

# Developments in the law relating to Green Energy projects

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# Southwick Estate Solar Farm

205 acre site; 48 MW; power 14,500 homes



## ➤ Green/renewables energy projects

- Windfarms- offshore/onshore
- Solar farms
- Biomass
- Nuclear

## ➤ Cases

- *Havant Biogas v Gas and Electricity Markets Authority* [2021] EWHC 84 (Admin)
- *Solaria Energy v Dept for Business, Energy and Industrial Strategy* [2020] EWCA 1625
- *Gwynt Y Mur OFTO v Gwynt Y Mur Offshore Wind Farm Limited* [2020] EWHC 850 (Comm)
- *Biosol Renewables UK Ltd v Lovering and Others* [2021] EWHC 71 (Comm)
- *Toucan Energy Holdings Ltd v Wirsol Energy Limited*
- *Equitix v Veolia* [2019] EWHC 593 (TCC)

## ➤ Themes

- Government investments and incentives
- Flawed Asset claims
- Contractual standards- fitness for purpose and other standards
- Defects
- Dispute resolution

- Variety of legal challenges associated with Government financing schemes
  - *Havant Biogas v Gas and Electricity Markets Authority [2021] EWHC 84 (Admin)*- refusal of subsidy
  - *Solaria Energy v Dept for Business, Energy and Industrial Strategy [2020] EWCA 1625*- removal of subsidy
  - *Biosol Renewables UK Ltd v Lovering and Others [2021] EWHC 71 (Comm)*- failure to perform to make the most of the subsidy

- **Biosol Renewables UK v Lovering [2021] EWHC 71**
  - Concerned the installation, commissioning, wood chip fueling and maintenance for 3 years of 10 biomass boilers
  - Fees not paid to the contractor. Contract terminated- allegations that boilers were oversized and, therefore, inefficient- failed to make the most of the Non-Domestic Renewable Heat Incentive (RHI) scheme
  - Government capital investment key part of dispute
  - Fitness for purpose and over-capacity
  - Rate of interest penal

## ➤ Fitness for purpose

- Common ground was a fitness for purpose allegation
- Issue was as to the nature of the purpose
  - Employer- purpose of efficiently heating the locations they were to be installed
  - Supplier- purpose was revenue generation from RHI scheme and costs saving compared to fossil fuelled heating costs
- Negotiation evidence admissible for this analysis
- On the facts primary purpose was to generate income from the RHI scheme. Secondly, to save on fuel costs.
- On the facts the boilers were fit for those purposes, though over sized for their actual use.

- *Who carries the risks on the sale of developing or developed green energy projects?*
  - Readily available capital and state-funded incentives
  - (Theoretically) low risk, clear predictable if modest long-term returns
  - Attractive to institutional and longer-term investors
  - Very saleable- asset packages at varying stages of development



- *Gwynt Y Mur OFTO [2020] EWHC 850 (Comm)*
  - SPA concerning operating new Wind Farm including subsea export cables
  - Less than one month following completion of the sale the first of two cables failed due to corrosion- £15M repair costs
  - SPA contained an indemnity:
    - *“If any of the Assets are destroyed or damaged prior to Completion (Pre-Completion Damage), then, following Completion, the [defendants] shall indemnify the [claimant] against the full cost of reinstatement of any Assets affected by Pre-Completion Damage.”*
  - **Who carried the risk?**

- Two questions:
  - What was the time period encompassed by “*prior to Completion*”?
    - From signature of the SPA to Completion; or
    - All time before Completion.
  - What is meant by any of the Assets being “*destroyed or damaged*”
- Classic application of the now well-recognised principles of contractual interpretation.

- Textual analysis of “prior to Completion”
  - Clause 8.2 itself.
  - Understanding by reference to surrounding clauses.
  - Would render Warranty as to the absence of damage to the Assets at the date of the SPA pointless.
  - Would remove the incentive for disclosure of damage.
  - Inconsistent with caps on liability

- **Meaning of “are destroyed or damaged”**
  - Useful trawl of cases on ‘damage’ in construction and insurance context.
  - Textual analysis:
    - Juxtaposition of “damaged” and “destroyed”
    - Contrast with the use of “defect or damage” in the Warranty
    - Commercial absurdity if it were to cover latent defects
  - Claimed failed on causation grounds in any event.
- **Contextual analysis unpersuasive**

## ➤ Defendant's claim for rectification

- *FSHC Group Holding v Glas Trust Corporation [2019] EWCA Civ 1361 per Leggatt LJ at [176]*
- Issue was whether there was a common continuing intention that the Indemnity should only apply to damage occurring after execution of the SPA
- Granted!
  - *"I find that the defendants would have been entitled to an order for rectification, had that been necessary. Whilst a finding that a contract should be rectified is unusual, and may be more so in the light of the decision in FSHC, it may be less surprising for a court to find, on an alternative basis, that the parties had an actual common intention which accords with the true interpretation of a contract."*

## ➤ Toucan Energy Holdings v Wirsol Energy

- Wirsol Energy v Toucan Energy Holdings [2018] EWHC 3924
- 15 solar parks sold as a package in SPA during development
- Warranties
  - as to condition on sale of the assets
  - minimum design operational life of 25 years
  - FIDIC silver book- quality of plant, materials and workmanship
- Substantial Defects
- Valuation of the flawed assets- solar valuation experts agreed would be residual diminution in value (or blight) even following substantial repair
- Judgment due imminently...

## ➤ *MT Højgaard v EON [2017] UKSC 59*

- Failure of the grouted connections of foundation structures of offshore wind farms
- *“The design of the foundations shall ensure a lifetime of 20 years in every aspect...”*
- Compliance with DNV standard J101 – as a minimum requirement- shown to be inadequate by failures at Egmond an Zee
- Need to seek to give effect to both requirements- prescribed criteria trumps prescribed design.
- Similar issue in relation to the defects liability shut-off of two years. Not a guarantee wind farm will last 20 years, but design has to be capable of doing so.

- Capacity (*Biosol, Toucan*)
- Corrosion/fatigue (*MTH, Gwynt Y Mur, all offshore windfarms*)
- Damage (*Gwynt Y Mur, Biosol*)



- **Equitix v Veolia Energy [2019] EWHC 593 (TCC)**
  - Dispute as to alleged defects in the construction of a biomass energy plant
  - Adjudicators were to be “*experts in the field of biomass energy plants.*”
  - Jefford J.:
    - Meaning was an expert in the field of disputes, concerning, inter alia, biomass energy plants
    - As a matter of policy should not be too limiting in assessing the approach of adjudicator nominating bodies- otherwise it would thwart the agreed purpose.

# Future trends



Land area:  
**2-2.3miles<sup>2</sup> / 5-6km<sup>2</sup>**

Estimated cost:  
**£1.3bn / \$1.75bn**

Will provide power to:  
**80 million people in...**

	
Great Britain	The Netherlands
	
Germany	Norway
	
Denmark	Belgium



- North Sea wind energy and island
  - “largest construction project in Danish history”
  - Starts with 3 gigawatts of capacity- 3 million homes
- Cleve Hill Solar Park- Graveney Marshes
  - Start construction this year
  - 890 acres; 91,000 homes
- New nuclear
  - Hinkley Point C (6 million homes);
  - Bradwell B;
  - Sizewell C

- As the sector develops- so will the law in this area
  - Development of existing themes
  - New themes will arise

# Thank you for listening.

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