

21 March 2016

## APPEAL FAILS FOR JUDICIAL REVIEW OF EARLY CLOSURE OF RENEWABLES OBLIGATION TO LARGE-SCALE SOLAR PV

### **Prospect Law Limited acted for the Appellants in Solar Century Holdings Ltd and Others v Secretary of State for Energy and Climate Change [2016] EWCA Civ 117**

The Solar Century Holdings Ltd case concerned the legality of the decision by the Secretary of State for Energy and Climate Change to bring to a premature close a statutory scheme supporting the generation of electricity from renewable sources. Jonathan Green, senior solicitor at Prospect Law Ltd, examines the case in more detail and concludes that the judgment is likely to result in reduced investment in large-scale renewable energy projects as a consequence of ‘pipeline’ investments remaining vulnerable to policy changes.

#### **What is the background to the case?**

The Renewables Obligation (RO) has been the main method by which the UK government has subsidised large-scale renewable energy generation since 2002.

On 13 May 2014, the Department of Energy and Climate Change (DECC) published a consultation announcing its intention to close the RO to solar photovoltaic (PV) projects over 5 megawatt peak (MWp) in size, with effect from 31 March 2015. The government confirmed the closure in October 2014 and the Renewables Obligation Closure (Amendment) Order 2015 was passed.

The claimants carry on business building solar PV systems (solar farms) and challenged the legality of the decision to bring forward the closure of the scheme. Many large-scale solar installations take over a year to go from inception to accreditation and developers working on projects over 5MWp stood little hope of completing their installations by 31 March 2015 once the consultation was published.

A judicial review of the decision was issued in the High Court on 1 August 2014. On 7 November 2014, Mr Justice Green dismissed the application. Permission to appeal was subsequently granted by Rt. Hon. Lord Justice Bean of the Court of Appeal.

#### **What were the key issues?**

The decision to close the RO for 5MW+ projects was challenged on four grounds:

- the decision to implement an early closure of the RO scheme by statutory instrument, as per the power granted by the Electricity Act 1989, ss 32LA and 32LB, was ultra

**Prospect Law Ltd**  
23 Berkeley Square, London W1J 6HE  
T +44 (0)20 7947 5354

Regus House, Pegasus Business Park, Castle  
Donington, Derbyshire DE74 2TZ  
T +44 (0)1332 818 785

F +44 (0)20 7665 6650  
E [info@prospectlaw.co.uk](mailto:info@prospectlaw.co.uk)  
[www.prospectlaw.co.uk](http://www.prospectlaw.co.uk)

21 March 2016

vires because the statutory power was for the purpose of preserving the 2017 closure date and not for extending it;

- the pre-legislative statements that the RO scheme would run until 2017 amounted to the type of assurance which would bind the executive, and early closure violated those assurances;
- the statements made by the government from 2010 onwards that the scheme would not close before 2017 were clear and unequivocal representations giving rise to a legitimate expectation which was not thwarted by any policy consideration; and
- the deadline imposed to fall within a one year Grace Period was retrospective in effect and therefore unfair in a public law sense.

#### **What was the decision?**

- The Court of Appeal held that there was no reason to believe that Parliament had intended to stop the minister from closing the scheme before 1 April 2017. Under the Electricity Act 1989, s 32LA the minister had a power to close the scheme to 'to electricity generated after a specified date'.
- The government had not undertaken that the RO would be immune from the changes it underwent by way of the May 2014 announcement. The minister stated that the closure was planned for 31 March 2017, not that there were no circumstances in which the scheme could be closed earlier.
- The Court of Appeal rejected the suggestions that the grace periods were the subject of retrospective legislation, and that the use of the legislation to enact them was unfair in a public law sense.

#### **What are the implications of the case?**

Together with some of DECC's other decisions, this judgment is likely to result in reduced investment in large-scale renewable energy projects.

The ruling endorses DECC's use of the Levy Control Framework (LCF) as a means through which to create inconsistent, unpredictable policy and will damage investor confidence in support mechanisms similar to the RO.

In July 2015 DECC announced its intention to extend the LCF past 2020, arguing it would continue to form 'a basis for electricity investment into the next decade'. Nevertheless, the Court of Appeal has allowed DECC to go back on such promises, and the renewables market is unlikely to take much comfort from DECC's announcements going forward.

**Prospect Law Ltd**  
23 Berkeley Square, London W1J 6HE  
T +44 (0)20 7947 5354

Regus House, Pegasus Business Park, Castle  
Donington, Derbyshire DE74 2TZ  
T +44 (0)1332 818 785

F +44 (0)20 7665 6650  
E [info@prospectlaw.co.uk](mailto:info@prospectlaw.co.uk)  
[www.prospectlaw.co.uk](http://www.prospectlaw.co.uk)

21 March 2016

*This article is not intended to constitute legal advice and Prospect Law and Prospect Energy accepts no responsibility for loss or damage incurred as a result of reliance on its content. Specific legal advice should be taken in relation to any issues or concerns of readers which are raised by this article.*

*Prospect Law and Prospect Energy provide a unique combination of legal and technical advisory services for clients involved in energy, infrastructure and natural resource projects in the UK and internationally.*

**Prospect Law Ltd**  
23 Berkeley Square, London W1J 6HE  
T +44 (0)20 7947 5354

Regus House, Pegasus Business Park, Castle  
Donington, Derbyshire DE74 2TZ  
T +44 (0)1332 818 785

F +44 (0)20 7665 6650  
E [info@prospectlaw.co.uk](mailto:info@prospectlaw.co.uk)  
[www.prospectlaw.co.uk](http://www.prospectlaw.co.uk)