MCNAIR CHAMBERS
INTERNATIONAL COMMERCIAL LAWYERS

RECENT ENERGY CASES – ENGLISH COURTS AND ARBITRATION

In recent years, there have been a number of renewable energy related cases before both the national courts and international investment tribunals. In the last 2-3 years alone, over 20 cases have been filed with arbitral institutions in this sector (with the majority of the decisions still pending). Investors have also sought redress from national courts, with the most recent decision in the English courts being the Court of Appeal judgment in *Department for Energy and Climate Change v Breyer Group Plc & Ors* [2015] EWCA Civ 408.

Department for Energy and Climate Change v Breyer Group Plc & Ors [2015] EWCA Civ 408

Introduction

On 28 April 2015, the English Court of Appeal handed down its decision in the *Department for Energy and Climate Change v Breyer Group Plc & Ors* in which it dismissed both the appeal of the Department for Energy and Climate Change and the cross appeal of the claimants.

Background

The litigation arose in respect of the Feed-in-Tariffs ("FIT") scheme which was introduced by the Department of Energy and Climate Change ("DECC") on 1 April 2010 and aimed to encourage low-carbon generation of electricity by specified types of technology, including solar photovoltaic. The present case involved 19 claimants, who collectively claimed approximately £195 million (with individual claims ranging from £233,000 to more than £27 million).

DECC sought to introduce a proposal which would have, in essence, brought forward from 1 April 2012 to 12 December 2011 the date by which installations had to be commissioned/registered in order to qualify for the original tariff rates for the life of the installation (the "Proposal"). This was challenged in judicial review proceedings, and ultimately, DECC did not proceed with the Proposal.

The claimants' complaint in the present proceedings was that, by the time the courts ruled that the Proposal was unlawful, many of the installations that would otherwise have been completed by 1 April 2012 were abandoned as a direct result of the making of the Proposal. This caused them to suffer substantial losses in respect of which they seek damages against DECC for interference with their rights to peaceful enjoyment of their possessions under Article 1 of the First Protocol of the European Convention on Human Rights.

At first instance, Coulson J held:

(i) the claimants had Article 1 possessions in so far as they had entered into contracts and/or they had marketable goodwill constituted by or referable to those contracts;

(ii) the doctrine of legitimate expectation could not be invoked as a "trump card" if the claimants could not establish that they had possessions on the basis of contracts and/or marketable goodwill;

(iii) the Proposal interfered with the claimants' possessions and on the assumed facts this interference caused the claimants to suffer loss;

(iv) the interference was not justified since it was unlawful and/or it was disproportionate; and

(v) the claimants were entitled in principle to an award of damages assessed by reference to the loss of profits caused by the interference with their possessions.

DECC challenged findings (iii)-(v). The claimants cross-appealed in relation to the possessions issue on the ground that the judge took too narrow a view of the extent to which marketable goodwill was capable of being a "possession".

Decision

The Court of Appeal (Lord Dyson MR, Lord Justice Richards and Lord Justice Ryder) dismissed both the appeal and cross appeal.

Lord Dyson MR, delivering the unanimous decision of the Court of Appeal, made the following findings:

- Possession: (having considered both domestic and European jurisprudence), the consistent line taken by the European Court of Human Rights was that the goodwill of a business, at any rate if it has a marketable value, may count as a possession within the meaning of Article 1, but the right to a future income stream does not – although this was not an easy distinction to draw in practice. In the present case, the judge at first instance was right to see a clear line separating (i) possible future contracts and (ii) existing enforceable contracts. Contracts which have been secured may be said to be part of the goodwill of a business because they are the product of its past work. Contracts which a business hopes to secure in the future are no more than that.
- Interference: Lord Dyson rejected the proposition that a proposal could not, as a matter of law, constitute an interference with Article 1 rights. Although the Proposal was only a proposal and was not a final decision, it affected the claimants in practice even if it did not have any legal effect. As the European Court of Human Rights has held, the fact that an expropriation permit has no legal effect (because there may be no expropriation) does not mean that there is no interference.
- Justification of the interference: Lord Dyson held, in disagreement with the first instance judge, that the Proposal was not an unlawful interference (which was not contrary to domestic law). However, he agreed with the judge that the Proposal did not strike a fair balance between the public interest and the interests of the investors in the scheme, and reached this conclusion despite the fact that DECC enjoyed a wide margin of discretion in relation to the making of the decision.
- Right to damages: the entitlement to damages was fact-specific to each of the cases, and was a matter to be determined at trial.

Renewable energy cases in arbitration

A number of cases relating to legal reforms affecting the renewable energy sector (many focusing upon solar photovoltaic provisions) have been filed in recent years pursuant to the provisions of the Energy Charter Treaty. The majority of these cases have been filed against Spain and the Czech Republic, following significant changes by the governments of those countries to incentives in the renewable energy sector. These cases include:

- *Antaris Solar and Dr. Michael Göde v. Czech Republic* (UNCITRAL, PCA administered)
- *Isolux Infrastructure Netherlands B.V. v. Spain* Arbitration Institute of the SCC
- *CSP Equity Investment S.à.r.l. v. Spain* Arbitration Institute of the SCC
- *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Spain* ICSID Case No. ARB/13/30
- *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain* ICSID Case No. ARB/13/31
- *Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v. Spain* ICSID Case No. ARB/13/36
- *Natland Investment Group NV, Natland Group Limited, G.I.H.G. Limited, and Radiance Energy Holding S.A.R.L. v. Czech Republic* (UNCITRAL ad hoc)
- *Voltaic Network GmbH v. Czech Republic* (UNCITRAL ad hoc)
- *ICW Europe Investments Limited v. Czech Republic* (UNCITRAL ad hoc)
- *Photovoltaik Knopf Betriebs-GmbH v. Czech Republic* (UNCITRAL ad hoc)
- *WA Investments-Europa Nova Limited v. Czech Republic* UNCITRAL ad hoc
- *Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, and JSW Solar (zwei) v. Czech Republic* (UNCITRAL ad hoc)
- *Masdar Solar & Wind Cooperatief UA v. Spain* ICSID Case No. ABR/14/01
- *Blusun SA, Jean-Pierre Lecorcier and Nichael Stein v. Italy* ICSID Case No. ABR/14/03
- *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Spain* ICSID Case No. ABR/14/11
- *InfraRed Environmental Infrastructure GP ltd. et al v. Spain* ICSID Case No. ABR/14/12
- *RENERGY S.à.r.l. v. Spain* ICSID Case No. ABR/14/18
- *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Spain* ICSID Case No. ABR/14/34
- *Stadtwerke München GmbH, RWE Innogy GmbH et al. v. Spain* ICSID Case No. ABR/15/1
- *STEAG GmbH v. Spain* ICSID Case No. ABR/15/4
- *9REN Holding S.a.r.l v. Spain* ICSID Case No. ARB/15/15

Italy (which changed its incentive rules on feed in tariffs in August 2014) has withdrawn from the Energy Charter through a formal notice sent to the Energy Charter Secretariat, according to the available information, in January 2015.

Such withdrawal would not take effect (unless otherwise set out in the notice of withdrawal) until one year after the date of notification, as per Article 47 of the ECT. Further, the provisions of the ECT continue to apply to investments made before the effective date of withdrawal (which we assume, for present purposes) will be January 2016. In addition, note that the European Union, of which Italy is a member, is still a signatory to the ECT; and Italy itself is party to almost 100 bilateral investment treaties (along with other international investment treaties).

26 May 2015