Briefing

A-Z of issues in renewable energy projects: T-V

In this series of articles, Burges Salmon's Energy team provides an "A-Z" of key legal and practical issues in renewable energy projects. This sixth instalment covering "T to V" sets out a number of issues that our energy, planning and employment teams regularly encounter and includes a special contribution from Quadrant Chambers.

Talent: recruiting and employing a skilled workforce

Recruiting and retaining the best people is a challenge faced by most businesses. However, this is a particular issue facing the renewables sector as it continues to grow and needs to attract an increasing number of skilled employees into the industry. Businesses, therefore, need to ensure that they are able to provide a sufficiently attractive offering to skilled applicants from a wider market place.

At the same time, as the sector matures there is an increasing threat of losing key employees to competitors and businesses are now experiencing the commercial damage that can be caused by the departure of a whole team. To combat this, employers need to ensure that they focus on retaining existing skilled employees and that there is appropriate contractual protection in place for all key employees.

This article looks at some of the key points to consider in dealing with the challenge of attracting and retaining skilled employees and the steps that employers should take to protect their businesses.

Develop the right offering to attract and retain talent

In spite of the difficulties of changing Government policy, it is important to remember that the renewables sector is an exciting and attractive place to work. Whilst you can't ignore the need to provide appropriate reward, you should make the most of the opportunities in the sector and the culture and values of your business in all your communications to employees and the wider marketplace.

It is not all about salary, but the reward package you offer is, without question, a key factor in attracting skilled applicants into the market. In basic terms, this means developing an attractive, fixed package of base salary, pension and other benefits, such as medical and life insurance. Increasingly (and particularly for younger applicants), family friendly benefits such as maternity, paternity and shared parental pay are viewed as key parts of a reward package.

You should also consider other variable pay elements (such as bonus and commission) and the benefit of introducing short and long term incentive arrangements that can be tied to the success of the business. These elements can be particularly useful in encouraging loyalty and the retention of key employees, but require proper consideration and careful drafting to ensure they achieve these aims.

Ensure pre-employment discussions are properly documented

It is a competitive market place and it is not just an applicant who should be selling themselves in any recruitment process. You will also need to sell your business and the reward packages and opportunities that you are offering.

However, care should be taken in making any promises during recruitment as oral agreements can be binding. You should, therefore, make sure that all offers are carefully recorded in writing. Any offer should be clearly made subject to contract and to any other pre-employment conditions being satisfied, such as references, qualifications and immigration permission.

Consider whether job applicants are subject to any restrictive covenants

As the sector is maturing, there is an increasing movement of key employees and teams between competitive organisations.

As explained below, you will need to take steps to ensure that you have appropriate protection in place for any key employees who may leave the business. However, this is also an issue that you need to be aware of when recruiting for skilled roles as applicants may be restricted in the work they can do for you.

You don't need to be put off employing a potential recruit simply because they are subject to restrictive covenants. However, you will need to be careful not to induce a breach of contract (i.e. by being seen to encourage them to breach an existing contract) throughout the recruitment process. There are a number of steps you can take to try to reduce the risks to the business:

1. **Check what restrictions the new recruit may have in place** regarding confidentiality. Even if the contract is silent, there will be common law provisions that apply (for example, in relation to trade secrets).
2. **Ask probing questions and check carefully whether the new recruit has restrictive covenants** either in their contract of employment or in a separate document, such as a deed or sale and purchase agreement (if the recruit has been involved as a shareholder on a buyout).
3. **If a recruit has restrictive covenants, you should consider taking expert advice** as restrictions will only be enforceable if they are reasonable. What is reasonable will vary from business to business and from employee to employee.
4. **Be clear about the new role and evaluate** whether this will be covered by the restrictive covenants. For example, the restrictions may only apply to a very different product or in a different sector.
5. **If a new recruit has restrictive covenants that may otherwise prevent them from doing the role, all is not lost.** It may still be possible to negotiate an early release with the former employer, to carve out certain clients from the restrictive covenants or to manage their work around the restrictions on a temporary basis.
6. **Team moves can be particularly high risk,** so if you are considering taking on a team from a competitor you should take advice early and plan approaches and communications carefully.

Ensure that you have appropriate contractual protection for the nature and seniority of the role

Every employer in England and Wales is obliged to provide its employees with a written statement containing minimum information in relation to the terms and conditions of employment. There is also a certain level of protection implied into all contracts of employment. However, this is very limited and is insufficient to protect most businesses that employ skilled workers. You should therefore consider including other appropriate protections, such as terms to protect the business' intellectual property and confidential information.

It may go without saying, but an often forgotten point is that you need to ensure that, once the contract has been agreed, a signed copy is retained on file. This can be particularly important on departure of a key employee as there are often disputes about the terms of their employment and the enforceability of any restrictive covenants.

Protecting the business on departure of a key employee

Choosing the right notice period

When recruiting, you may be concerned about giving employees too generous a notice period because:

- you cannot envisage that you would want a reluctant employee - one who has resigned or been dismissed - continuing to work through a lengthy notice period; and/or
- you may have to buy out (or pay in lieu of) a lengthy notice period.

However, a longer notice period can be useful to tie in key employees and to help you respond tactically to the departure of a key employee – particularly one who may have influence over key suppliers/customers.

When recruiting key employees, you should actively consider what notice period the business needs for the role. For example, how low long will it take you to recruit a suitable replacement? Also, the ability to keep a particular employee out of the marketplace for longer may be more important than the short-term cash-flow implications of, say, a six month notice period as opposed to a three month notice period.

Garden leave and other flexibility during notice periods

For any skilled employees, you should include a 'garden leave clause' as this is a particularly effective means of restricting a departing employee's activities. Departing employees will remain bound by obligations to the business, but you will be able to prevent them being actively involved in the business for some or all of their notice period.

It is also advisable to have an express clause that allows you to require an employee to carry out alternative duties (within reason), either generally or specifically in the notice period.

Restrictions on competitive activity

When drafting contracts of employment, you should consider including relevant restrictions on competitive activity to protect the business both during and after employment. It is particularly important to have post-termination restrictions in place as there are no implied rules that you can rely on (unless the employee has breached their confidentiality obligations).

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You will need to obtain the employee's express consent to any post-employment restrictions. This protection can often be obtained during employment (by agreeing a change to the employee's contract of employment, for example on promotion) or at the point of termination (for example, by effectively "buying" the protection in a Settlement Agreement). However, the easiest and cheapest option will usually be to obtain agreement at the point of recruitment and to ensure that appropriate restrictive covenants are included in all contracts of employment for key employees.

Keep contracts of employment under review

It is important to ensure that the contracts of employment of key employees are reviewed regularly to keep them up-to-date. In particular, you should make sure that the terms reflect any changes to the employee's role and the terms of employment. Particular attention should be paid to key clauses about notice, bonuses, deferred compensation, share options and restrictive covenants.

Unilateral undertakings

Unilateral undertakings are often integral to the grant of planning permission for renewable energy projects. Their purpose is to impose planning obligations.

Planning obligations

Planning obligations can be attached to a planning permission to make a development acceptable in planning terms. Such obligations can vary widely from one site to another, but will generally control the use of land or seek to offset the impact of a development on its environment.

Section 106 of the Town and Country Planning Act 1990 provides the statutory basis for planning obligations. Often, the developer and the Local Planning Authority ("LPA") will reach agreement and record the obligations in a 'section 106 Agreement.' Where it is not possible (or inappropriate) to reach agreement with an LPA, a unilateral undertaking can instead be offered by the developer to bind itself to the proposed planning obligations it considers necessary to make its scheme acceptable.

Statutory and policy tests

Statutory and policy tests regulate the use of planning obligations. Regulation 122 of the Community Infrastructure Levy Regulations 2010 (the "CIL Regulations") provides that a planning obligation may only be a reason for the grant of planning permission where it is necessary to make the development acceptable in planning terms; it relates directly to the development; and it is fairly and reasonably related to the development in scale and kind. These tests reiterate the policy tests, which in England are found at paragraphs 203 and 204 of the National Planning Policy Framework ("NPPF").

The CIL Regulations do not apply to buildings into which people do not normally go, or buildings into which people only go intermittently in order to inspect or maintain fixed plant and machinery; for example a wind turbine. Therefore, the main

control on the use of planning obligations by developers of renewable energy projects in England will be the policy tests in the NPPF, but they are less likely to be affected by the statutory controls in the CIL Regulations.

The interpretation of these tests has been considered time and time again by the Courts. The seminal case is *Tesco Stores Limited v SSE [1995] 2 All E.R. 636 (*generally referred to as *"Tesco (Witney)")*. In this case, the House of Lords ruled that whether an obligation was necessary (and therefore directly, fairly and reasonably related to the development) was a matter entirely for the decision maker, provided that it had a connection with the proposed development that was more than de *minimis*.

Lord Keith of Kinkel commented that if a planning obligation:

> *"has some connection with the proposed development which is not de minimis, then regard must be had to it. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision maker."*

More recently, *R.* (*on the application of Welcome Break Group Ltd*) *v Stroud DC [2012] EWHC 140 (Admin)* considered the tests following the introduction of the CIL Regulations. In this case, there was an obligation committing the operator of a motorway service station to use locally sourced produce in the retail and cafe outlets and to source staff from the local area. The Court held that *Tesco (Witney)* remained good law and that the extent to which the planning obligation affected the decision maker was a matter entirely within his discretion, provided it had the necessary nexus with the development in question.

Community benefit

Planning obligations, whether secured through a unilateral undertaking or a section 106 agreement, will often be central a developer's proposals to offset the impacts of its proposed development. Care should be taken to ensure that the LPA understands the relationship of such obligations to the development and that it has applied the statutory and policy tests in its decision making (if legal challenges on these grounds are to be avoided).

In a development environment, where community benefit contributions are increasingly being offered by renewable developers and where such contributions may lack the necessary nexus to satisfy these tests for planning obligations, careful presentation of a developer's proposals has never been more important.

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Valid consents: common issues

This article identifies common issues which arise for promoters seeking planning consents for renewable energy projects and for those seeking to invest. We have focused on English projects, but similar issues arise for Welsh, Scottish and Northern Irish projects as the consenting regimes throughout the UK have many equivalent features.

Which consent(s) are needed?

The 'main' planning consent for a renewable energy project in England is either a Development Consent Order (DCO) from the Department of Energy & Climate Change (for larger projects) or planning permission (for smaller projects). A marine licence will be needed for offshore works. Some projects may have a choice about which consenting regime they follow.

In addition to its main consent, a project may require further consents, for example, an environmental permit, land drainage consent and/or a protected species licence.

For any project a consenting strategy is invaluable. This will be influenced by the timetable and risk management considerations and may, in tturn, influence the scope of the project itself.

Does the promoter have control over the land needed to develop the project?

If not, the promoter will need to consider negotiations with landowners and whether compulsory purchase powers are an option.

How much design flexibility can be built into the main consent?

There needs to be ongoing dialogue between the project design and consenting teams. Whilst flexibility can be built into the consent, the decision maker will need some certainty about what the project is. It is a balancing act.

Who controls the consenting timetable?

The consenting timetable will be governed by legislation, the examining body and the decision maker. However, that timetable can be influenced to a certain extent by the promoter planning well, being proactive, dealing with issues that arise and ensuring good communication is maintained throughout.

Are all the stakeholders engaged?

Identifying the relevant organisations and individuals who are key to the consenting regime is vital. Meaningful engagement with those stakeholders will make the consenting process smoother and could save considerable time.

Are the conditions of the consent workable?

Watch out for conditions which will have an impact on the build timetable and/or operational hours, which involve onerous financial commitment or which rely on a third party to be discharged. For larger projects, anticipate the likely contractor packages when drafting and negotiating conditions. Consider the financing of the project and whether the project will stay wholly in the promoter's ownership.

Be aware that in the case of DCOs, breach of a DCO condition (known as a requirement) is a criminal offence.

When can works begin?

The consent will be subject to a challenge period (usually 6 weeks), so any works started within that period may be at risk. Pre-commencement conditions must be fulfilled before works begin.

In order to obtain valid consents which allow a project to be deliverable, to timescales which are acceptable to promoters and investors alike, it is essential that a developer identifies the consents, licences, rights or permissions that it requires to deliver that project at the earliest possible stage. Once identified, a proactive approach to the consenting process will aid the delivery of a buildable consent within the desired timescales.

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Specialist **V**essels in the construction of offshore wind farms: some legal issues

Written by Quadrant Chambers

Introduction

The enthusiasm for renewable energy in the United Kingdom, Europe and further afield is continuing to fuel increasing demand for specialist, often purpose-built, vessels to be used in the construction of offshore wind farm projects. With planning approval for the largest project in the world – off the Yorkshire coast – recently given, and more projects in the pipeline, there is every reason to expect a significant increase in the construction and conversion of such vessels.

This article provides some background and context, and identifies some of the legal issues which are likely to arise out of the construction process, drawing on experience gained from the construction and modification of vessels of similar complexity used in the oil and gas industry.

Wind farm projects

The United Kingdom is a world leader in the development of offshore wind farm projects (although, sadly, not in the manufacture of the turbines themselves). 2013 saw the commissioning of what is currently the world's largest wind farm, the London Array, with 172 turbines and generating capacity of 630 MW.

The London Array was part of the second round of wind farm development, and a substantial number of Round 3 projects are also underway. These include the Dogger Bank project, off the Yorkshire coast, which is planned to comprise up to 400 turbines, covering approximately 430 square miles.

Round 3 developments have tended to be more ambitious and technically challenging, and Dogger Bank is no exception. This ambition is not merely in terms of sheer scale, as the development will take place some 80 miles offshore: significantly further offshore than has ever previously been attempted. Not only are such projects underway in the United Kingdom, but there is a similar pattern throughout Europe and further afield. The list of major projects is impressive.

The construction challenges involved in these projects are considerable, for instance:

- Secure foundations are necessary to cope with wind and sea
  - Different solutions are possible here, such as gravity based foundations, involving a concrete structure that uses rock, sand, or iron ore ballast to maintain the turbine in position by means of the structure's own weight.
  - A more common solution is the monopile foundation - the use of long cylindrical steel tubes, hammered into the seabed - which was adopted for the London Array. The choice of solution will depend upon such factors as water depth, and topography and composition of the seabed in the location concerned.
- Once the foundations have been laid, the turbines themselves - weighing hundreds of tonnes - must be brought on site, lifted into place and installed.
- Cables must be laid: connecting the turbines to one another, the turbines to offshore substations, and exporting the electricity generated to the Grid.
  - The London Array, for example, required several hundred kilometres of cabling to be laid. The demands of a project like that at Dogger Bank will be commensurately greater.

Specialist Vessels

The above construction challenges require a variety of specialist vessels: to lay the foundations, to lift the turbines into position, to lay and bury the cabling, and to provide accommodation and support for the installation teams and vessels. For the construction of the London Array, two purpose built vessels were used to both lay the foundations, and install the turbines. A larger number of specialist cable laying vessels were also used.

The identification and timely provision of suitable specialist vessels for a particular project is likely to be of critical importance in order to avoid delays, knock-on costs and loss of income. There are a number of reasons why newbuilding or conversion may be attractive:

- The technical requirements of a particular project may require a bespoke vessel.
- Existing vessels may not be available due to present commitments. Given the number of projects in the pipeline, demand is set to rise, and a project may tie up a vessel for several years.
- The cost, whilst considerable in the abstract, may be relatively insignificant when set against the costs, and potential income streams, of the project as a whole.

Conditions are therefore ripe for an increase in newbuilding. Conversion of existing offshore support vessels used in the oil and gas sector is also likely to become an increasingly attractive proposition. Such vessels are increasingly available due to the downturn in oil production as a result of the collapse in oil prices coupled with the ongoing decommissioning of oil fields in the North Sea.

This demand for new and converted vessels is by no means a new phenomenon in the offshore energy sector. Over the past 40 years or so there has been an exponential growth in the construction and conversion of Floating Production, Storage and Offloading Units ("FPSOs"). FPSOs are commonly used to store and process oil and gas offshore.

Potential areas of dispute in offshore wind farm construction contracts

One feature of FPSOs that is likely to be paralleled by specialist vessels in the wind farm sector is that contracts for their construction and conversion provide fertile ground for disputes. Three particular areas are identified below.

Variations

Issues as to the nature and scope of varied work commonly arise in offshore construction and conversion contracts. Because these contracts are often concluded before the vessel's requirements have been fully defined, both builder and customer know that change orders will be required. Indeed, it is not uncommon for contractors to bid on the basis that much, if not all, of their profit margin will be realised through remuneration for varied work. Contracts for the construction of specialist wind farm construction and support vessels are likely to raise similar issues.

Delay and disruption

The customer's right to change the design and impose variations often gives rise to claims for delay and disruption. Construction/conversion contracts invariably contain stringent delivery clauses and provide for the payment of liquidated damages in the event of late delivery.

Concurrent delay

Issues as to concurrent delay often arise and ordinary principles of construction law will apply. Thus, where there is true concurrent delay between a relevant (for the purposes of a contractual extension) event causing delay and a builder event causing delay, the builder is entitled to an extension of time for the period of the delay: *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999)* 70 Con LR 3.

True concurrent delay will, however, be rare, in circumstances where there will only be concurrency *"if both events in fact cause delay to the progress of the works and the delaying effect of the two events is felt at the same time":* see *Adyard Abu Dhabi v SH Marine* [2011] BLR 384, per Hamblen J.

Prevention principle

It has become increasingly frequent for shipyards to rely on the "prevention principle" (i.e. that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing) as an excuse for missing contractual completion dates, even though it is (or ought to be) now well established that the prevention principle does not apply where the contract provides for an extension of time in respect of the relevant events: see *Multiplex v Honeywell* [2007] BLR 195 at §§ 47-49, 56 per Jackson J; *Adyard* (above) @ §§240, 241, 243 per Hamblen J.

Interaction between concurrent delay and the prevention principle

Even where the prevention principle does apply, where there are two concurrent causes of delay, one of which is the builder's responsibility and one of which is said to trigger the prevention principle, the builder must still prove that the "preventing" event in fact relied on caused delay: *Adyard* (above) @ §§263-264; *Jerome Falkus v Fenice Investments* [2011] BLR 644 @ §§49-52.

The burden of proof is upon the builder to demonstrate that the customer's acts or omissions have prevented the builder from achieving an earlier completion date. If that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the builder's own default, the prevention principle will not apply: *Adyard* (above) @ §282; *Falkus* (above) @ §52.

Consequential loss clauses

Construction contracts in the energy sector usually contain exclusions that relieve the builder for liability for all consequential losses caused by any breach of contract, or other matters, for which the builder is responsible. Such clauses are of vital importance given the enormous losses that could arise as a result of a breach.

This consideration is particularly relevant in the case of specialist vessels for the installation of turbines and laying of cables. A delay in the construction of a bespoke vessel might put back a project by weeks, months or even years, with catastrophic financial consequences.

A clause which simply excludes liability for "consequential loss" without more, however, will not be apt to relieve the builder of liability for loss of production, earnings or profits. This is because it has been decided that "consequential loss" simply means any loss which does not directly and naturally result in the ordinary course of events from late delivery – in other words it means "indirect loss" which would only be recoverable under the second part of the rule in *Hadley v Baxendale*: see *Croudace v Cawoods* [1978] 1 Lloyd's Rep. 55 @ 59.

Many offshore contracts seek to avoid this unfortunate (and much criticised) result by defining consequential loss to include loss of production, earnings or profits, although not always with equal success: see e.g. *The Herdentor* (1996) unreported, Clarke J.; *Ease Faith v Leonis Marine* [2006] 1 Lloyd's Rep. 673, Smith J; *Ferryways NC v ABP* [2008] 1 Lloyd's Rep. 639; *Transocean Drilling UK Ltd v Providence Resources Plc* [2015] BLR 190 (currently under appeal).

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Stewart has long been recognised by leading legal directories, Chambers (UK and Global) and the Legal 500, and was nominated by Chambers as Shipping Junior of the Year in 2014.

The recent editions note that he is *"praised for his approachability and user-friendliness", is "a delight to work with" and is "admired for his advocacy skills".*

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For futher information on Burges Salmon's renewables and wider experience please go to **http://www.burges-salmon.com/Sectors/energy_and_utilities/default.aspx**

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BRM0942 07 15