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INTRODUCTION

As we enter 2023, we reflect on 2022 as another dynamic year in the renewables and clean energy market. The Renewables and Clean Energy team at BCLP has undertaken a review of judicial decisions reported in 2022 involving the development and construction of renewable energy projects from around the world. Cases before the courts included various permitting and consent challenges, design liability, intellectual property in various technologies, claims of force majeure under a construction contract, the nature of property rights in the built asset, and nuisance and noise pollution relating to the operation of wind turbines. A selection of the judgments surveyed are summarised below.

The Renewables and Clean Energy team at BCLP provides advice across all areas of the low carbon economy. We have a particular focus on the development, financing and operation of renewable energy assets and related infrastructure. Our experience ranges from advising on generation from renewable sources such as solar, offshore and onshore wind, biomass and energy from waste to regulated and decentralised transmission, distribution and off-grid arrangements and networks, to customer supply and management contracts.

WIND FARMS

Judicial Review of development consent orders (UK): Application for judicial review of development consent orders relating to two wind farms in East Anglia, with associated onshore and offshore development (both nationally significant infrastructure projects). The claim for judicial review was dismissed on all six grounds. The grounds included flood risks, heritage assets and alternative locations.

Case: [R \(on the application of Substation Action Save East Suffolk Limited\) v Secretary of State for Business, Energy and Industrial Strategy \[2022\] EWHC 3177 \(Admin\)](#) (13 December 2022)

Contract interpretation (Scotland, UK): Energiekontor identified the potential for a wind farm at a site at Longhill Burn. Because the site lies close to the flight path of aircraft using Edinburgh Airport, there is a risk that tall structures such as wind turbines will interfere with the radar system. The group of companies of which the defenders form part, Muirhall, also develops and operates wind farms. Between 2015 and 2017 Muirhall procured and paid for the installation and operation of a new radar system (the New Radar) at Edinburgh Airport. An agreement was reached between Energiekontor and Muirhall regarding use of the New Radar, with a right of access granted to Muirhall at another wind farm site. The relationship subsequently broke down. Energiekontor had assigned its rights under the agreement to Longhill (not a group company). The case considers the principles of contractual interpretation and whether an obligation is assignable. The court held that the relevant provision in the agreement was a warranty, which was capable of assignment, and, therefore, Longhill was entitled to recover damages equivalent to a payment made in relation to the New Radar.

Case: [Longhill Wind Farm LLP as the assignee of Energiekontor UK Ltd v Muirhall Energy Limited and Others \[2022\] CSOH 85](#) (25 November 2022)

Alleged infringement of EU patent (UK): GE is undertaking the provision of wind turbines for off-shore electricity generation on Dogger Bank. GE's product is called the Haliade-X wind turbine. In this action, Siemens alleged that GE had infringed European Patent (UK) No. 2 657 519 B1 in relation to elements of a wind turbine. GE denied infringement and stated that the Patent was invalid. Justice Meade ruled that neither GE's fully assembled Haliade-X nor its rotor hub infringe on the patent held by Siemens. Note that this UK patent case is separate to the patent case against the Haliade-X in the US (see US case below), which GE is in the process of appealing, and a case in France which is still pending.

Case: [Siemens Gamesa Renewable Energy A/S v GE Energy \(UK\) Ltd \[2022\] EWHC 3034 \(Pat\)](#) (20 October 2022) (judgment not publically available)

Infringement of US patent (Massachusetts, US): In contrast with the above decision, GE was found to have infringed Siemens' patent over a key component of wind turbines. The respondent was therefore barred from selling its Haliade-X turbines, while existing ones in use can continue on the basis that the respondent pays royalty payments to the claimant. [GE is in the process of appealing the decision. See separate UK case above.]

Case: [Siemens Gamesa Renewable Energy A/S v. General Electric Co](#) (7 September 2022)

Permitting – material considerations (Scotland, UK): In this case, it was held that the Scottish Ministers had not acted unlawfully in holding that, although proposals for two wind farms in Orkney did not comply with the applicable local development plan, there were material considerations that warranted granting permission; in particular, the contributions of each of the proposals in delivering the needs case for an interconnector between Orkney and the mainland, as well as the response to the climate emergency.

Case: [Sinclair v Scottish Ministers \[2022\] CSIH 49](#) (5 October 2022)

Judicial Review – reclaiming motion (appeal) refused (Scotland, UK): An energy company reclaimed (appealed) against a decision of the Lord Ordinary refusing its petition for judicial review seeking declarator that the Scottish Ministers' refusal of its application for consent for the development of a wind farm was unlawful and ultra vires. Motion refused. Climate change legislation has set ever-increasing reduction targets, but a "*decision which prefers the preservation of an atmosphere of isolation and remoteness over the attainment of energy targets...is quintessentially one of planning judgement which Parliament has assigned to the organs of government and not the courts to resolve.*"

Case: [NLEI Ltd v Scottish Ministers \[2022\] CSIH 39](#) (26 August 2022)

Noise pollution caused by wind turbine (Victoria, Australia): Bald Hills Wind Farm, an on-shore wind farm at southeast Victoria, was found to create noise nuisance at night to neighbours in surrounding areas. The Victoria Supreme Court held that the project did not comply with its noise permit condition and granted a permanent injunction with an initial three month period to fix the nuisance.

Case: [Uren v Bald Hills Wind Farm Pty Ltd \[2022\] VSC 145](#) (25 March 2022)

Tax – Capital allowances (UK): The First-tier Tribunal (Tax Chamber) considered Gunfleet's (the taxpayers') appeal concerning the extent to which capital allowances were available to them for expenditure incurred on studies and project management in relation to offshore windfarms. The FTT agreed that each windfarm was a single item of plant, and capital allowances are available for expenditure "on the provision of plant or machinery". Although the FTT allowed the appeal for some studies (such as marine mammal studies), not all studies and project management costs were deductible as capital allowances. Expenditure on studies that directly related to necessary design qualified for capital allowances. The case considers UK tax law in detail and the decision is relevant to all construction projects.

Case: [Gunfleet Sands Limited and Others v The Commissioners for HM Revenue and Customs \[2022\] UKFTT 35 \(TC\)](#) (3 February 2022)

Judicial Review of benefits versus detriments in planning proposals (Northern Ireland, UK): In this case, it was held that there was no legal error in the Planning Appeals Commission's

decision to uphold the refusal of planning permission for a wind farm development on the ground that the benefits of the proposal did not outweigh the detrimental impact on the visual amenity and the landscape character of the area. Planning applications involving significant wind farm proposals will not infrequently require weighing the above-mentioned unacceptable adverse impacts against wider environmental, economic and social benefits that would be delivered by the proposal. This case raises interesting and important issues about the level of reasoning that a planning authority must provide where its decision ultimately turns on the exercise of planning judgment.

Case: [Application by ABO Wind \(NI\) Ltd for Judicial Review \[2022\] NIQB 3](#) (20 January 2022)

Alleged nuisance caused by wind turbines (Scotland, UK): In this case, it was held that the sheriff had not erred in finding that an abatement notice served on the operator of two wind turbines by the local authority in respect of an alleged statutory nuisance was valid and allowing the matter to proceed to proof. On a plain reading of the notice, there was no difficulty in identifying that the nuisance alleged by the respondent was the volume and character of the noise generated by the wind turbines, and that the appellant was required to abate the noise to avoid the continuation of the nuisance. [The original planning application included a condition that required a means of managing noise from the proposed turbines – an important consideration for onshore wind turbines (as opposed to their offshore counterparts).]

Case: [Frank A Smart & Son Ltd v Aberdeenshire Council \[2022\] SAC \(Civ\) 5](#) (14 January 2022)

Challenge to consenting process (Scotland, UK): North Lowther Energy Initiative Ltd (NLEI) unsuccessfully challenged a decision of the Scottish Ministers to refuse an application by NLEI for consent (and deemed planning permission) under the s36 of the Electricity Act 1989 for the development of a wind farm. NLEI sought reduction of the decision (judgment of the court to legally invalidate the purportedly legal decision) and separately a declarator that the unreasonable delay in determining the application was a breach of its European Convention on Human Rights Article 6 rights to determination within a reasonable time. The court refused the declarators and reduction sought.

Case: [North Lowther Energy Initiative Limited v Scottish Ministers \[2021\] CSOH 104](#) (15 October 2021)

Tax - Whether a wind turbine is a chattel or a fixture (Victoria, Australia): In this case, the Supreme Court of Victoria considered whether wind turbines are chattels or fixtures, in the context of assessing tax payable based on the improved value of the land. It was held that turbines are chattels.

Case: [AWF Prop Co 2 Pty Ltd v Ararat Rural City Council \[2020\] VSC 853](#) (16 December 2020)

WASTE TO ENERGY

Force majeure under construction contract (West Australia): Acciona entered into an agreement with Macquarie Capital and Phoenix Energy in 2018 for the construction of a waste to energy power plant in Kwinana, Australia. It was expected to be operational by 2021. In October 2021, Acciona declared that several force majeure events had happened, including Australia's national state of emergency and the lockdown on borders that prevented workers from entering the plant, in order to terminate the contract. It also sought an extension of time of 824 days and additional costs of AUD410 million to finish the project. The Supreme Court of West Australia dismissed the claim.

Case: [Acciona Industrial Australia Pty Ltd v Kwinana WTE Project Co Pty Ltd \[2022\] WASC 380](#) (11 November 2022)

Contract interpretation (UK): A document containing the heads of terms of an agreement proposing that a farming business would lease some land to an anaerobic digestion plant operator was not binding and enforceable. There were a number of clear indicators from the wording of the provisions that the parties had not objectively intended the document to be legally binding, except for an agreed period of exclusivity in which to conduct negotiations.

Case: [Pretoria Energy Company \(Chittering\) Limited v Blankney Estates Limited \[2022\] EWHC 1467 \(Ch\)](#) (14 June 2022)

TIDAL / HYDROELECTRIC

Failure to commence construction under a planning consent (UK): Developer was granted consent for a tidal lagoon electricity generating station in Wales, but had failed to "commence" work on the project within the five-year time limit, as defined in The Swansea Bay Tidal Generating Station

Order 2015. The developer was not entitled to a declaration that it had "begun" the development within the meaning of the Planning Act 2008 s.155 when it undertook ground investigation works shortly after consent was granted (this type of work being expressly excluded in the definition of "commence"). The consent order had accordingly lapsed. The Court of Appeal broadly agreed with the first instance decision and dismissed the appeal (the developer had neither begun nor commenced the development). The case is a useful reminder to commence works promptly and check definitions within contracts (or Orders).

Case: [Tidal Lagoon \(Swansea Bay\) Plc v Secretary of State for Business, Energy and Industrial Strategy \[2022\] EWCA Civ 1579](#) (1 December 2022)

[First instance: [Tidal Lagoon \(Swansea Bay\) Plc v Secretary of State for Business, Energy and Industrial Strategy and others \[2021\] EWHC 3170 \(Admin\)](#) (25 November 2021)]

SOLAR

Judicial Review – planning permission (UK): The claimant applied for judicial review of the defendant local authority's 2021 decision to grant the interested party planning permission for a solar park. In addition to the 2021 planning permission, there was a 2017 planning permission - implementation of both might give rise to a breach of planning control (breach of the 2017 planning permission). The court accepted that it was for the developer to decide how to proceed with development / ensure no breach, and not for the authority to grapple with or speculate about the various options when considering planning permission (the later 2021 permission). The challenge to the 2021 permission failed.

Case: [R \(on the application of Fiske\) v Test Valley Borough Council \[2022\] EWHC 1111 \(Admin\)](#) (13 May 2022)

Defects (UK): In awarding damages for defective design and construction works on a number of solar energy parks, the court made various findings of fact and discussed the principles relating to claims for blight and the waiver of conditions subsequent.

Case: [Toucan Energy Holdings Limited and Others v Wirsol Energy Limited and Others \[2021\] EWHC 895 \(Comm\)](#) (14 April 2021)

OTHER

European Court of Justice – incorrect transposition of a directive (EU): The WEEE Directive was partially invalid, in so far as it obliged producers of photovoltaic panels to finance the costs relating to the management of waste from those panels where they were placed on the market on a date prior to the date on which that directive entered into force.

Case: [Vysocina Wind as v Czech Republic \(C-181/20\)](#) European Court of Justice (Grand Chamber) EU:C:2022:51 (25 January 2022)

Judicial Review - green energy "Subsidy Scheme" (UK): Four special purpose vehicle companies that had applied to participate in the 'Renewable Heat Incentive', a green energy subsidy scheme, successfully quashed a decision by OFGEM (the UK's energy markets regulator) not to register them as participants on the scheme. The court remitted the matter to OFGEM, to issue new decisions.

Case: [Havant Biogas Limited and Others v The Gas and Electricity Markets Authority \[2021\] EWHC 84 \(Admin\)](#) (22 January 2021)

CASE TO WATCH

Alleged breach of director's duties - waste-to-energy projects (UK): This claim arises out of three waste-to-energy projects undertaken by the Claimant. The Claimant's case is that the Defendants were in breach of their duties and obligations as directors of the Claimant by entering into contracts for the above projects without engaging adequate and suitably experienced personnel, without adequate investigation into new technologies, without adequate designs or information, without taking proper and reasonable account of the project risks, without properly examining profitability, and using tender prices which were far too low.

Case: [MW High Tech Projects UK Ltd v Greenhalgh and Others](#) (recent judgment [2022] EWHC 2000 (TCC) was largely procedural). The case still seems to be on going as HT-2021-000094 (TCC).