The Renewable Energy Consumer Code
Appeal Panel Hearing

In the matter of

Smart Save Solutions Ltd

held on

2 February, 2016

at

1 Wood Street, London

Panel Members:

Michelle Peters (Chair),

Bryn Aldridge,

Alan Wilson.

Legal Assessor to the Panel

Jessica Boyd

In attendance:

Andrew McIlwraith (panel secretary).

Renewable Energy Consumer Code ("RECC") representation:

Emily MacKenzie, counsel

In attendance

Lorraine Haskell, RECC,

Rebecca Robbins, RECC.

Smart Save Solutions Ltd representation:

None.

Appeal to be heard

The Appeal Panel ("the Panel") convened to hear the appeal of Smart Save Solutions Ltd ("the Member") against the determination of the Non-Compliance Panel following the hearing held on 16 April and 7 May, 2015.

Under Bye-Law 9 of the Renewable Energy Consumer Code ("the Code"), a Member can appeal the decision of the Non-Compliance Panel ("NCP") on the grounds that the decision or part thereof was irrational, based on a fundamental error of fact or on a clear misinterpretation of the Code or the RECC Bye-Laws, or a serious procedural irregularity, or if the penalty/remedial steps or Conditions imposed are not in reasonable proportion to the findings made by the Non-Compliance Panel or the costs imposed were not fair and reasonable in the circumstances.

The Member was not represented at the Appeal hearing. The Panel had to decide whether it could proceed with the hearing, and referred to Clause 5.1 of the Appeals Panels Process. The Chair of the Panel stated that the Member had made a request to the Regulator to agree to adjourn the hearing on 29 January, which the Regulator had refused, and a subsequent application of the Chair of the Appeals Panel at 5.02pm on 1 February, which the Chair had rejected, providing written reasons, that were sent to the Member on the evening of 1 February. The Panel Secretary confirmed that he had received an email read receipt from the Member in response to this communication.

The Regulator provided evidence in the form of delivery receipts for letters and emails that the Member had received notice of the location and time of the hearing. The Panel noted the Regulator's submissions that it was in the public interest for the hearing to proceed, and that there was no or little prejudice to the Member, in that the notice of appeal, with supporting grounds, was in the bundles made available to the Panel.

In all the circumstances, the Panel was satisfied that the Member had been properly notified of the hearing and considered that it was appropriate to proceed with the appeal hearing.

Evidence before the Panel
The Panel had before it all the evidence provided to the NCP at its hearing of 16 April and 7 May 2015, together with the NCP's determination, a transcript of the hearing, and the Member's notice of appeal of 29 June 2015.

The Panel heard representations from the Regulator's representative in relation to the grounds of appeal. The Panel also read and had regard to the written representations made by the Member to the NCP on all issues including costs.

Appeal Panel's decision
In reaching its decision the Panel considered the grounds of appeal contained in the Member's notice of appeal in turn.

1. Ground 1 of the appeal relates to the adjournment granted by the NCP on 24 February 2015 of the hearing scheduled for the following day. Although the adjournment was granted as a result of the Regulator's submission of further evidence, the NCP declined to reflect this in its costs order on the basis that *"the Panel… considers that it was very likely the hearing would have been adjourned in any event because of the nature of the case and having regard to the fact that the Member had only just instructed representatives*". The Member argues that the NCP's reasoning in this regard is inconsistent with, and irrational in light of,

the NCP Chairman's decision of 24 February 2015 granting the adjournment, in which she stated "*the Chairman also wishes to make clear that, but for the need to ensure a fair hearing in respect of the additional documentation, no adjournment would have been granted. In particular: …(c) the recent instruction of counsel by the Member and that counsel's availability for the hearing on the Wednesday, would likewise have not justified an adjournment. It was open to the Member to instruct counsel earlier or to rely on representation at the hearing from its existing solicitors*". The Member argues that, but for the submission of this evidence, the hearing would have gone ahead on 25 February 2015 and the vast majority of the costs in these proceedings would not have been incurred.

The Regulator submitted that there was in fact no inconsistency: despite the terms in which the NCP Chairman made her decision to adjourn in February 2015, it was open to the NCP following the hearing of the case to conclude that the hearing would have had to be adjourned at some point in the proceedings. The Regulator submits that, in any event, it would not follow from the fact that the adjournment was due to the Regulator's submission of additional evidence that all of the costs of the proceedings following the adjournment were due to the Regulator's conduct. Ms MacKenzie submitted that the high level of costs incurred following the adjournment was in fact attributable to decisions made by the Member as to how to conduct its appeal, including by submitting lengthy written representations drafted by counsel, which addressed not only the further evidence but all issues in the case.

The Panel considered two issues: whether the NCP's determination on costs contained the error alleged by the Member; and, if it did, what the consequences of this should be for the costs order, bearing in mind that this Panel's task is to consider whether the costs imposed were fair and reasonable in the circumstances.

In relation to the first issue, the Panel does not accept that there is no inconsistency between the basis on which the NCP Chairman granted the adjournment on 24 February 2105 and the NCP's finding that there would have been an adjournment in any event. There is no doubt that the adjournment of 24 February was granted in consequence of the Regulator's service of late evidence, and the Chairman made clear that the adjournment would not otherwise have been granted. In these circumstances, it is unclear on what basis the NCP could have concluded that the hearing would have been adjourned for reasons other than the service of late evidence. The Panel therefore concludes that there was an error in the NCP's determination on this point.

In relation to the second issue, the Panel does not accept that the vast majority of costs in the proceedings were a consequence of the adjournment, rather than of the Member's decision, following the adjournment, to instruct counsel and make substantial further submissions. It is also relevant to the fairness and reasonableness of costs that the Member had wanted more time in order to instruct counsel and make further submissions.

However, the Panel accepts that the late adjournment resulted in some limited wasted costs. The Panel asked the Regulator to provide it with information about the costs it says were wasted as a result of the adjournment. It presented a detailed breakdown, which amounted to a total of £3,027, which the Panel accepted.

Although the Panel does not consider that it would be reasonable for the Regulator to bear all the costs of the proceedings after the adjournment for the

reasons given above, it considers that it is reasonable for the Regulator to bear its own wasted costs of the adjournment. However, it does not consider that it would be fair to require the Regulator to bear the Member's wasted costs. Although the adjournment was caused by the service of late evidence, the Panel finds that it was reasonable for the Regulator to serve this evidence, having been provided by a third party with this evidence, and deeming it relevant to the proceedings. In all the circumstances, the Panel finds that it is fair that each party bears its own wasted costs in relation to the adjournment.

2. Under Ground 2 the Member argues the NCP erred in failing to find that the Executive had acted unreasonably by submitting Trading Standards evidence, anonymous complaint evidence and "mystery shopper" evidence, and by failing to reflect this in the costs order.

2.1. Trading Standards evidence

This complaint relates to unsolicited evidence that the Regulator received from Essex Trading Standards. The Regulator initially intended to rely on this and served it on the Member, but withdrew it two weeks before the hearing. The Member argues that the evidence was unlawfully obtained and the Regulator should never have sought to rely on it. It claims to have incurred substantial costs as a direct result of relying on this evidence; and it claims that the NCP did not address its submissions in this regard in relation to costs.

As regards the first of these points, the Panel notes that the Regulator did not and does not accept that the evidence was unlawfully obtained. The Regulator submitted to the Panel that it had withdrawn reliance on the evidence in order to avoid an unnecessary ancillary dispute about its admissibility, and because it wanted to focus on the issue of consumer harm. The Regulator also submitted that it had simply relied in good faith on evidence it had received from a third party, and which it considered relevant to the issues in the proceedings. The Panel accepts these submissions and does not consider that the Regulator acted unreasonably either in serving the evidence initially or in withdrawing its reliance on it.

In relation to the second point, the Regulator submitted that any costs incurred by the Member as a direct result of the Trading Standards evidence must have been *de minimis*, and in any case, less than was asserted by the Member to the NCP. Ms MacKenzie noted that only four and a half pages out of 100 in the Member's submission to the NCP dealt with the Trading Standards evidence, and that the evidence did not need to be addressed at the hearing because the Regulator had withdrawn its reliance on that evidence two weeks earlier.

The Member submitted that the costs incurred in relation to the Trading Standards evidence were 15% of the global costs incurred by the Member. The Panel agrees that it is difficult to see how this can be correct, but in light of the Panel's finding that the Regulator's conduct was reasonable in relation to the evidence, such that it would not be fair to require it to bear the Member's costs of responding to that evidence, it does not need to make a finding on the level of costs incurred by the Member.

As to whether the NCP addressed this point, the Panel accepts that the written determination makes no mention of it. This Panel has however considered the submissions made in relation to the Trading Standards

evidence by the Member in the Notice of Appeal and by the Regulator orally and have concluded that the Regulator did not act unreasonably. The Regulator's conduct in relation to this evidence does not, in the Panel's view, affect the reasonableness of the cost order.

2.2. Anonymised complaints evidence

The Member submits that the Regulator acted unreasonably first in seeking to rely on, and then withdrawing its reliance on, evidence from anonymous complainants, and that it had to incur significant costs responding to that evidence, which was ultimately not relied on. It submits that the NCP did not properly address this issue.

The Panel notes that the Regulator did not and does not accept that the evidence in question was inadmissible. Again, it was submitted to the Panel that the Regulator withdrew its reliance on this evidence due to expediency; it wished to avoid an unnecessary procedural dispute, and in any case did not need to rely on this evidence to make the charges out. Indeed, as the NCP noted, the withdrawal of the evidence had no impact on the findings of breach by the Member.

The question for the Panel was whether the Regulator's conduct in relation to this evidence was unreasonable such that it should be reflected in the cost order. The Panel does not consider that the Regulator acted unreasonably. In circumstances where it did not consider that the evidence was necessary in order to prove the charges against the Member, and where its admissibility was being disputed, it appears to the Panel to have been sensible and proportionate for the Regulator to withdraw reliance on this evidence.

The mere fact that the Member incurred costs responding to this evidence does not mean that the Regulator should be required to bear those costs, or that the NCP's costs order in the Regulator's favour is not fair and reasonable, in circumstances in which the Regulator, in the Panel's assessment, acted reasonably.

2.3. "Mystery shopper" evidence

The Member also submits that the Regulator acted unreasonably in seeking to rely on mystery shopper evidence, which was found by the NCP to be partly inadmissible. The NCP ruled that the evidence was admissible insofar as it related to systemic allegations in relation to processes, but was inadmissible in relation to specific events. The Member also said that the Regulator did not rely on this evidence at all, although the Regulator submitted that it did.

The Panel agrees with the NCP that it was not unreasonable for the Regulator to submit the mystery shopper evidence; moreover the Regulator was partially successful on that issue. The Member states that the consequence of the NCP's ruling was that the mystery shopper evidence could not be relied on at all and that the NCP did not rely on it. The Panel accepts the Regulator's position that this was not the case. Although the Regulator did not specifically refer to this in its oral submission, it was included in the material before the Panel, and the Regulator did not withdraw its reliance on it.

The Panel does not accept that it was not fair and reasonable to fail to make an allowance for this in the costs determination.

3. Under Ground 3, the Member submits that the Regulator behaved unreasonably in failing to engage with it in relation to sanction. It says that the sanction imposed broadly accords with its own suggestion as to what the sanction should be, and that if the Regulator had been prepared to enter negotiation on this, the costs of the disciplinary process could have been avoided.

   The Regulator submitted to the Panel that this complaint was misguided because there is no mechanism under the Bye Laws for the Regulator to settle a disciplinary case or agree a sanction. The Panel does not accept that this is strictly correct. Clause 7 of the Bye Laws provides for a procedure under which the Executive and the Code Member may agree a Consent Order as an alternative to a disciplinary hearing. And in any event, Clause 8 (11) provides the Chairman of the NCP with discretion to adjourn a hearing if he or she thinks it appropriate. It is not therefore clear to the Panel that there is no way for the Regulator to effectively settle a disciplinary case in appropriate circumstances.

   However, that does not lead the Panel to conclude that it was unreasonable for the Regulator to decline to do so in this case. The charges, and the extent of alleged non-compliances were very serious. Moreover, although the Member admitted the charges, it disputed the factual basis of those charges. The Panel accepts the Regulator's submission that there were numerous disputed issues of fact that needed to be decided before the question of sanction could sensibly be addressed.

   The Panel also considers that in a case of this seriousness, it was reasonable for the Regulator to seek to deal with the allegations by means of a formal and transparent process.

   Finally, the Panel accepts the Regulator's submission that the Member itself was slow to engage with the Regulator in relation to the issues of conduct in question. The NCP found as follows on page 12 of its determination:

   "the Member's overall lack of communication and proactivity with the Regulator reflects the culture of the Member. The Member did not think it important to respond to the Regulator in a timely or detailed manner or ensure compliance with the Code. It lacked understanding of the importance of the Code and the serious nature of the audit failures until relatively recently. The very earliest that the Member could be said to have been trying to comply with the Code is when the MCS suite of documents were purchased in November or December 2014, some six months after the May audit, failure of which gave rise to these proceedings".

   This finding is not challenged in the Appeal. In these circumstances, the Panel considers it was reasonable for the Regulator to conclude that it needed to take the serious step of bringing disciplinary proceedings and pursuing them to conclusion in order to persuade the Member to take the issues of conduct seriously.

   The Panel notes in any event that, although the NCP imposed a 12-month period of monitoring (as opposed to the 6-month period proposed by the Member), the Regulator's primary submission before the NCP was that the Member's membership should be terminated. Given the distance between the outcome

sought by the Regulator, and the sanction the Member was proposing, the Panel is doubtful that there would have been room for fruitful negotiation.

4. Under Ground 4, the Member argues that the NCP erred in refusing to order the Executive to pay any of the Member's costs. The Member says (a) that it is incorrect to regard the Regulator as the overall successful party in the proceedings; and (b) that the NCP's refusal to allow the Member's application for costs against the Regulator was based on a misunderstanding or misapplication of the principle in *Baxendale-Walker v Law Society* (2007) EWCA civ233.

   In relation to the first of these points, the Panel can see no basis on which to disagree with the NCP's conclusion that the Regulator was the overall successful party in these proceedings. The Panel observes that the Regulator was successful in relation to each of the nine disputed factual issues. There were four minor matters in relation to which the Member may be said to have been successful. First, as recorded above, the Member succeeded in excluding the mystery shopper evidence in relation to specific events, as opposed to processes. But, as noted above, the Regulator was also partially successful on this issue. Second, in relation to the allegation of pressure selling, the NCP found the allegation made out in relation to two complaints; found that it was less clear in relation to a third complaint; and was not convinced that pressure selling had taken place in respect of a fourth complaint. Third, the NCP made no finding as to whether the word "free" had been used by sales representatives in their discussions with consumers but, since the NCP found that the words "self-funding" had been used, and that these words were misleading to customers, the point is immaterial. Finally, in relation to two complaints, the Panel did not find that misleading statements had been made in the sales process but it did find that misleading statements had been made in relation to four other complaints. Overall, it seems plain to the Panel that the Regulator was the successful party.

   As for the test in *Baxendale-Walker*, the Member submits that the NCP erred in basing its decision on the principle to be that cost orders should not be made against a Regulator acting in the public interest unless the complaint has been improperly brought or has been "a shambles from start to finish". The Member argues that the true principle is that costs orders should not *ordinarily* be made, on the basis that costs follow the event, unless these conditions are satisfied. It submits that the NCP erred by considering that it was under an "absolute prohibition" against ordering costs against the Regulator.

   The Panel heard submissions from the Regulator on the meaning of *Baxendale-Walker* and the NCP's application of that case, and received advice (in public) from the legal assessor, which it accepted. The Panel considers that the NCP did not misunderstand or misapply the principle. First, the meaning of the principle in *Baxendale-Walker* was clearly and correctly set out in the advice of the NCP's legal assessor, which there is no basis to suppose the NCP misunderstood. Secondly, the NCP based its decision not to make a costs order in favour of the Member in the first instance, not on a presumption that it was not entitled to do so, but on its conclusion that the Regulator was the overall successful party in the proceedings – a conclusion with which the Panel agrees. The general principle (expressed in *Baxendale-Walker*) that a tribunal should be slow to make a costs order against a losing Regulator must apply *a fortiori* in cases where (as here) the Regulator has won. Thirdly, the NCP's formulation of the *Baxendale-Walker* principle does not in any case appear to us to be incorrect, although it omits the word "*ordinarily*": as recorded in the subsequent case of *Solicitors Regulation Authority v Davis* (2011) EWHC 232, on which the Regulator relied before the NCP, the principle is that "*costs should not be made against the [Regulator]*

unless something has gone wrong with the disciplinary proceedings for which it is responsible".

The Panel does not therefore consider there to have been an error of law. In any event, the Panel has itself considered the question whether it would be fair and reasonable to make a costs order in favour of the Member in this case, and concludes that it would not be fair and reasonable to do so, having regard to all of its findings above.

5. Under Ground 5, the Member submits that the NCP failed adequately to consider the representations made about the reasonableness of the Regulator's costs. It makes this complaint on the basis that the NCP's determination makes no specific reference to the submissions made to it by the Member.

   The Panel notes that the NCP determination states, under the heading "Costs", that the NCP had considered the written submissions of both parties and all of the evidence. The Panel sees no basis for concluding that the NCP did not consider the Member's detailed written submissions on costs. In any event, this Panel has considered both the Member's detailed submissions in relation to the reasonableness of the Regulator's costs at paragraphs 3.30 to 3.33 of its costs submissions, together with the Regulator's reply submissions at paragraphs 21 to 28 of its submissions of 1 June 2015. Having regard to all of these submissions, the Panel finds that the level of costs claimed by the Regulator is reasonable. It has had regard in particular to the following illustrative facts:
   (a) The Regulator's claimed costs before the NCP were £60,510.80 as compared with the Member's costs of £123,000.
   (b) Under the disciplinary process, the Regulator bears all of the overheads associated with the hearing. When these are omitted, the regulator's costs of the proceedings are £30,604, i.e. less than a third of the Member's own costs.
   (c) Whereas both parties used Grade A solicitors for the majority of the work, the Regulator's Grade A solicitor has charged for 70.5 hours, as compared with the 249.3 hours charged by the Member's Grade A solicitor.
   (d) The Regulator's counsel fees for the hearing below were £6,000, whereas the Member's were £45,600.

6. Ground 6 is essentially a summary of the Member's representations under Grounds 1 to 5. The Member submits first that 45% of its own costs are attributable to the Regulator's attempted reliance on unlawful or inadmissible evidence, such that the Regulator should pay 45% of the Member's costs. And having regard to the extent to which each party was successful, it suggests that the Member should pay 50% of the Regulator's costs.

   For the reasons set out above, the Panel does not accept that the Regulator behaved unreasonably in relation to the evidence. Nor does it consider that there is any other basis for a costs award against the Regulator, which was undeniably the successful party in these proceedings. The Panel considers that it is fair and reasonable in all the circumstances for the Member to pay the Regulator's costs of the proceedings below, subject to the following adjustment: in light of Panel's assessment of Ground 1 above, the Panel considers that the Regulator should bear its own wasted costs of the adjournment of the 25 February hearing, and that the costs order against the Member should therefore be reduced by £3,027.

Costs
[To be determined]

The Renewable Energy Consumer Code

Costs Determination in the Appeal of Smart Save Solutions Ltd

On 2 February 2016, the Appeal Panel ("the Panel") held a hearing to consider the Appeal of Smart Save Solutions Ltd ("the Member") against a Non Compliance Panel ("NCP") determination of 16 June 2015. The Panel delivered its determination, and the Panel Chair adjourned the hearing to consider the issue costs, and issued directions on costs submissions to both parties on 9 February 2016.

The Renewable Energy Consumer Code ("the Regulator") made written submissions on costs to the Panel on 12 February 2016, and served these on the Member. The Member provided its written submissions on costs on 23 February to the Regulator, and this was then put before the Panel. The Regulator made Reply submissions on costs on 25 February 2016, which were again served on the Member.

Preliminary Issues

The Panel notes there is no application from the Member for an award of its costs. For such an application to have been permitted, the Member would have had to serve a costs schedule on the Regulator 24 hours prior to the Appeal Hearing.

The Panel also notes The Member's written submission that it did not attend the Appeal Hearing on the basis it was concerned about apparent bias from the Chair of the Panel because the Chair had refused its application for an adjournment of the Appeal Hearing. The reasons for refusal of the requested adjournment are set out in the Appeal Determination of 9 February 2016. The Panel notes that despite the Member's comments, no application was received by the Panel for recusal of the Chair on grounds of bias.

Appeal Panel's Decision

The Panel read and considered carefully the submissions of both parties in relation to the Regulator's application for costs. Under Bye Law 10 of the applicable version of the Bye Law the Panel has the power to award such costs "as it considers fair and reasonable in all the circumstances", and these costs may include "the cost of investigating any alleged breach of the Code, Bye Laws, Conditions, or Consent Order, enforcing the Code and/or Bye Laws (including the costs of Monitoring and Audits… the costs of the Hearing or the Appeals Hearing (including, as appropriate, attendance, legal representation (if any), room hire, recording, transcription, the legal assessor (if any), and the Panel Members' and Panel Secretariat's time), or any other item of cost which the Executive considers to be connected to the matter being heard".

In reaching its decision the Panel considered the following issues:

1. **Is the Regulator the "successful party" in the appeal and therefore prima facie entitled to its costs?**

   The Panel concluded that the Regulator was overall the successful party despite the small reduction made to the costs award from the NCP. Therefore, the Regulator is prima facie entitled to recover its costs from the Member.

   The Panel considered whether there should be any reduction in the Regulator's costs on the grounds that there had been a small reduction in the costs award from the NCP. It concluded that since the reduction in the amount of costs awarded by the NCP was minor, and related to a narrow point, it did not constitute good reason to reduce the costs award in favour of the Regulator.

2. Are the Regulator's costs reasonable?

The Panel considered the reasonableness of both the overall level of the Regulator's costs and the reasonableness of the individual items of costs set out in the schedule by the Regulator.

The Panel noted that the Member says the Regulator's costs are "disproportionate" compared to the "average costs" quoted on the Regulator's website. But the costs quoted on the Regulator's website are the "basic costs" for a Panel Hearing (not an Appeal) and the Member could not reasonably have expected the Appeal costs to be anything close to those "basic costs" given its knowledge of the level of costs for the NCP hearing. The Panel noted that the Regulator's costs for the Appeal hearing, disregarding the costs associated with the various adjournments, or adjournment applications, and the Member's applications to recuse the original Panel and Chair, were £34,190.32, which was approximately half those of its costs before the NCP.

In assessing the Regulator's costs (excluding the costs of the adjournments and recusal applications) totalling £34,190.32, the Panel concluded there was nothing to suggest those costs were disproportionate, either overall or in relation to any specific item of costs claimed. The Panel noted that after removing from this figure the cost associated with convening the Appeals Panel and the costs of the legal assessor (said by the Regulator to total £21,992.63), the Regulator's remaining costs (i.e., in effect, its own costs of defending the appeal) were £12,197.69, which the Panel considered to be reasonable in the circumstances.

The fact that the Member stood down its legal team immediately prior to the hearing was not, in the Panel's view, a reason for the Regulator to have done the same given the legal arguments put forward in the Appeal Notice and the fact that the Bye-laws make no provision for the Regulator to put forward written submissions in advance. The Panel therefore considered it reasonable for the Regulator to have appointed counsel to put forward its oral submissions in reply to the Appeal Notice. In any event, counsel's costs were a small part of the overall costs at £5,022.00.

The Panel concluded that the Member's argument that costs were "avoidable" had no merit in relation to costs of the Appeal as there was never any suggestion that the Appeal could have been settled without a hearing.

Turning to the costs related to the adjournment, adjournment applications and recusal applications (each of which was a consequence of the Member's rather than the Regulator's actions), which amounted to £33,338.31, the Panel considered each item of costs set out by the Regulator in its schedule and the Regulator's submissions about the amount of time and complexity involved in dealing with the issues thrown up by those applications. The Panel considered that there was no basis on which it could conclude that the claimed costs were unreasonable, having regard to all the circumstances.

In conclusion, and in all the circumstances, the Panel concluded there was nothing unreasonable in the level of costs claimed by the Regulator. This is despite the fact that the level of costs might, initially, appear to be surprising, given the length of the appeal hearing and the fact that they exceed the level of the costs that were in issue in the appeal.

The Panel's decision is that the Member should pay the Regulator's costs amounting to £67,529.23.

8 March 2016