**CASE CONCERNING RENEWABLES OBLIGATION SCHEME FOR LARGE SCALE SOLAR COMES INTO THE UK COURT OF APPEAL ON 2 FEBRUARY**

*This article is intended to provide a summary of the background to and issues at stake in the case of Solar Century Holdings Limited, Lark Energy & Others versus the Secretary of State for Energy and Climate Change in which Prospect Law represents the appellant solar companies. The case is due to be heard by the Court of Appeal on 2 February 2016 and, whichever way the judgment goes, it is likely to have implications for the conduct of UK government policy relating to subsidy schemes for renewable energy installations and for the future of the UK's solar industry.*

## The History of the Case

1. This appeal concerns a Government subsidy scheme, the Renewables Obligation ("RO") for incentivising large scale renewable electricity generation, including solar PV (photovoltaic) projects, in the UK. Under this scheme qualifying projects are granted certificates ("ROCs") which are sold to generate income in addition to the sale price of the electricity.

2. The appellants are all UK solar industry businesses developing solar PV projects in the UK that would ordinarily be supported by the RO Scheme.

3. On 13 May 2014 the Department of Energy and Climate Change ("DECC") released a consultation paper which proposed to close the RO to solar PV projects over 5MW in size ("large-scale solar") on 31 March 2015. Before this consultation the scheme was due to close to all projects on 31 March 2017 – i.e. the proposal was to close the scheme for large-scale solar 2 years early.

4. The main controversy of this consultation was that the notice given was unreasonably short (9 months from the consultation – where most large-scale solar projects have a longer development time than this), and that only projects that met certain arbitrary 'grace period' criteria as of the date of the consultation would get extra time to deliver. Any new legislation introducing such a closure (following the Government decision on the issue, which came out on 2 October 2014 – 6 months before the closure) would have a back-dated effect on projects (i.e. would have a retrospective effect).

5. Owing to the potentially substantial investment at risk on projects already under development the appellants issued a claim for Judicial Review challenging the legality of the consultation.

## The Decision of the High Court

6. The Judicial Review was heard before Mr Justice Green in the High Court in June 2014, with the decision of the Court released in November 2014 (*[2014] EWHC 3677 (Admin)*).

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7. The Judge granted permission for the Judicial Review to be heard, but dismissed the application. The Judge acknowledged the "*need for operators to have a secure and stable legal and investment environment in which to plan*", that "*projects can involve a significant lead time from first investment to accreditation*" and that "*clear and repeated representations were made by Government to the effect that the scheme would remain in place until 2017*".

8. Nevertheless, the Judge also ruled that the Levy Control Framework ("LCF"), the Government's self-imposed cap on funding for renewable energy schemes, "*acts as an all pervasive proviso or caveat to any exercise of the statutory power*" and that whilst the proposed changes included "*a degree of retrospectivity*" this was fair in the circumstances.

9. The over-arching rationale being, put simply, that the Government's justification of defending the LCF cap levels was important enough to make the approach of the Government lawful.

10. The appellants do not agree with this, and have appealed this decision.

**The Points on Appeal**

11. Permission to appeal was granted by Lord Justice Bean of the Court of Appeal in early 2015.

12. The appellants' main argument is that the LCF clearly states that investor confidence is paramount to the operating of renewables subsidy schemes and that retrospective changes will not be made to such schemes. With such statements and assurances clearly set out in the LCF it is difficult to believe that the LCF should be interpreted in the solar development and investment community as "*an all pervasive proviso*".

13. There are also arguments in relation to the purpose of the legislation introduced to allow the closure of the RO and that the test for the lawfulness of retrospectivity in secondary legislation (i.e. a statutory instrument) is not whether such changes are 'fair', but whether the Secretary of State has the power to make such retrospective changes.

14. The appeal is due to be heard by the Court of Appeal on 2 February 2016.

**The Wider Implications**

15. We have already seen further DECC consultations with similar retrospectivity in relation to (1) further changes to support under the RO and (2) changes to the Feed-in Tariff ("FIT") scheme, a sister scheme to the RO that support smaller renewables projects. In each changes are proposed, usually at short notice, with some aspects to take effect from the date of the consultation, not the date of the new legislation, all justified by seeking to protect the self-imposed LCF caps. These 'consultations' force those in the renewables sector to take action on the basis of these consultations as if they are final decisions. According to

the latest Ernst and Young Renewable Energy Country Attractiveness Index reports, this is very damaging to investor confidence in the UK market.

16. If it is held that budgetary concerns override legitimate expectations, protection from retrospectivity and other such concepts that investors rely upon to allow them to make investment decisions, then the implications could extend even further than just the renewable energy industry.



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