

DECC held liable to compensate the Solar PV supply chain industries for its unlawful acts in Prospect Law's claim for £132 million brought under Human Rights legislation

Introduction

1. On 9 July 2014, judgment was handed down in the case of *Breyer Group Plc & Ors v. Department of Energy and Climate Change [2014] EWHC 2257 (QB)*, in which Prospect Law successfully represented 14 solar supply-chain businesses to establish their right in principle to recover substantial damages in relation to government's attempts to make unlawful retrospective changes to the Feed-in Tariff Scheme, under which generators are paid for generating green renewable energy.

Feed in Tariff Scheme

2. The Feed-in Tariff scheme ("FITS") is a subsidy scheme created by the Department of Energy and Climate Change ("DECC") to encourage the small-scale generation of electricity from renewable sources. It came into force on 1 April 2010.
3. Under the scheme, generators of clean energy would be paid a fixed subsidy per kWh of electricity they produced for 25 years, adjusted yearly for inflation. This subsidy was to allow those adopting such technology to recoup the initial high upfront costs. Without the subsidy the technology was unaffordable and no UK solar industry could have existed.
4. The original subsidy rate was due to remain in place until 31 March 2012; however, in a consultation released on 31 October 2011, DECC indicated that it would set a 'reference date' of 12 December and that anyone installing after this date would only enjoy the current rate until 31 March 2012, at which point it would be reduced by 55%. The drop was from 43.3p to 21p per kWh.
5. This essentially pulled the rug from under the fledgling industry. With only 6 weeks' notice of the proposed change, the market endured a catastrophic dislocation until, from 12 December, it collapsed.

Judicial Review

6. Prospect Law was instructed by members of the supply chain industries to mount an urgent Judicial Review challenge to DECC's proposed changes. The action was subsequently joined by Friends of the Earth.

7. The challenge was successful, both in the High Court (*[2011] EWHC 3575 (Admin)*) and, on DECC's challenge to this decision, in the Court of Appeal (*[2012] EWCA Civ 28*). DECC attempted to appeal to the Supreme Court, but it was refused permission to do so.
8. What DECC had proposed was unlawful because the statute in question did not permit DECC to introduce secondary legislation with retrospective effect.

Compensating the industry

9. In the aftermath of its successful Judicial Review challenge, Prospect Law was approached by several companies enquiring as to the potential of claiming compensatory damages from the Government for the losses suffered as a result of the 31 October 2011 announcement.
10. Prospect Law's analysis was that damages could be claimed pursuant to the Human Rights Act 1998, which permits claims for damages in relation to violations of human rights guaranteed by the European Convention. The right in question was that of peaceable enjoyment of possessions.
11. The claim would involve novel aspects. First, it is somewhat counter-intuitive to employ legislation concerned with "human rights" violations to compensate commercial organisations for their losses.
12. Further, the case-law in relation to crucial matters such as the nature of qualifying "possessions" was under-developed and often contradictory. Nevertheless, Prospect Law evolved a case that would have a reasonable chance of success, and was instructed to issue the first of a series of claims.
13. Eventually 18 claimants instructed Prospect Law and the claims were consolidated into a single action in the High Court with a combined value of some £132 million. Subsequently, 3 other companies made independent claims of their own similar to the Prospect Law claims, and the Court decided to deal with them at the same time.

Preliminary trial of legal issues, 19-21 May 2014

14. On Prospect Law's advice, its clients adopted a split-trial strategy. If certain legal issues were not held in the Claimants' favour, the costs of a full trial on evidence would be avoided. If, on the other hand, these issues were held in the Claimants' favour, they could expect to establish significant damages in due course.

15. DECC on the face of it accepted the split-trial approach, but took the position that it must be a preliminary trial of both factual and legal issues and that the scope of the issues to be decided should be limited.
16. This was a suggestion to incur significantly more costs for a less decisive outcome, and, so, would effectively have negated the benefit of a preliminary trial of issues. DECC fought hard in relation to these points in two interlocutory hearings, and lost in both instances.
17. The preliminary trial went ahead on the basis advocated by Prospect Law, and was heard by Mr Justice Coulson in the sitting in the Queen's Bench Division between 19-21 May 2014.
18. The four vital issues were:
 - (i) Did the Claimants have A1P1 possessions?
 - (ii) If so, had DECC interfered with them?
 - (iii) If so, had that interference been justified?
 - (iv) If not, were the Claimants entitled to damages to put them back into the position they were in before the interference?
19. The Court answered in the Claimants' favour on all 4 issues.
20. DECC had argued that the Claimants had no A1P1 possessions. The Claimants argued that they had, by virtue of having the benefit of contracts, having a legitimate expectation and having marketable goodwill. The Judge accepted that, in each of these three ways, the Claimants had possessions to the extent that they had concluded or binding contracts.
21. The Claimants submitted that the making of the proposal took effect as a decision, as it had an immediate and catastrophic effect, an effect, moreover, that DECC had anticipated and intended.
22. DECC argued that there had been no interference, and could not be, because its consultation had been a mere proposal. The "mere proposal" submission found no more favour with Mr Justice Coulson than it had in the judicial review proceedings.
23. DECC's submission that the Claimants had caused harm to themselves by not going ahead with contracts was, in effect, to say that the Claimants were at fault for believing that DECC would do what it said it would do.
24. The Court did not find any merit in such submissions. Further, the Judge held that, as DECC knew and intended the making of its proposal to have an immediate impact by discouraging

further installations, it was entirely artificial to seek to deny that it was an act of interference.

25. DECC had argued that its actions were justified in the public interest. The Court agreed with the Claimants' submissions that unlawful conduct, such as DECC proposed, could not, as a matter of principle, be in the public interest.
26. The Claimants maintained that interference was not justified on the facts, even though the trial of this issue proceeded on the basis of facts assumed in DECC's favour. On these facts, the Judge recognised that DECC had some legitimate aims in seeking to protect subsidy budgets, but considered that these were outweighed by contrary factors.
27. The Judge accepted that the FIT scheme had been presented as long-term, and yielding a certain return, in order to induce private investment, investment that the Claimants had made on a considerable scale. The Court also noted that DECC had assured the market that it would make no retrospective changes to the FIT scheme, shortly before attempting to do so.
28. Finally, the Judge fully accepted the Claimants' submission that the 'just satisfaction' remedy available for a rights violation would be compensatory damages in this case, designed to put the Claimants in the position that they would have been in, but for the interference with their rights.
29. Prospect Law is now engaged in the exercise of assisting each of the Claimants in establishing the precise amount of the losses that it can expect to recover following the principles set out by Mr Justice Coulson. The damages sought will be very substantial.
30. DECC has indicated that it is considering an appeal to the Court of Appeal.