secretary of State for Work and Pensions & Anor* [2025] EWCA Civ 127. His written argument was that these cases show that: "if cumulative criteria are met there will be a duty to inquire further and to consider such clarifications (sic) consideration of the bid. The (cumulative) criteria are that (i) there is an error that is obvious on its facts (a clerical error being a classic example….) (ii) which error can be readily corrected and (iii) to do so would not amount to 'having another go' by changing the bid".

37. Ultimately the *British Oxygen* point was not pursued by Mr Sinclair at the hearing on the grounds, he said, that it had fallen away in the light of Ofgem's evidence and skeleton argument. A good deal of his argument at the hearing was really to the effect that the *outcome* of the Decision was unreasonable or irrational for various reasons,

although he did not present it as such. Nor did he dispute that there was no pleaded challenge on this ground and nor did he specifically seek to raise such a challenge, whether by an application to amend or otherwise.

38. Mr Sinclair also suggested that there had been inconsistent treatment of applicants in that, on his analysis of the statistical evidence outlined at [27] above, there must have been at least 11 cases where an application which was originally rejected on the grounds of incomplete or missing information was accepted after representations were made. Again, no challenge on this basis was pleaded whereas such an argument would entail consideration of whether the facts of the other cases were comparable. It therefore had to be pleaded. Moreover, if it was right that there were 11 such cases, this was consistent with Ofgem's evidence that there was no absolute rule against the submission of information late: whether this would lead to the application being rejected would depend on the reasons for the omission. As I pointed out to Mr Sinclair, if anything his analysis of the statistics therefore supported Ofgem's case. And, in any event, Mr Hayward-Grant's evidence, which I accept (see [27], above) was that there were no cases where information was admitted which had been submitted after the deadline. Ofgem changed its mind where it was persuaded that it had misunderstood what had been submitted by the deadline.

39. Moving closer to the pleaded issues but still some distance from the challenge pleaded in the Statement of Facts and Grounds, Mr Sinclair appeared to be submitting that an analogy with the approach under the public procurement regime should be read across into the duty of procedural fairness in public law in the present type of case. At the hearing he referred to *Working on Wellbeing Ltd* (supra) including the Court of Appeal's reference to [31] of *Harrow* case (supra) and I understood him to be arguing that there was a public law duty, as part of the duty of procedural fairness, to allow the correction of errors which satisfied the three criteria referred to in this paragraph. In his reply, however, Mr Sinclair said that his submission had been misunderstood. He accepted that the public procurement case law to which he had referred was concerned with the concept of proportionality, and that that concept did not apply in the context of the present claim. He said that he had only been suggesting that an analogy "could be" drawn with the position in relation to public procurement.

40. In the course of his oral submissions Mr Sinclar also referred to the *Camelot* case and asserted that the Decision was "conspicuously unfair". And he appeared to suggest that it was also an abuse of power.

41. Mr Sinclair did not in fact challenge Mr Hayward-Grant's evidence that the Claimant's representations in its letter of 8 August 2025 were carefully considered by Ofgem. I understood him to say, at the beginning of his submissions, that the centre of gravity of the claim was Ground 2. His argument was that it was irrational for Ofgem to decline to consider the Claimant's financial model given that the decision which it was required to take was as to whether the Application satisfied the eligibility criteria. The financial model had been provided very shortly after its omission had been pointed out in the MTD. There were then approximately 8 weeks before the 22 September decision during which there was ample time to consider the Application as a whole, including the financial model, with a view to deciding whether the eligibility criteria were satisfied. There would have been no difficulty about considering it, no prejudice to Ofgem's process and no unfairness to the other applicants given that this was obviously a clerical error case.

Ofgem's position

42. Ofgem's submission was that permission should be refused on the basis that the grounds of challenge do not have a realistic prospect of success. The question of delay was also raised in its pleaded case and in Mr Barrett's skeleton argument but, as I have noted, at the hearing he confirmed that this objection was not pursued.

Discussion

Ground 1

43. The key principles for the purposes of Ground 1 are very familiar. Although this was an application case, and in principle a less exacting duty of procedural fairness therefore applied (see *McInnes v Onslow-Fane* [1978] WLR 1520, 1528H-1529C and *R (Khatun) v Newham LBC* [2005] QB 37 at [31]), in its MTD Ofgem invited representations and said that they would be taken into account when finalising its decision. The fairness question in this case is whether it did so.

44. In any event, Mr Barrett relied on the judgment of Singh LJ in *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841 which contains a useful discussion of the principle of procedural fairness. Singh LJ said that this is the modern term for what used to be called the rules of natural justice. The first limb of procedural fairness is the rule against bias and:

> "57…..the fundamental requirement of the second limb....is to give an opportunity to a person whose legally protected interests may be affected by a public authority's decision to make representations to that authority before (or at least usually before) the decision is taken.."

45. Singh LJ went on to say that the question whether the substantive decision should have been different has nothing to do with the concept of procedural fairness in this sense [58], and to emphasise that generally public law is not concerned with the substance of decisions by public bodies [64]. As to the role of the Administrative Court:

> "Our role is principally to correct errors of law made by public authorities and ensure that fair procedures have been complied with."

46. In the present case the uncontested evidence of Mr Hayward-Grant is that the Claimant's representations of 8 August 2025 were carefully considered, albeit they were rejected. The answer to Ground 1 is therefore that they were not "ignored".

Ground 2

47. As far as Ground 2 is concerned, it is important to focus on the nature of a *Tameside* challenge. This is an argument that a public body could not rationally make the decision in question without making given further enquiries. The principles, so far as relevant, were summarised by the Court of Appeal as follows in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647 at [70]:

> "First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge… it is for the public body and not the court to decide upon the manner and intensity of inquiry

> to be undertaken…Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient."

48. The answer to Ground 2 is that Ofgem did make inquires for the purposes of deciding whether to allow the Claimant to submit its financial model after the 9 June deadline and/or to allow the Claimant to satisfy the eligibility criteria after that deadline. It invited representations from the Claimant which would explain or contest the apparent flaws in the Application. Once it had received those representations there were no further enquiries which it needed to make in order to make its decision. It had all of the information which the Claimant wished to rely upon and all of the information which it needed. The *Tameside* complaint is therefore misconceived.

Overall

49. I agree with Mr Barrett's submission that the key flaw in the Claimant's case is that it is based on a mischaracterisation of the Decision. In substance, the Claimant's challenge proceeds on the basis that the Decision was simply that the Application failed to satisfy the eligibility criteria. The Claimant argues that in coming to that decision Ofgem irrationally ignored the Claimant's representations and, in particular, the financial model which did satisfy the criteria. In fact, the Decision was that the Application did not satisfy the eligibility criteria within the deadline specified in the ECAF and that Ofgem was not willing to consider material which was submitted late for reasons which were essentially the fault of the Claimant.

50. Once the true nature of the Decision is appreciated, the Claim obviously fails:

    i) It is common ground that the Application did not satisfy the eligibility criteria within the 9 June deadline for doing so set by the ECAF, as I have noted.

    ii) The issue for Ofgem in the light of the Claimant's representations was whether to allow the Claimant to submit the financial model late i.e. whether to give it an opportunity to satisfy the eligibility criteria after the deadline which had been set had passed.

    iii) That issue required consideration of why the financial model had not been submitted within the deadline and Ofgem did consider the Claimant's representations on this question. The duty to act in a procedurally fair manner did not require Ofgem to accept those representations. Ground 1 therefore inevitably fails.

    iv) It was not irrational to decline to consider the contents of the financial model or the merits of the Application overall in coming to a decision as to whether the financial model should be accepted late and/or the Claimant should be permitted to satisfy the eligibility criteria after the deadline. The prior question was whether the deadline for submitting an application which satisfied the eligibility

criteria should be relaxed given the reasons why it had not been met by the Claimant. If anything, it would have been irrational to adopt an approach which involved deciding whether the Application now satisfied the eligibility criteria before deciding whether it should be permitted to do so after the deadline for applications. Ground 2 therefore fails.

v) The reality is that once Ground 1 is rejected, Ground 2 falls away in that it assumes that which the Claimant is required to prove, namely that the Defendant acted unlawfully in rejecting the Application on the grounds that the eligibility criteria were not satisfied within the specified deadline. Since that decision was unimpeachable, it was not irrational to fail to go on to consider the financial model and the merits of the Application overall.

51. For completeness, and in case there was any misunderstanding about Mr Sinclair's possible analogy with the position in relation to public procurement, I accept Mr Barrett's well informed and helpful submissions as follows:

i) The public procurement cases where the court is concerned with the rejection of a bid on the grounds that it was not validly submitted by the specified deadline are concerned with the question whether it was proportionate or disproportionate to refuse to waive the deadline or to grant an extension of time: see e.g. *Azam & Co Solicitors v Legal Services Commission* [2011] EuLR 132. It was in this context that His Honour Judge Waksman QC (as he then was) said, at [31] of the *Harrow* case, that:

> "the critical factor which gives rise, or may give rise, to a duty to seek clarification is where the tender as it stands cannot be properly considered because it is ambiguous or incomplete or contains an obvious clerical error rendering suspect that part of the bid. If the inability to proceed with a bid, which may be an advantageous addition to the competitive process, can be resolved easily and quickly it should be done, assuming there is no change to the bid or risk of that happening. If there is an obvious error or ambiguity or gap, clarifying it does not change the bid because, objectively the bid never positively said otherwise."

ii) However, as Mr Sinclair accepted in his reply, the public law issues arising out of his pleaded grounds of challenge do not raise the question whether the Decision was proportionate. There is no "read across". Apart from the fact that the present case is concerned with different legal concepts, the public procurement legal framework engages different legal and policy sources and considerations: compare *Menai Collect Limited & Another and Department for Constitutional Affairs* [2006] EWHC 724 (Admin) at [49] and *R (British Gas Trading Ltd) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 737 (Admin) at [192]-[194].

iii) Moreover, even if there were a read across or an analogy, the approach under the public procurement legal framework emphasises the legitimacy and importance of deadlines (provided they are communicated) and the need, in the interests of fairness to all potential and actual bidders, to apply them rigorously and consistently. Refusals to grant extensions of time where the failure to submit a valid bid within the deadline results from error or carelessness on the part of

the bidder will generally be held to be proportionate even if the error is not particularly culpable and the consequences for the bidder are severe: see the cases considered in *Harrow* and see *Inhealth Intelligence Limited v NHS England* [2023] EWHC 352 (TCC).

iv) Even assuming in the Claimant's favour that the present is an "obvious clerical error" case, the overwhelming likelihood is that the Decision would be held to be proportionate had it been reached in the context of public procurement.

52. Finally, as far as Mr Sinclair's references to conspicuous unfairness and abuse of power are concerned, I accept Mr Barrett's submission, based on *R (Gallagher Group Ltd) v Competition and Markets Authority* [2019] AC 96 at [40]-[41] that there are no free standing public law principles of "conspicuous unfairness" or "substantive unfairness". There is a principle of substantive legitimate expectation where, in very broad summary, there is a clear, unambiguous and unqualified representation that the claimant will receive a substantive benefit from which it would be an abuse of power for the public body to resile. That does not arise and is not contended for here: for such a case to reach "first base" there would need to have been, at least, a representation by Ofgem that materials submitted after the 9 June deadline would be taken into account whereas Ofgem's often stated position was to very different effect. Mr Sinclair referred in passing to abuse of power when he showed the *Camelot* case to the court, but in no realistic sense was it an abuse of power for Ofgem to decline to consider material submitted after the 9 June deadline in circumstances where that deadline and its effect had been publicised long in advance, the deadline was applicable to all applications and the Claimant had failed to meet it through its own lack of care.

Conclusion

53. For all of these reasons I refuse permission.