

Appeal against a Direction, made by the Guernsey Competition and Regulatory Authority, made under section 29 of the Electricity (Guernsey) Law, 2001, as amended, seeking that said Declaration be quashed, in whole or in part. The Appeal is brought under section 15 of the Regulation of Utilities (Bailiwick of Guernsey) Law, 2001, as amended.

[2021]GRC027

**IN THE ROYAL COURT OF GUERNSEY**  
**(ORDINARY DIVISION)**

**Between**

**GUERNSEY ELECTRICITY LIMITED**

**Appellant**

**-and-**

**GUERNSEY COMPETITION AND REGULATORY  
AUTHORITY**

**Respondent**

**Hearing date: 22<sup>nd</sup> March 2021**

**Judgment handed down: 30<sup>th</sup> July 2021**

**Before: Richard James McMahon, Esq., Bailiff**

**Counsel for the Appellant: Advocate M G A Dunster**  
**Counsel for the Respondent: Advocate M G Ferbrache**

**Cases, Texts & Legislation referred to:**

The Electricity (Guernsey) Law, 2001  
The Regulation of Utilities (Bailiwick of Guernsey) Law, 2001  
Guideline 10 – *Procedures for investigations conducted by CICRA*  
The Electricity (Guernsey) Law, 2001 (Amendment) Ordinance, 2015  
Billet d’État No. XVIII of 2013  
*Norweb plc v Dixon* [1995] 1 WLR 636  
The Electricity Act 1989  
The Administration of Justice Act 1970  
*Bichard v States of Guernsey* 2005-06 GLR 388  
*R (Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755  
*R (on the application of Trail Riders Fellowship) v Dorset County Council* [2015] UKSC 18  
*Aylesbury Vale DC v Call a Cab Ltd* [2013] EWHC 3765 (Admin)

**Introduction**

1. This is an appeal brought by Guernsey Electricity Limited against a Direction given to it pursuant to section 29 of the Electricity (Guernsey) Law, 2001, as amended (“the Electricity Law”), by the Guernsey Competition and Regulatory Authority on 19 November 2020. The appeal is brought under section 15 of the Regulation of Utilities (Bailiwick of Guernsey) Law, 2001, as amended (to which I will refer as “the Utilities Law”, because that has been the style

adopted by the parties, although it is referred to as “the Regulation Law” in the Electricity Law). The appeal seeks an order that the Direction be quashed, in whole or in part.

2. Both the Appellant and the Respondent have put forward two Affidavits containing the materials relevant to this appeal. On behalf of the Appellant, its Chief Executive Officer, Alan Bates, has sworn both Affidavits, on 26 November and 18 December 2020 respectively. On behalf of the Respondent, its in-house counsel, Richard Harrington, has sworn both Affidavits, on 3 December 2020 and 8 January 2021 respectively. The earlier Affidavits dealt, at least in part, with the Appellant’s application for interim relief, suspending the time for compliance with the Direction until the final determination of the appeal, which was granted on 4 December 2020, when a timetable to progress the appeal to a hearing was also set. What matters most from this material is the sequence of events and the materials exhibited. The explanations offered, particularly by Mr Bates, about the subject-matter of this appeal is of less relevance, which is why I make no real reference to that evidence.
3. In addition to the evidence, I have had the benefit of Skeleton Arguments from Advocates Dunster and Mark Ferbrache on behalf of the Appellant and Respondent respectively. They elaborated on the parties’ cases at the hearing of the appeal on 22 March 2021. The parties accepted a short delay to the date originally fixed for the hearing so that all those they wished to attend could do so following the easing of the lockdown arising from Covid-19 earlier this year. At the end of the hearing I reserved judgment.
4. In this judgment, I set out my reasons for allowing the Appellant’s appeal and quashing the Direction.

### **The Direction**

5. In Annex 1 to the letter from the Respondent to the Appellant dated 19 November 2020, the Appellant was given three weeks within which to comply with the Direction given in these terms:
  - “1. *As required in Licence Condition 20.1, Guernsey Electricity Limited publish and provide full detail of any new prices, any discounts to published prices or any special offers in relation to the supply of electricity, which are included in the section 16 special agreements as has been agreed with commercial customers; and*
  2. *As required in Licence Condition 20.3, Guernsey Electricity Limited provides the Authority with full details of the section 16 special agreements that demonstrate they comply with the obligation that all its published prices, discount schemes and special offers are transparent and non-discriminatory; all discount schemes shall be cost-justified and all special offers shall be objectively justified.”*
6. The specific reasoning on which the Respondent relies is set out in Annex 2, which contains the response to the Appellant’s submissions. The Respondent simply did not accept the contention on behalf of the Appellant that section 16 special agreements are outside the obligations imposed by Condition 20 on the Appellant’s licence. In particular, it was not persuaded that Condition 20.1(c) applies only to section 12 Fixed Tariffs. When the Appellant’s licence was granted, this limitation was not made to Condition 20.1 where such a limitation could have been included if it had been considered appropriate for the proper regulation of the Appellant’s electricity prices, which the Respondent considered clearly it was not. In respect of Condition 20.3, this is a natural extension to the requirement to provide full details of new offers and discounts. In respect of the Appellant’s submissions about process, the Respondent

stated that it had followed the statutory scheme by setting out its proposal in a Notice and considering the Appellant’s written response. Further, at para. 9 of Annex 2, it wrote:

*“On 12 June 2020, the Authority confirmed that it had instructed the Law Officers to provide a legal opinion specifically to advise on whether GEL’s use of Section 16 Special Agreements was compliant with the requirements of the Electricity Law and indicated that it would provide a copy of the legal opinion when it issued its decision on IEG’s complaint. That legal opinion did not address the matters subject to the Notice and is therefore not relevant to GEL submissions in reply to the Notice. We accept that it would have been courteous to have made this point when the provisional notice was introduced. In any event, the Authority has been advised by independent Counsel that it should not provide its legal opinions to GEL as a general policy.”*

7. In the body of the Respondent’s letter there are some further paragraphs under the heading “Electricity Regulation”, which can be regarded as supplementing its reasoning:

*“Visibility of prices and discounts offered by Guernsey Electricity to electricity customers is necessary for the Authority as the regulatory body, to carry out its particular role in this sector. Consumers and other stakeholders are also entitled to know what regulated prices Guernsey Electricity charges. The regulated business is held to account through licence obligations on transparency of the prices it offers given the features of this market where Guernsey Electricity also has a monopoly. The Authority has been faced with a situation where Guernsey Electricity’s decision not to be transparent has removed visibility on its pricing behaviour as a States-owned commercial business, arguing that the use of ‘Special Agreements’ removes its obligation to be transparent about the prices it charges to some commercial customers. Despite being informed that its conduct breaches its Electricity Licence, Guernsey Electricity has not accepted this obligation.*

*The Authority has now come to the view that without that information and with Guernsey Electricity refusing to act transparently regarding the price it charges its customers, the checks and balances that the regulator, customers and potential competitors are able to provide is absent and needs to be remedied as soon as possible.”*

## **Facts**

8. The Appellant was granted a licence under section 2(1) of the Electricity Law on 1 February 2012 by the predecessor to the Respondent, the Director General, permitting it to generate, to convey and to supply electricity. By Condition 1.2(c), “*headings used for Conditions, paragraphs and subparagraphs are for ease of reference only and will not affect the interpretation of the Conditions*”. In respect of supply, which is the activity of the Appellant with which this appeal is concerned, Condition 2.1(c) authorises the Appellant to “*supply electricity in that person’s Authorised Area as designated in this licence subject to the Conditions of this Part I, Part V, and, if applied by direction by the Director General, Part II*”. The reference to the Authorised Area for supply is to the Island of Guernsey (see Condition 36.4 in Part V).
9. It is common ground that a direction has been given that the Conditions in Part II are applicable. These apply to dominant operators and it is within this Part that Condition 20 appears. It provides that:

**“20. PRICE REGULATED SERVICES**

**20.1 Where the Licensee intends**

- (a) *to introduce new prices, any discounts to published prices or any special offers in relation to the generation of electricity, it shall publish notice of same at least 7 days prior to their coming into effect;*
- (b) *to introduce new prices, any discounts to published prices or any special offers in relation to the conveyance of electricity, it shall publish notice of same at least 3 months prior to their coming into effect;*
- (c) *to introduce new prices, any discounts to published prices or any special offers in relation to the supply of electricity, it shall publish notice of same at least one month prior to their coming into effect,*

*or it shall publish notice at such longer periods as may otherwise be required by law and the licensee shall provide full details of same to the Director General at the same time as the publication notice is required.*

20.2 *The Director General may determine the maximum level of charges the Licensee may apply within a relevant market in which the Licensee has been found to be dominant. A determination may;*

- (a) *provide for the overall limit to apply to such charges;*
- (b) *restrict increases in any such charges or to require reductions in them whether by reference to any formula or otherwise; or*
- (c) *provide for different limits to apply in relation to different periods of time falling within the periods to which any determination applies.*

20.3 *All published prices, discount schemes and special offers of or introduced by the Licensee shall be transparent and non-discriminatory; all discount schemes shall be cost-justified and all special offers shall be objectively justifiable.*

20.4 *If the Director General, after consulting the Licensee and such other persons as she may determine, is satisfied that any published price, discount scheme or special offer is in breach the Regulation Law, Electricity Law or this Licence, the Director General may, by issuing a direction, require the Licensee to bring the relevant prices, discount schemes or special offers into conformity with the Laws and/or the requirements of this Licence”.*

Although the appeal focuses on Condition 20.1(c) and 20.3, setting out the full Condition in this fashion enables those parts to be put into context.

10. The Appellant was informed by a letter dated 12 November 2019 that the Respondent had received a complaint made by Guernsey Gas and Islands Energy Group (“IEG”) that agreements the Appellant may have entered with a former customer of IEG had the object and effect of hindering and preventing competition in the market and amounted to breaches of the Appellant’s licence conditions. To enable it to consider how to deal with this complaint, the Respondent’s letter sought provision of the agreement or agreements concerned pursuant to Condition 4 of the Appellant’s licence and enquired how the Appellant believed it had complied with Condition 20.1 regarding new prices, any discounts to published prices or any special offers. Condition 4.1 provides:

*“For the purpose of monitoring the Licensee’s compliance with the Conditions and the Laws, the Licensee shall provide to the Director General in the manner and at the times required by the Director General any documents, accounts, returns, estimates, reports or other information required by the Director General, including the documents, accounts, returns, estimates, reports and other information specified in this Licence.”*

11. Under cover of a letter dated 29 November 2019, the Appellant provided a copy of the commercial supply agreement (which it then abbreviates in its letter to “CSA”) entered into under section 16(1) of the Electricity Law. In relation to compliance with Condition 20.1, the letter set out the argument that has been maintained since, namely that:

*“... the whole purpose of section 16 is to give customers the choice (or, where reasonable, to require them) to enter into private and bespoke supply agreements, independent of the published tariffs. It is for that reason that sections 16(1) and (2) make it clear sections 10 to 15 (including section 15(2), which is what obliges GEL to publish its tariffs and hence what underlies condition 20.1) do not apply to section 16 agreements. Indeed, it would make no sense if they did, as section 16 agreements will often contain commercially sensitive information, and to expose that to public scrutiny would be inappropriate or would risk undermining the freedom of choice which section 16 affords. ...*

*GEL has created a brand-new commercial arrangement with [its customer] under section 16. The CSA does not represent a new price, discount or special offer to our published prices. The arrangement with [the customer] is not based upon public tariffs at all. Indeed, the CSA bears no resemblance to published tariffs. The structures are completely different. As explained above, the CSA is more clearly and transparently aligned with the costs of the infrastructure and electricity provided.”*

12. The Respondent replied by way of a letter dated 20 December 2019 seeking an explanation *inter alia* as to why the Appellant “*thought it was reasonable in all the circumstances to enter into the agreement*” and how section 16 discharges the Appellant from responsibility under its licence conditions. The Appellant replied on 16 January 2020 pointing out that the request for an explanation about the reasonableness of the circumstances related to para. (b) in section 16(1) of the Electricity Law where the Appellant had proceeded under para. (a) in respect of the CSA in question. The Appellant also repeated its contention that Condition 20.1 does not apply to section 16 special agreements.
13. The Respondent’s next letter is dated 3 February 2020 and does little more than indicate that the Appellant’s contentions were not accepted. The Appellant’s response dated 7 February 2020 questioned whether the Respondent was complying with the terms of its published Guideline 10 – *Procedures for investigations conducted by CICRA*. This was the first occasion on which some of the arguments relied upon by the Appellant as an alternative to its primary case in respect of the Direction were articulated.
14. By way of a letter dated 12 February 2020, the Respondent gave to the Appellant a formal notice pursuant to section 5 of the Utilities Law. It required various items of information relating to the CSA. On 28 February 2020, the Appellant sought an extension of time within which to comply with this notice. The Respondent was prepared to grant a short extension but not quite as long as requested, which led to the Appellant responding by way of a letter dated 10 March 2020 under cover of which it provided what it described as its “*voluntary disclosure*”, whilst also reserving its position as to the lawfulness of the notice. The status of the investigation by reference to Guideline 10 was raised in a further letter from the Appellant of the same date.

15. By an undated letter to IEG, but which Mr Harrington deposes was sent by e-mail on 11 June 2020, IEG was updated about the investigation and the Respondent's decision to take advice from the Law Officers. By a letter dated 12 June 2020, the Respondent provided a similar update to the Appellant, indicating its intention to provide the Appellant with a copy of that advice with its decision and indicated that it intended to put recommendations to its board the following month. The absence of any notification to the Appellant of a formal investigation having been opened was raised on its behalf by its Advocates, who wrote raising these concerns on 29 June 2020, again drawing attention to Guideline 10. The response from Mr Harrington dated 3 July 2020 noted:

*“We have reviewed the procedures recommended in CICRA Guideline 10, and on reflection, they do not appear to suitably reflect the investigatory processes and information gathering procedures in sector specific legislation or the provisions in the licence conditions for licensees such as your client, GEL. Therefore, we plan to withdraw Guideline 10 and will produce an updated guideline for licensees that Guernsey Competition and Regulatory Authority (**Authority**) regulates.”*

16. On 17 July 2020, Mr Harrington wrote to IEG and the Appellant in similar terms, referring to the advice that had been received, apparently on 3 July 2020, and in respect of which further clarification was sought, adding that the next meeting of the board was scheduled for 4 August 2020, at which a decision was expected on the next steps.
17. By letter dated 30 October 2020, but apparently sent on 30 September 2020, the Respondent informed the Appellant that its investigation and review of the Appellant's use of section 16 special agreements led it to identify potential contraventions of the licence. The letter enclosed a notice pursuant to section 29(3) of the Electricity Law, which was to be published on the Respondent's website that day. The notice explained that the Respondent proposed giving a direction to the Appellant in terms that are the same as the Direction subsequently given because the Respondent had formed the opinion that the Appellant had contravened Condition 20.1 and 20.3 of its licence:

*“In breach of Licence Condition 20.1, Guernsey Electricity Limited entered into special agreements under section 16 of the Electricity Law with commercial customers which include prices that are outside of its published tariff and it failed to publish notice of those prices and it failed to provide full details of the same to the Authority.*

*In breach of Licence Condition 20.3, Guernsey Electricity Limited failed to provide full details that demonstrate how the special agreements under section 16 comply with the obligation that all of its published prices, discount schemes and special offers are transparent and non-discriminatory; all discount schemes shall be cost-justified and all special offers shall be objectively justified.”*

The notice informed the Appellant or any other interested party of the ability to provide written representations or objections in respect of the proposed Direction within seven days of publication.

18. The Appellant's Advocates wrote on 1 October 2020 requesting sight of a copy of the legal advice received by the Respondent, a copy of which had been promised to be provided by its letter dated 12 June 2020. That letter also sought an extension of the time for representations to 14 days from publication, which request was refused by the Respondent the following day. The Respondent's letter of 2 October 2020 also declined to provide a copy of the advice it had received. The Appellant's written representations were, therefore, provided by its Advocates' letter dated 6 October 2020. In Mr Harrington's letter dated 12 October 2020, the Respondent acknowledged receipt of them and explained that they would now result in a final decision, which led to the Direction sent with the letter dated 19 November 2020.

## Appeal grounds

19. The Appellant's Cause sets out the grounds on which it appeals against the Direction. The grounds of appeal available are set out in section 15(3) of the Utilities Law. They are that an error of law has been made, a material error as to the facts has been made, there was a material procedural error, or that there was some other material irregularity, including unreasonableness or lack of proportionality.
20. The Appellant's primary case is that the Respondent erred in law in deciding that special agreements under section 16 of the Electricity Law come within Condition 20. This ground raises a question of construction first of the terms of the Electricity Law, and in particular the relationship between the tariff arrangements in sections 10 to 15 with special agreements under section 16, and whether Condition 20 is confined to such tariff arrangements. As an alternative, the Appellant argues that Condition 20.1 does not require full details of any section 16 special agreement to be published. Accordingly, the Direction has been cast more broadly than is permissible and so amounts to an error in law. The final alternative error of law alleged is that Conditions 20.3 does not require provision of information to the Respondent.
21. The Appellant proceeds to allege that the Direction lacks proportionality. This arises because the ability of the Respondent to issue any direction is discretionary. Its desire for transparency could be achieved without requiring the publication of commercially sensitive information and could be achieved simply by requiring the provision of information to the Respondent without it being published.
22. As a further alternative argument, the Appellant alleges that the Respondent fell into material procedural error. By publishing its Guideline 10, the Respondent created a legitimate expectation that it would follow its terms. It has conceded that it did not do so and, at the time of pleading the cause, the Guideline was still publicly available on its website. Because the Respondent's publication of its notification to the Appellant pursuant to section 29(3) of the Electricity Law happened before the Appellant was properly aware that a formal case had been opened against it, the Appellant lost the opportunity to seek to persuade the Respondent that its interpretation of the Law and the licence conditions was wrong with a view to persuading it not to take that step, and publicise that it had done so.

## The Electricity Law

23. By virtue of Part I of the Electricity Law, unless an exemption is granted, anyone wishing to generate, convey or supply electricity in the Island of Guernsey requires a licence. Licences are granted having regard to the objectives set out in section 2 of the Utilities Law, referring to the general duties of the States of Guernsey and the Respondent. Those objectives are:
  - “(a) to protect the interests of consumers and other users in the Bailiwick in respect of the prices charged for, and the quality, service levels, permanence and variety of, utility services,*
  - (b) to secure, so far as practicable, the provision of utility services that satisfy all reasonable demands for such services within the Bailiwick, whether those services are supplied from, within or to the Bailiwick,*
  - (c) to ensure that utility services are carried out in such a way as best to serve and contribute to the economic and social development and well-being of the Bailiwick,*

- (d) *to introduce, maintain and promote effective and sustainable competition in the provision of utility services in the Bailiwick, subject to any special or exclusive rights awarded to a licensee by the Authority pursuant to States' Directions.*"

24. Part II of the Electricity Law covers the generation, conveyance and supply of electricity. This is where section 16 is found, which provides as follows:

- “(1) *Notwithstanding anything in sections 10 to 15, a person who requires a supply of electricity in pursuance of section 10(1) –*
  - (a) *may enter into a special agreement with a public electricity supply licensee for the supply on such terms as may be specified in the agreement, and*
  - (b) *shall enter into such an agreement in any case where it is reasonable in all the circumstances for such an agreement to be entered into.*
- (2) *The rights and liabilities of the parties to an agreement as provided for in subsection (1) shall be those arising under the agreement and not those provided for by sections 10 to 15; but nothing in this subsection shall prejudice the giving of notice under section 10(2) specifying as the day on which the supply is required to commence the day on which such an agreement ceases to be effective.*
- (3) *In this Part, “tariff customer” means a person who requires a supply of electricity in pursuance of section 10(1) and is supplied by a public electricity supply licensee otherwise than on the terms specified in such an agreement as is mentioned in subsection (1).*
- (4) *For the avoidance of doubt, rights and liabilities under an agreement as is provided for in subsection (1) may include rights and liabilities relating to the payment of expenses reasonably incurred on researching and investigating the feasibility and cost of provision of any supply to be made under such an agreement.”*

Subsection (4) was inserted into this section by the Electricity (Guernsey) Law, 2001 (Amendment) Ordinance, 2015.

25. It is readily apparent that section 16 creates a different regime for someone who otherwise falls within section 10 than for those who are, as defined in subsection (3), tariff customers. Section 10 creates a duty to supply on request and provides:

- “(1) *Subject to the following provisions of this Part and any regulations made under those provisions, a public electricity supply licensee shall, upon being required to do so by the owner or occupier of any premises –*
  - (a) *give a supply of electricity to those premises, and*
  - (b) *so far as may be necessary for that purpose, provide electric lines or electrical plant or both.*
- (2) *Where any person requires a supply of electricity in pursuance of subsection (1), he shall give to the relevant public electricity supply licensee a notice specifying –*
  - (a) *the premises in respect of which the supply is required,*

- (b) *the day on which the supply is required to commence,*
- (c) *the maximum power which may be required at any time, and*
- (d) *the minimum period for which the supply is required to be given.*

(3) *Where a public electricity supply licensee receives from any person a notice under subsection (2) requiring it to give a supply of electricity to any premises and –*

- (a) *it has not previously given a supply of electricity to those premises, or*
- (b) *the giving of the supply requires the provision of electric lines or electrical plant or both, or*
- (c) *other circumstances exist which make it necessary or expedient for it to do so,*

*it shall, as soon as practicable after receiving that notice, give to that person a notice under subsection (4).*

(4) *A notice from a public electricity supply licensee under this subsection shall –*

- (a) *state the extent to which the proposals specified in the other person's notice under subsection (2) are acceptable to the public electricity supply licensee and specify the counter proposals made by the public electricity supply licensee,*
- (b) *state whether the prices to be charged by the public electricity supply licensee will be determined by a tariff under section 12, or a special agreement under section 16, and specify the tariff or proposed terms of the agreement,*
- (c) *specify any payment which that person will be required to make under section 13(1) or under directions made under section 13(2),*
- (d) *specify any other terms which that person will be required to accept under section 10, and*
- (e) *state the effect of section 17.*

(5) *In this section and in sections 11 to 17 –*

- (a) *any reference to giving a supply of electricity includes a reference to continuing to give such a supply,*
- (b) *any reference to requiring a supply of electricity includes a reference to requiring such a supply to continue to be given, and*
- (c) *any reference to the provision of an electric line or an item of electrical plant is a reference to the provision of such a line or item either by the installation of a new one or by the modification of an existing one.”*

Of note is that subsection (4)(b) draws a distinction between charging pursuant to a tariff under section 12 or under a section 16 special agreement.

26. Section 11 covers those cases where a public electricity supply licensee is not required to give a supply of electricity. By virtue of subsection (2)(c), a licensee “*shall not be required to give a supply of electricity pursuant to section 10(1) if and to the extent that ... it is not reasonable in all the circumstances for it to be required to do so.*” Subsection (4) was inserted by the 2015 Ordinance and sets out the considerations that must be taken into account for the purposes of determining whether it is reasonable or not for the licensee to be required to give a supply of electricity under subsection (2)(c). The policy letter leading to the enactment of this Amendment Ordinance (Article VI of Billet d’État No. XVIII of 2013) helpfully sets out the background to these new provisions and explains some of the differences between sections 10 to 15 on the one hand and section 16 on the other. The impetus for these changes was the expectation that the Appellant would wish to negotiate section 16 agreements, especially with the advent of data centres.

27. Section 12 confers upon the licensee the power to recover charges. It provides:

“(1) *Subject to the following provisions of this section and section 23, the prices to be charged by a public electricity supply licensee for the supply of electricity by it pursuant to section 10(1) shall be in accordance with such tariffs (which, subject to any condition included in its licence, may relate to the supply of electricity in different areas, cases, premises and circumstances) as may be fixed by him from time to time and approved by the Authority before they are levied.*

(2) *A tariff fixed by a public electricity supply licensee under subsection (1) may include –*

(a) *a standing charge in addition to the charge for the actual electricity supplied,*

(b) *a charge in respect of the availability of a supply of electricity, and*

(c) *a rent or other charge in respect of any electricity meter or electrical plant provided by the public electricity supply licensee,*

*and such a charge as is mentioned in paragraph (b) may vary according to the extent to which the supply is taken up.*

(3) *In fixing tariffs under subsection (1), a public electricity supply licensee shall not show undue preference to any person or class of persons, and shall not exercise any undue discrimination against any person or class of persons.*

(4) *Any question relating to whether any act done or course of conduct pursued by a public electricity supply licensee amounts to such undue preference or such undue discrimination shall be determined by the Authority but nothing done in any manner by a public electricity supply licensee shall be regarded as undue preference or undue discrimination if and to the extent that the public electricity supply licensee is required or permitted to do the thing in that manner by or under any provisions of its licence.”*

Section 23 makes provision for a consumer to whom electricity has been supplied to resell that electricity, subject to the maximum prices fixed by the Respondent. By section 23(2), the Respondent may publish those prices as fixed by it or “*direct a licensee to publish such prices, in such manner as in the opinion of the Authority will secure adequate publicity for them*”.

28. Section 13 of the Electricity Law enables a public electricity supply licensee which provides any electric line or electrical plant to require that any expenses reasonably incurred by it be defrayed by the person requiring the supply. Section 14 enables such a licensee to require any person requiring a supply of electricity in pursuance of section 10(1) to give reasonable security for the payment to it of all money which may become due to it in respect of the supply or the provision of any electric line or electrical plant, under which failure to give that security may result in the licensee refusing to give the supply or, as the case may be, providing the line or plant. I have referred to these two sections for the sake of completeness but neither is directly relevant to the issues raised by this appeal.

29. Section 15 makes further provision in respect of the terms of a supply of electricity, as follows:

*“(1) A public electricity supply licensee may require any person who requires a supply of electricity in pursuance of section 10(1) to accept in respect of the supply –*

*(a) any terms requiring that person to continue to receive and pay for the supply of electricity for a minimum period of time and subject to minimum consumption requirements,*

*(b) any restrictions which must be imposed for the purpose of enabling the public electricity supply licensee to comply with regulations under section 19, and*

*(c) any terms restricting any liability of the public electricity supply licensee for economic, consequential or other indirect loss however arising which it is considered reasonable by the Authority in all the circumstances for that person to be required to accept.*

*(2) A public electricity supply licensee shall –*

*(a) publish the terms and conditions upon which it supplies electricity, and*

*(b) notify its customers of those terms and conditions,*

*in such manner as the Authority may direct.”*

30. The parties also referred to section 17, relating to the determination of disputes, which provides:

*“(1) Any dispute arising under sections 10 to 16 which cannot be resolved between the relevant public electricity supply licensee and a person requiring a supply of electricity may be referred by either party to the Authority for resolution.*

*(2) On the reference of a dispute to it under subsection (1) –*

*(a) the Authority shall investigate within a reasonable period of time, and in any event within a period of 6 months from the date of the reference,*

*(b) the Authority shall resolve the dispute by issuing a direction, and*

*(c) if the Authority issues a direction under paragraph (b) that a supply shall be provided, it may issue a further direction as to the terms, conditions and charges that shall apply, having regard to the provisions of this Part.*

(3) *Where any dispute arising under section 10 to 16 between a public electricity supply licensee and a person requiring a supply of electricity to continue to be given falls to be determined under this section, the Authority may give directions as to the circumstances in which, and the terms on which, the public electricity supply licensee is to continue to give the supply pending the determination of the dispute.*

(4) *Where any dispute arising under section 14(1) falls to be determined under this section, the Authority may give directions as to the security (if any) to be given pending the determination of the dispute.*

(5) *Directions under subsections (3) or (4) may apply either in cases of particular descriptions or in particular cases.”*

31. If only for the sake of completeness, the final section in Part II gives effect to the provisions of Schedule 2 to the Electricity Law, which contain the Electricity Supply Code. Paragraph 1 enables a public electricity supply licensee to recover charges due to it from a tariff customer. Paragraph 2 is similarly directed only at tariff customers, and it deals with the restoration of supply. Paragraph 3 prevents the restoration of supply by anyone other than the public electricity supply licensee. Paragraph 4 deals with damage to electrical plant, electric lines or any part of any domestic electricity supply equipment, which constitutes an offence and may result in the discontinuance of supply. Paragraph 5 relates to powers of entry to premises during the continuance of supply and paragraph 6 relates to entry when supply is to be discontinued for the purpose of disconnecting or removing the meter. Paragraph 7 covers the entitlement to enter premises to enable the replacement, repair or alterations of electric lines or plant. By paragraph 8, if gaining entry under these provisions has not been successful, the Magistrate’s Court can grant an order authorising entry, if necessary through the use of force and paragraph 9 requires the premises to be left in as secure a state as when entry was obtained. Finally, paragraph 10 provides that electrical plant, lines and meters of a public electricity supply licensee do not become part of a landlord’s fixtures and are not subject to be distrained upon.

### **Appellant’s primary case**

32. Against that statutory framework, the Appellant contends that section 16 agreements do not come within the terms of Licence Condition 20. Accordingly, the Respondent has fallen into error by concluding that there has been a contravention of this Condition, which is a precondition to giving a direction under section 29(1) of the Electricity Law, which provides:

*“Where the Authority is satisfied that a licensee is or has been in contravention of –*

*(a) any condition of a licence, or*

*(b) any provision of, or any provision of a direction or regulation under, this Law or the Regulation Law,*

*it may give, and may publish, a direction under this section.”*

33. The Appellant relies upon the explanation offered in *Norweb plc v Dixon* [1995] 1 WLR 636 about provisions in the Electricity Act 1989 which are similar to those appearing in the Electricity Law. (The numbering of the corresponding sections in the Act begin at 16, equivalent to section 10 of the Electricity Law, meaning that section 22 of the Act corresponds to section 16 of the Law.) The facts of that case were different, because it related to an allegation that the public electricity supplier had unlawfully harassed a debtor, which led to the conviction on the information preferred by Mr Dixon of Norweb plc of an offence under section 40(1) of the Administration of Justice Act 1970, as amended. That subsection required that the

debt in question had to be due under a contract, so the main issue on the appeal was whether or not a tariff customer was being supplied under a contract.

34. The passage on which the Appellant relies is found in the judgment of Dyson J at page 644:

*“The words of section 22 of the Act of 1989 provide further support for the view that there is no contract. That section refers to a special agreement “for the supply on such terms as may be specified in the agreement.” What is contemplated is a negotiated agreement to meet the particular requirements of a consumer. Section 22(3) states that the rights and liabilities of the parties to the special agreement shall be those arising under the agreement, and not those provided for by sections 16 to 21 of the Act. Thus a clear distinction is drawn as to the source of the rights and liabilities between (i) supplies under special agreements which are governed by the terms of those agreements and (ii) supplies to tariff customers which are governed by the Act of 1989. This provides clear confirmation that the rights and liabilities as between tariff customers and their public electricity suppliers are governed by statute and not by contract.”*

His Lordship continued to explain why the absence of a contract did not affect the ability of a public electricity supplier to recover charges:

*“The justices were of the opinion that, if there was no contract between the parties, there would be no basis in law for the supplier to recover debts owed to it. In my view, they were mistaken. Paragraph 1(1) of Schedule 6 gives the supplier power to recover charges due to it. There is, therefore, no need to have recourse to contract.”*

The same position is found in the Electricity Law under para. 1 of Schedule 2. In other words, the regime found in the Electricity Law mirrors that in the 1989 Act. There is a distinction between a section 16 agreement, which is a contract between the supplier and the consumer, and those who are tariff customers and who are supplied on the terms governed by the statute.

35. I also consider it helpful to quote another paragraph from this judgment (from page 643) because it explains why the conclusion was reached that there is no contract for a tariff customer:

*“The issue in this case is: which side of the line does the relationship between a tariff customer and a public electricity supplier fall? In my judgment, the legal compulsion as to both the creation of the relationship and the fixing of its terms is inconsistent with the existence of a contract. As regards the creation of the relationship, the supplier is obliged by section 16(1) of the Act of 1989 to supply if requested to do so. The exceptions from the duty to supply provided in section 17 are very limited in scope. Mrs. Cover [counsel for the respondent] submits that section 17(2)(c) gives the supplier what she calls a “discretion” not to supply. That is not so. A supplier is excused from supplying if (the burden being on him) it is not reasonable in all the circumstances for him to be required to do so. What is reasonable is a question of fact to be established objectively. Discretion does not come into play. Thus, save in certain narrowly defined circumstances, if a consumer requests the supply of electricity, the supplier is obliged to supply.”*

36. I am satisfied that this reasoning applies equally to the scheme created by the Electricity Law. Indeed, even without the benefit of this authority, I would reach the same conclusions. For a tariff customer, the relationship is founded on the statutory scheme. Such a consumer does not bargain with the public electricity supply licensee. The terms and conditions upon which electricity is supplied are those that are published, thereby giving notice to the customers. The distinction, therefore, is between tariff customers on the one hand, who are not in a contractual

relationship with a licensee, and any persons who require a supply of electricity and enter into a special agreement under section 16, where the right and liabilities between the parties are governed by the terms of the agreement rather than by the statutory regime found particularly in sections 10 to 15.

37. The second aspect of the relationship between the different provisions in the Electricity Law is that section 10(1) requests for supply must be complied with unless there is an exception from having to do so found in section 11. If there were to be a dispute between the person requesting the supply and the licensee from which the supply is being requested, section 17 enables the Respondent to resolve that dispute by issuing a direction, and this may extend to a further direction as to the terms, conditions and charges that shall apply. I consider it significant that the Respondent must have regard to the provisions of the Part when doing that, because this means that it must consider the two different routes found by which the rights and liabilities between the supplier and consumer are established. The supply may be to a tariff customer, in which case the scheme created under the Law applies, or it may be that there is to be a special agreement under section 16. This is also consistent with section 10(4)(b) when such a notice is given.
38. The parties did not agree about how section 16(1) operates, differing as to whether the two paragraphs are conjunctive or disjunctive. This arises because of the use of “and” between them. Whilst this would normally indicate that both paragraphs have to be satisfied, the language used demonstrates that this is not the case here. Paragraph (a) is permissive, in the sense that it enables the person requiring the supply of electricity to agree terms with the licensee, presumably through the usual channels of commercial negotiation. Paragraph (b) is mandatory, in that the request for supply can be required to be provided under a section 16 agreement where it is reasonable in all the circumstances for such an agreement to be entered into. I consider that this entitles the licensee to impose that requirement, even if it might not be the choice of the consumer and, if the consumer did not wish to accept that imposition, it would result in a dispute capable of being determined under section 17 by the Respondent. As such, there are two routes by which a section 16 special agreement can come into existence.
39. Having identified the distinction between the two situations in which electricity is being supplied by a licensee, the real question is how Licence Condition 20 operates. The Appellant contends that it simply does not cover section 16 agreements and is confined to tariff customers. The Respondent notes that there is nothing on the face of Condition 20 that limits its application to tariff customers only and the language used is such that it also covers section 16 arrangements. This raises a further question of construction.
40. The first matter to note is that the heading used, referring to price regulated services, cannot of itself assist in construing the content of that Condition. This is the effect of Condition 1.2(c) (“*headings used for Conditions ... are for ease of reference only and will not affect the interpretation of the Conditions*”). However, this reference to price regulated services cannot, in my view, be disregarded in its entirety. If it is consistent with the language used in Condition 20, then it will help to clarify what is covered by the Condition for which it is the heading. I am satisfied that the heading offers that level of assistance in the present case.
41. I accept the submission that the Conditions on the Appellant’s licence cannot override the terms of the Electricity Law. Section 5(1) of that Law provides that:

*“A licence may, subject to the provisions of any States’ Direction, include such conditions as appear to the Authority to be appropriate, having regard to the nature of the application for the licence, the objectives set out in section 2 of the Regulation Law and the enforcement of the Regulation Law and this Law ...”.*

By para. (f), “*conditions regulating the prices, premiums and discounts that may be charged or (as the case may be) allowed by a licensee which has a dominant position in a relevant market*” are included amongst those available. Bearing in mind that Condition 20 is found in Part II of the Appellant’s Licence Conditions, which applies because of the direction that it has a dominant position, I take the view that it can properly be read in that light as a form of price regulation. It is also worth noting that Condition 20.2 enables the Respondent to determine maximum charges.

42. In this regard, I further consider that the content of Condition 20 must be read in the light of the Condition as a whole. In respect of Condition 20.1(c), the obligation on the Appellant arises where it intends “*to introduce new prices, any discounts to published prices or any special offers in relation to the supply of electricity*”. Of particular note are the opening words of Condition 20.3 (“*All published prices, discount schemes and special offers*”) and the words found in Condition 20.4 (“*any published price, discount scheme or special offer*”). Accordingly, although Condition 20.1(c) refers to “*published prices*” by reference to discounts applicable to them, I find that the reference to “*new prices*” also means prices that are different from those that have previously been published. Similarly, I find that the reference to “*special offers*” can only sensibly mean those that are offered generally to customers, or particular groups of customers who can take advantage of them. In other words, the starting point is to ascertain what has to be published because it is only if something has to be published that there could be a contravention of Condition 20.1(c) or 20.3 by the Appellant.
43. In each case, if the Appellant intended to introduce a new price, or to offer a discount to the prices already published or to give any special offers, the obligation is to “*publish notice of same at least one month prior to their coming into effect*”. In my view, this supports the interpretation to be given to Condition 20 that it relates to the statutory regime for tariff customers only. The underlying purpose of requiring publication in advance of a new price, or a discount or a special offer (or even a combination of them) is to enable the tariff customers who will be affected or might avail themselves of the discount or special offer to adjust their usage of the supply so as to benefit from, or even avoid the adverse consequences of, the new prices, etc generally available. I am not persuaded that any of the terms on which the Appellant might enter into a section 16 special agreement with a person requesting a supply can properly be regarded as amounting to a new price, or a discount from published prices or a special offer because the terms on which such a special agreement will be founded are bespoke to the particular customer. They are not terms that are available on the same basis to others.
44. I have further noted that the first element of the Direction given by the Respondent requires the Appellant to “*publish and provide full detail of any new prices, any discounts to published prices or any special offers in relation to the supply of electricity, which are included in the section 16 special agreements as has been agreed with commercial customers*” without the Respondent having been able to identify whether any special agreement amounts to a new price, a discount or a special offer. Before the Direction could be given, under section 29(1) of the Electricity Law the Respondent needed to identify the contravention of the licence condition on which it was relying. It is unclear from the materials of the Respondent whether it had found that the prices in any special agreement amounted to a new price, a discount or a special offer. I doubt it could have been all three. The inability of the Respondent to clarify whether the contravention of Condition 20.1(c) arose from the introduction of a new price, a discount or a special offer without the required prior publication before it took effect does not surprise me because, on the material produced by it, the Respondent has not attempted to analyse the issue in that way. The reasoning associated with the giving of the Direction refers to transparency on pricing. If, as I have found, the obligations under Condition 20 can only properly be read by reference to tariff customers and does not extend to section 16 special agreements, any terms negotiated before concluding a section 16 agreement do not amount to a discount or special offer.

45. When the Respondent gave notice of its intention to consider giving the Appellant a direction, and published the materials relating to that intention, that notice stated that the Respondent took the view that there had been a contravention of Licence Condition 20.1 because the Appellant had entered into special agreements “*which include prices that are outside of its published tariff*”. It did not state whether this amounted to a new price. It did not state whether this was regarded as a discount. It did not state whether this was being treated by it as a special offer. In my view, the Respondent was obliged to set out more particularly what the contravention of the Licence Condition was and its decision not to do so supports the conclusion that it was not clear that there had been a new price, a discount or a special offer. Further, if it were a new price, it would not be one generally available and, if it were a discount or a special offer, what mattered would be the circumstances in which such a discount or special offer would be available. Sweeping the contravention up in the manner the Respondent has done, referring to transparency in pricing, did not satisfactorily explain the contravention found. I am satisfied that the Appellant’s interpretation of Condition 20.1 as not covering section 16 agreements is correct, meaning that the heading has been accurately applied. This condition relates to the areas which are price regulated through general publication and not to the terms upon which electricity might be supplied under a section 16 agreement.
46. Turning to Condition 20.3, if there was no obligation to publish, then this aspect of the Condition is simply not engaged. The obligation to publish is found in section 15(2) of the Electricity Law. This relates to tariff customers only. I am satisfied that the reason for requiring the terms and conditions upon which a licensee supplies electricity to arise from the fact that it is the statutory scheme, rather than the individual agreement under section 16, which governs those terms and conditions. If they were not published, customers would not necessarily be aware of those terms and conditions. Publication serves to give notice of them to the tariff customers as a body of consumers. When considered in the light of section 12(3) of the Electricity Law, relating to fixing tariffs without showing undue preference to any person or class of persons or exercising undue discrimination, it is clear that Condition 20 operates in respect of tariff customers and does not extend to those persons to whom electricity is supplied under a section 16 agreement.
47. A further consideration in respect of Condition 20.3 is that the Respondent has not specified how it regards a section 16 special agreement. It is not readily apparent that it would amount to a new price and nothing else. More likely than not, the best argument is that it would be a special offer, with the alternative possibility being that it is a discount. If it were a special offer, then Condition 20.3 requires it to be objectively justifiable. However, the whole purpose of a section 16 special agreement appears to be that it is tailored to that particular customer. It is, therefore, difficult to see how it can properly be regarded as an objectively justifiable special offer. Further, given that it may or may not constitute a discount to published prices (and the Respondent has not articulated what has happened in that manner), such a discount has to be cost-justified or else there is a contravention of Condition 20.3. These are further reasons why I have concluded that Condition 20.3 is not engaged in relation to section 16 agreements.
48. As a result, I find that the Respondent has erred in law in giving to the Appellant the Direction because it should not have found that the Appellant had contravened Licence Condition 20.1(c). The terms of a section 16 special agreement do not constitute the Appellant introducing any new price and, in my view, they are not discounts to published prices or special offers in the sense of being available to others. Similarly, because I do not find that there are any prices, or discounts or special offers that had to be published under Condition 20.1(c), it follows that Condition 20.3 has also not been contravened by the Appellant entering into special agreements with a small number of its customers.
49. For these reasons, the appeal is granted and the Direction will be quashed in its entirety.

50. Having reached that decision, I can add that some of the concerns expressed on behalf of the Respondent about its inability to regulate satisfactorily if it cannot require publication of the details in its Direction are, in my opinion, unjustified. The Respondent's ability to require the provision of information to it continues to operate. This is apparent from Condition 4 of the Appellant's licence and also the general powers conferred upon it by section 5 of the Utilities Law, both of which the Respondent has exercised in relation to its earlier investigation. Although it is not an issue that requires determination for the purposes of this appeal, I am satisfied that the Appellant's objections to being required to provide information when it was sought by the Respondent in relation to one section 16 special agreement were probably without any real substance. The Appellant's position that a section 16 agreement fell outside the compass of the Respondent's regulatory powers was subsequently modified anyway, with the recognition that it was information that it could be required to provide. Moreover, the obligations of confidentiality placed on the Respondent by section 7 of the Utilities Law should provide further comfort that the details that the Appellant considers are commercially sensitive cannot be disclosed without consequences. I am satisfied that the Respondent is permitted to call for copies of such section 16 agreements under its powers and can then decide how it wishes to engage with the Appellant thereafter. The extent of the decision on this appeal is confined to the question of interpretation of the statutory regime and as it affects whether there has been any contravention of a condition on the Appellant's licence, where my conclusion is that there was not, so the Direction must be quashed as arising from an error of law.

### **The alternative cases**

51. Having decided the appeal on the basis of the Appellant's primary case, there is no strict requirement to comment on the alternative bases on which the Direction has been challenged, but I will do so briefly in case these comments assist the parties.
52. If I am wrong to conclude that Condition 20.1 does not extend to cover the pricing elements of section 16 agreements, the Appellant contends that the Direction went further than was required by it. This raises the question of whether it was permissible for the Respondent to give a direction requiring the Appellant to "*publish and provide full details of any new prices, any discounts to published prices or any special offers ... included in the section 16 special agreements as has been agreed with commercial customers*". It draws a distinction between the publication of prices, discounts and special offers found in Condition 20.1(c) and the provision of full details. Had it been necessary to do so, I would have agreed that the reference to "*full details*" here can only be to full details of the prices, discounts and special offers and did not extend to a requirement to publish anything further from the body of any section 16 agreement agreed by the Appellant with a consumer of electricity.
53. Taking each of these aspects discretely, a new price (at least in this context) would be a price different from any price or prices already published. I suspect, although it has not been explained by the Respondent, that it is most likely that Condition 20.1 would operate by way of there being a special offer. In other words, a departure from the terms of the generally available published price for electricity available to tariff customers would be offered to anyone who would bring themselves within the same, or at least broadly similar, terms to a consumer being supplied pursuant to a section 16 special agreement. If this is what the Respondent intended by way of its references to price transparency, it would no doubt have been helpful to the Appellant to have spelt this out. (The failure of the Respondent to be clear as to what contraventions of licence conditions it had actually found was not the basis of the appeal, but it was, in my view, something that might well have been capable of being advanced had the Appellant chosen to take that point.) In this regard, remembering that this alternative ground depends upon there having been a contravention of Condition 20.1, the contravention would be failing to publish the special offer. Complying with the Direction given would entail providing sufficient information to enable anyone reading it to understand the basis on which such a special offer is available. In other words, the terms of the Direction would only be capable of

being viewed in the light of the need to comply with Licence Condition 20.1(c). Apart from considering removing “and provide” through a form of “blue pencilling”, there is nothing inherently wrong with the first element of the Direction. Had this been the position, I would probably not have been minded to allow the appeal in part on that basis because I take the view that what would matter would be compliance rather than the wording of the Direction itself. I consider that the words “and provide” cannot be regarded as being distinct from the requirement in the Condition to “publish”. To that extent, I would construe the requirement as being to set out with sufficient particularity what the terms of the special offer are.

54. I have concentrated on compliance because of the effect of section 25 of the Electricity Law, which makes contravening any provision of a direction under section 29 an offence punishable with up to two years’ imprisonment, a fine or both. As a result, I am satisfied that it would be appropriate to construe the terms of the Direction given as narrowly as the words permit, applying a form of *contra proferentum* approach. That same approach would apply if the Respondent were to exercise its powers under section 29(5). Accordingly, if I had needed to, I would not have allowed the appeal in part but would have made these comments instead as a means of clarifying what complying with the Direction entails.
55. In relation to the second element of the Direction in respect of Condition 20.3, again it should be remembered that it follows that there has been a contravention of the requirement to publish prices, discount schemes and special offers, before considering whether they are transparent and non-discriminatory. If, as I have suggested, the proper analysis of a section 16 special agreement in this context is as a special offer, those special offers would need to be objectively justifiable or, if it were a discount, the scheme would have to be cost-justified. These are matters that the Respondent would have to consider once it sees the details of what prices, discounts and special offers are published. This is because Condition 20.3 is not about the provision of information to the Authority, but rather about what is actually published.
56. I take the view, therefore, that the second element of the Direction is flawed. What the Respondent can do to ensure compliance with Condition 20.3 is to require the provision of information under Condition 4. From the evidence on this appeal, such a requirement to provide information had already been given and the Respondent is in possession of the section 16 agreement concerned. If the Respondent considers that such agreement are special offers (or discounts), it can then seek to engage with the Appellant over whether the terms of the offer or discount that then needs to be published are objectively justifiable or cost-justified, as the case may be. If they are found not to be, then there would be a contravention of Condition 20.3 and this would result in the Appellant having to adjust those terms. (The fact that this is the consequence of such a finding is why the section 16 agreement regime falls outside Condition 20.) In other words, the Respondent has purported to find a contravention of Condition 20.3 without explaining why it is that any price, discount or special offer does not comply with the requirements found therein. This shows that the imposition of the second element of the Direction lacks rationality and so would be quashed, even if the first element were not quashed. I think the Respondent has wrongly conflated these two aspects of Condition 20 and all that was required, if section 16 agreements are indeed covered, was to find a contravention of Condition 20.1, require publication and, once published, engage further, as necessary. However, if there is a contravention of Condition 20.3, meaning that the special offer or discount that would otherwise need to be published is not objectively justifiable or cost-justified, then it is not something that should be published in any event until it has been corrected so as to comply.
57. Moving on to the Appellant’s alternative arguments about proportionality in the event that section 16 agreements are within the compass of Condition 20, I am not persuaded that there is any real merit in these arguments. They largely turn on the fact that the power of the Respondent to issue a direction is discretionary. However, once there is a finding of a contravention of a licence condition, choosing to deal with it by way of a direction in terms that

are permitted (by which I mean to draw the distinction between Conditions 20.1(c) and 20.3 to which I have just referred), then I am satisfied that this was a step the Respondent was entitled to take. Subject to what follows about procedure, I do not consider that the Respondent was obliged to engage further with the Appellant before deciding that it was minded to issue a direction and following section 29(3).

58. In accordance with section 29(3), before giving the Direction to the Appellant, the Respondent chose to publish that it proposed to give that direction on its website, thereby enabling interested parties to make any representations as well. In doing so, it appears to be common ground that the Respondent overlooked the definition of “publish” in section 33(1) of the Electricity Law, which refers to publication in La Gazette Officielle or, if it publishes on its website, as it did, giving notice in La Gazette Officielle of the availability of the document on its website (or at its offices). Although there is no suggestion that any representations were received and considered from interested parties, it would have caused some difficulties for the Respondent if there had been and they were taken into account because its non-compliance with these obligations would mean that they should not have been considered.
59. The final alternative ground advanced by the Appellant is that of material procedural error. In particular, the Appellant contends that this is a paradigm case of procedural legitimate expectation. It is recognised that legitimate expectation is known to Guernsey law (*Bichard v States of Guernsey* 2005-06 GLR 388) and the Appellant has relied on the description found in *R (Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755. The passage to which Advocate Dunster has referred is from the judgment given by Laws LJ:

“29. There is a paradigm case of procedural legitimate expectation, and this at least is in my opinion clear enough, whatever the problems lurking not far away. The paradigm case arises where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy: see *CCSU* [1985] AC 374 at 408G – H (Lord Diplock’s category (b)(ii)), *Ex p Baker* [1995] 1 AER 73 at 89 (Simon Brown LJ’s category 4, acknowledged by him to equate with Lord Diplock’s category (b)(ii): see p. 90), *Ex p Coughlan* at paragraph 57, p.242A – C: Lord Woolf’s category (b)). I need not for present purposes set out these taxonomies.

30. In the paradigm case the court will not allow the decision-maker to effect the proposed change without notice or consultation, unless the want of notice or consultation is justified by the force of an overriding legal duty owed by the decision-maker, or other countervailing public interest such as the imperative of national security (as in *CCSU*). There may be questions such as whether the claimant for relief must himself have known of the promise or practice, or relied on it. It is unnecessary for the purpose of these appeals to travel into those issues; I venture only to say that there are in my view significant difficulties in the way of imposing such qualifications. My reason is that in such a procedural case the unfairness or abuse of power which the court will check is not merely to do with how harshly the decision bears upon the individual. It arises because good administration (“by which public bodies ought to deal straightforwardly and consistently with the public”: paragraph 68 of my judgment in *Ex p Nadarajah* [2005] EWCA Civ 1363) generally requires that where a public authority has given a plain assurance, it should be held to. This is an objective standard of public decision-making on which the court insists. I note with respect the observations of Peter Gibson LJ on the importance of reliance on *Ex p Begbie* at 1124B – D; but that was a case (or putative case) of substantive legitimate expectations, where different considerations may arise.”

60. The Appellant argues that it had a legitimate expectation that the Respondent would comply with its published Guideline 10. The Respondent conceded in correspondence that it was not doing so. Consequently, its procedure departed from what the Appellant expected would happen and it lost its opportunity to engage properly before the publication by the Respondent under section 29(3) of the Electricity Law of its proposal to give a direction. Further, the Respondent had promised that it would provide a copy of the advice it was seeking from the Law Officers' Chambers and it then reneged on that promise.
61. The Respondent does not accept that it has failed to comply with the procedure it needed to follow. Guideline 10 addresses a different situation to the path that was then followed of considering a contravention of a Licence Condition. In any event, before that stage was reached, the Appellant had been informed by the Respondent that Guideline 10 was not being followed. In other words, any expectation thereafter cannot be relied upon by the Appellant because factually it had ceased to operate. As regards the advice received from an Advocate at the Law Officers, the Respondent had told the Appellant that it did not address the issues raised leading to the Direction. Further, even if there has been technical non-compliance, the Court should consider whether, as in *R (on the application of Trail Riders Fellowship) v Dorset County Council* [2015] UKSC 18, the requirements had been fulfilled by substantial compliance. In any event, if no prejudice arises, the resulting act is not invalid (*Aylesbury Vale DC v Call a Cab Ltd* [2013] EWHC 3765 (Admin)).
62. Guideline 10 relates to the procedures for investigations conducted by the Respondent. It explains that it applies to investigations of potential infringements of the competition laws or sector-specific legislation. One of the measures referred to under the heading of sector-specific legislation is the Electricity Law. The second section of this Guideline covers transparency, which includes informing those involved when “*key milestones in a case are reached*”, with the example given being “*when a case is opened*”. The third section then elaborates upon when an investigation is opened. The final circumstance listed for an investigation to be opened is when the Respondent has reasonable cause to suspect that a business licensed by it “*has breached one or more conditions of its licences*”. The first stage of the process is to conduct a preliminary investigation, which would normally result in a preliminary assessment being completed within two weeks. If there is reasonable cause to suspect one or more breaches, recognising that this test is not found in the sector-specific legislation, the Respondent considers opening a formal investigation. The fourth section refers to a status known as “*Formal Complainant status*”. It was not made explicit whether the Respondent’s dealings with IEG meant it had this status, but some of what is set out was done anyway. The fifth section explains that, when a formal investigation is opened, unless it would compromise the investigation, the Respondent “*will inform the parties directly involved that a formal case has been opened*”. In addition, they will be provided with a description of the case, the legal basis for bringing it, the industry sector concerned and the reasons for the Respondent opening a formal case. The sixth section deals with the conclusion of such a formal investigation, which may involve reaching a decision that an infringement exists, in which case the draft decision will be communicated and a request to meet during the time for responses will be available. There is also reference to the publication processes and the availability of an appeal. There are a number of additional sections to the Guideline, but they are not really of relevance to this appeal.
63. The Respondent has acknowledged that it did not follow this Guideline. In particular, it did not notify the Appellant that a formal investigation had been opened. Having published Guideline 10, it would have been desirable for the Respondent to have followed its terms. Although the number of licensees it regulates is comparatively small and the relationship between the Appellant and the Respondent may inevitably be closer than would be the case in a larger jurisdiction, there is, in my view, no justification for the Respondent not adhering to the promises it makes through publication of guidance as to the procedures it will follow, such as in Guideline 10. I am satisfied that the principles derived from English law are equally applicable in Guernsey and those are the levels of standards that everyone can expect public

bodies to follow where they choose to set out how they will deal with certain matters. I am, therefore, also satisfied, that the Respondent did not comply with the procedures that it had published. In principle, it has not met the procedural legitimate expectations of a person such as the Appellant.

64. It is, though, also necessary to consider what actually happened and not to focus solely on whether there has been strict compliance with the procedures that the Respondent has indicated it would follow. The timescale over which there were exchanges between the Respondent and the Appellant means that nothing was being rushed and, in particular, the Appellant was given plenty of opportunity to comment on what was being raised with it by the Respondent. It cannot be said that the Appellant was taken by surprise. It is clear that the Appellant knew what was being alleged against it and that it provided detailed responses about why it had entered into section 16 agreements. Even before the Respondent published its proposal to give the Appellant a direction, the Appellant had been able to articulate its assertion that the Respondent was wrong about the effect of Condition 20. It even had the opportunities to draw the Respondent's attention to Guideline 10, resulting in the Respondent informing it that the Guideline was not being followed in this instance. In those circumstances, I am not persuaded that there was any ongoing expectation on the part of the Appellant that Guideline 10 was operating and so any expectation that it would be had disappeared.
65. The core of the Appellant's case is that it has been drawn into something that went public when there was still an opportunity to resolve matters between it and the Respondent. The publication of the proposal to give a direction, which was then given anyway, may have been viewed by the Appellant as damaging to it, but it seems clear that, whatever the Appellant said, this would have ended up in the same way. The representations made by the Appellant, even if made before the section 29(3) stage in those terms would not have resulted in any different outcome. That is demonstrated by the Respondent rejecting those arguments when they were made. This means that, even if I were persuaded that there had not been the level of compliance expected, there has not been any prejudice to the Appellant that has not been resolved through this appeal. In those circumstances, had I needed to consider the procedural legitimate expectation argument, I would have concluded that the Appellant had not made it out in relation to Guideline 10.
66. I do consider that the Respondent was unwise to promise to provide a copy of the advice being taken once it had been received, even if that meets its desire to be as transparent as possible. One aspect of the Respondent's letter sending the Direction to the Appellant that is a little odd is the reference to the Appellant being "*a States-owned commercial business*". I fail to see the relevance of that and, in the context of taking advice from those who are standing counsel to the States of Guernsey, there may be a degree of circularity in the advice being tendered if it is in the nature of advice on the meaning of the legislation. The States Trading Supervisory Board, as shareholder in the Appellant, might be able to obtain the same advice and pass it to the company in which it holds all the shares. Having promised to provide the advice and then reneged on that promise, the Respondent has run the risk of having its decision affected through those actions. However, because this appeal has been resolved through the issues of construction set out above, what was in this advice does not matter. In any event, had this been the only issue left as to whether the appeal should be allowed or dismissed, I would not have quashed the Direction on this basis alone.

## Conclusion

67. For the reasons I have given, this appeal is allowed and the Direction is quashed. This rests on the view I have taken of the relationship between Licence Condition 20 and the difference between tariff customers, whose relationship is governed by statute and, in particular, sections 10 to 15 of the Electricity Law, to which Condition 20 applies, and those consumers who enter into section 16 special agreements, to which Condition 20 does not apply.

68. Had I needed to do so, because that conclusion is wrong, the appeal would have been partly successful because I would have quashed the second part of the Direction, but left in place the first part relating to Condition 20.1(c), whilst noting that it is confined to a requirement to publish what appears to be a special offer, but might be a discount to published prices and nothing more than the information required to make sense of that special offer or discount. I would not have regarded this as disproportionate and, although the Respondent ought not to have made the promises it did about procedure in the way it has, I would not have been minded to quash any part of the Direction as a result of those shortcomings.
69. I expect that the costs will follow the event and will make such an order that the Respondent pays the Appellant's costs on the recoverable basis unless that outcome is not agreed between the parties, in which case either party is at liberty to pursue a different order by bringing the action back before the Interlocutory Court on a mutually convenient date.