Introduction

The recent decision of the Hon. Mr Justice Coulson in the case of Breyer Group plc & Others v Department of Energy and Climate Change (2014) EWHC 2257 (QB), will no doubt make interesting reading for policy makers and regulators on the island of Ireland and across the EU.

Electricity markets in the EU are, in a state of flux, due to fundamental changes in market dynamics caused by the increasing penetration of renewable generating technologies, as well as changes to market rules that are necessary in order to implement the EU’s Target Model for the energy sector. On the island of Ireland, the drive to establish full compliance with the Target Model has led to the commencement of a process under which the jurisdictional energy regulators are re-designing the SEM wholesale electricity market in time to meet a 31 December 2016 deadline. While the re-design is occurring primarily in order to facilitate the “coupling” of electricity prices between the SEM and its neighbouring regions (and hence the “Integrated SEM” – or “I-SEM” – working title), it is likely to have significant knock-on effects across the web of contracts that supports trading and payment in the Irish electricity sector, including contracts that are the subject of public service obligations, including renewable energy support schemes.

In the GB context, the decision in the Breyer case illustrates the important role the European Convention on Human Rights (“ECHR”) can play in protecting the rights of investors and, in some cases, supply chain businesses operating more generally in the supported sector. Whilst this decision may only have persuasive authority in an Irish context, the ECHR has been given effect in Ireland by the European Convention on Human Rights Act 2003, and compliments constitutional and other protections that may be available as a matter of Irish law generally. Due to the wide-ranging effect of the implementation of I-SEM, the potential impact of the Breyer case should not be overlooked.

Background to the Breyer Case

Pursuant to the Feed-In Tariffs (Specified Maximum Capacity and Functions) Order 2010, DECC introduced a ‘Feed-in-Tariff’ (“FIT”) scheme for small-scale photovoltaic (“PV”) power installations, which applied to installations commissioned prior to 1 April 2012. The scheme was introduced to encourage the low-carbon generation of electricity. In 2009 DECC consulted on incentives to encourage renewable electricity generation. In the UK Government’s response to that consultation it was noted that “… any individual installation, once starting to receive a tariff at a certain level, will continue to receive the same generation tariff level through its entire support period under the FIT
scheme.”² It was further noted that the scheme “will provide long-term certainty for export payments. “and thus would provide certainty for investors.”³

In a House of Commons debate on 20 October 2011, the Secretary of State for Energy and Climate Change, was questioned by Labour Co-op’s Chris Leslie regarding a Financial Times report which indicated that the Secretary of State was about to “completely pull the rug from underneath thousands of people up and down this country who might have taken steps to invest in solar power for their own houses and who are now finding that their investment is being completely undermined by his decisions.”⁴ The Secretary of State’s response was that the “Government are very committed to not having retrospection in legislation and legislative changes”.⁵

Notwithstanding this statement, on 31 October 2011, Gregory Barker, Minister of State, announced a consultation paper on proposed changes to the FIT scheme (the “DECC October Proposal”). Due to the concerns that the support scheme was too generous, it was proposed by DECC in the consultation paper that the eligibility date by which installations had to be commissioned should be brought forward from the originally specified date of 1 April 2012 to an earlier date of 12 December 2011. DECC noted that in the 18 months since the FIT scheme had been introduced, it had successfully encouraged people across the country to get involved in green energy generation and while this “trend is a testament to the popularity of FITs, it also reflects the pace of change that has recently characterised the solar PV market.”⁶ DECC proposed that as a consequence of these changes it was necessary to reduce the “tariffs for solar PV to a level consistent with providing a reasonable rate of return.”⁷ In other words, it was proposed that the cut-off date for eligibility for the payment of the highest rates of FIT would be brought forward to 12 December 2011 from 1 April 2012.

The Hon. Mr Justice Coulson commenting on the proposed change noted that, as a result of the date change, “hundreds, if not thousands, of installations which would otherwise have been completed by the April 2012 cut-off date were abandoned”. In January 2012, the English Court of Appeal ruled that the DECC Proposal was unlawful. This ruling was clearly too late for work to resume on the abandoned installations which would have been completed on time, but for the now-unlawful DECC October Proposal.

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The Claimants

The Claimants in the proceedings fell into a number of different categories including: small-scale solar PV generators or nominated recipients under the FIT scheme; parties engaged in various businesses connected in some way with solar PV generation; and companies that supplied solar PV equipment to installation companies. The Hon. Mr Justice Coulson noted that: ‘It is also important to note the wide range of customers that the claimants had in connection with their solar PV installations. They included not only private homeowners, but local authorities, schools, social housing landlords and commercial businesses. The claimants were therefore playing the wide role envisaged for the private sector in the consultation paper and the response to the consultation paper in 2009.’ The Claimants had entered into contracts with occupiers, contractors, financiers, brokers and suppliers in connection with proposed solar PV installations which would have been installed and commissioned by 31 March 2012. The Claimants argued that these contracts were entered into in anticipation of a particular FIT rate per kWh and that the DECC October Proposal rendered many of these concluded contracts valueless because the anticipated rate would no longer be paid for installations not completed by 12 December 2011.

Grounds for Challenge

The Claimants’ claim was based on the catastrophic effect of the DECC October Proposal to bring forward the eligibility date. The Claimants sought damages against DECC under Protocol 1, Article 1, ECHR which provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions.

No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

It was alleged that the DECC October Proposal was an unjust interference with the Claimants’ peaceful enjoyment of their possessions. The Claimants contended that ‘possessions’ included their customer contracts (both concluded and unsigned), the marketable goodwill of their businesses and their legitimate expectation of an entitlement under the statutory scheme.

There were a number of elements to this challenge which the Court had to consider: Did the Claimants have ‘possessions’ within the meaning of the ECHR Article? Did the DECC October Proposal constitute an interference? If there was interference, was it justified? Finally, would a financial remedy be necessary for proper satisfaction?

Judgment

‘Possessions’ under Protocol 1, Article 1, ECHR

The Court first addressed the determination of what might constitute ‘possessions’ under Protocol 1, Article 1, ECHR. The Hon. Mr Justice Coulson found that concluded contracts may be classified as assets and were therefore possessions under Protocol 1, Article 1, ECHR. In this context, the Court found that termination provisions of the contract in question, such as those dealing with the obtaining
of relief for non-performance, were deemed immaterial to the question of whether the contract may be characterised as an asset. While such provisions may have affected the residual value of the contract, they would not affect their designation as possessions for the purposes of Protocol 1, Article 1, ECHR.

In reaching this conclusion, the Court relied on the ‘indicia of possessions’ concept as stated in Murungaru v Secretary of State for the Home Department ([2008] EWCA Civ 1015, [2009] I.N.L.R. 180), namely that the tangibility, assignability, transmissibility and a capability of a thing to be realised for an economic value enables that thing or possession to be described as an “asset”.

Significantly, though arguably not surprisingly, the Court found that unsigned contracts did not meet the Murungaru test and therefore were not possessions. The Court ruled that the DECC October Proposal rendered concluded contracts incapable of being performed, thereby causing a clearly identifiable loss. Non-concluded contracts, on the other hand, were not yet assets of an economic value capable of realisation and therefore could not be defined as ‘possessions’ and protected by Protocol 1, Article 1, ECHR.

In considering the Claimant’s assertion of a right to damages for loss of goodwill, the Court distinguished a currently subsisting easily identifiable sources of income and future income or profit incapable of precise identification or capitalisation. If a loss of marketable goodwill could be capitalised, it would be prima facie protected as a ‘possession’ under Protocol 1, Article 1, ECHR, but loss of goodwill for the future is not recoverable as it falls into the category of a future profit. However the Court commented that ‘sensibly distinguishing’ between marketable goodwill and future profit is a ‘Herculean task’.

Applying the logic that ‘marketable goodwill’ is an asset with a monetary value (rather than an expected stream of future income), the Court thus categorised the concluded contracts as ‘marketable goodwill’ which were protected ‘possessions’ and thus entitled recovery. Non-concluded contracts were not yet realisable assets, and could not amount to possessions. The latter difficulty could not be overcome using the doctrine of legitimate expectation as non-concluded contracts could not be considered to be a sufficient property right to which a legitimate expectation could attach.

**Interference**

The DECC October Proposal was held to be an interference with the Claimants’ possessions within the meaning of Protocol 1, Article 1, ECHR as it prevented concluded contracts from being fulfilled. DECC’s contention that it was a mere proposal was rejected, as the Court applied an earlier ruling that a judicial review challenge could be directed at actions (such as this “Proposal”) that are no more than steps on the way to the substantive event (ie, any ultimate decision to curtail the support scheme). Further, the proposal was held to be a careful and deliberate state action causing material consequences and could therefore be classified as a wrongful interference within the meaning of Protocol 1, Article 1, ECHR.

The Court ruled that this interference could not be justified for two reasons. DECC’s action was legally impermissible and as a matter of principle, an unlawful act was not capable of justification. In addition, the Court, having considered the circumstances, felt that a fair balance would never have been achieved by the DECC October Proposal unless those that suffered financially as a result of their reliance upon it were compensated.
**Damages**

The Court held that the Claimants were entitled to damages to put them back into the position they would have been in had the wrongful interference not occurred.

Only a wrongful interference with items that the Court has deemed to be ‘possessions’ under Protocol 1, Article 1, ECHR, entitled the Claimants to damages. In other words, the Claimants were entitled to recover damages for concluded contracts rendered unperformable (as they were considered realisable assets), but not unconcluded contracts (which do not carry the indicia of possessions or assets as outlined in *Murungaru*).

The ability to recover would turn on the facts of each claim, as there must be some demonstration that a direct loss has been suffered in the prevailing circumstances. The Court commented, in a basic sense, on the fundamental importance of the presence of direct causation in any claim for damages. However, in the circumstances of this case, it emphasised that the mere fact that a Claimant and its contractual counterparts might seek to abandon a particular project due to the effect of the DECC October Proposal did not mean the Claimant had not suffered direct economic loss or that the chain of causation emanating from DECC’s actions in making the DECC October Proposal had been broken.

While the Court did afford relief to the Claimants on a number of points, claims for compensation for the loss of unconcluded contracts was firmly rejected on the basis that such contracts could not be categorised as assets or possessions.

**Conclusion**

The stability of regulatory frameworks is considered to be one of the key determining factors in the assessment of the relative attractiveness of a particular market from an investment perspective. Whilst to date there is no suggestion that there will be any departure from the supports granted to investors in the Irish renewable sector arising out of the high level design proposed for I-SEM, much of the detail surrounding the new market remains to be settled. One also wonders whether other proposed changes to market rules and incentives that were put in place in recent times to expressly encourage market entry will stand up to judicial scrutiny on the basis of the Breyer judgment, other Irish constitutional protections, and the doctrine of legitimate expectation particularly in circumstances where the beneficiary of the incentive can point to a contract that underpins the investment and a particular rate of return.

An interesting if not complicating factor in an Irish context arises from the fact that regulatory decisions of the Single Electricity Market Committee (“SEM Committee”) acting through the Regulatory Authorities (the Commission for Energy Regulation in Ireland and the Utility Regulator in Northern Ireland), must be compatible with applicable legislation in both jurisdictions. In Ireland the European Convention on Human Rights Act 2003 provides at section 3(1) that ‘Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State’s obligations under the Convention provisions.’ There is therefore a statutory duty on the Commission for Energy Regulation and the SEM Committee to perform their statutory duties in a manner that is compatible with the ECHR. Pursuant to section 3(2) of the 2003 Act, where a person has suffered injury, loss or damage as a result of a contravention of section 3(1), that person may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention.

There will always be winners and losers in energy market change scenarios. The judgement in the Breyer case lays down an important marker with regard to the rights of investors who have come into
a market (in that case the GB market), in pursuit of an express government policy targeting them and encouraging them to invest funds in pursuit of a particular activity in return for a predetermined return over a period of years. Across Europe the Energy Charter Treaty is also being employed by disgruntled investors in the renewable energy sector who have suffered loss as a consequence of policy U-turns, many of which have supposedly been necessitated out of, a re-evaluation of the appropriateness of certain support schemes in light of the economic malaise of recent years.

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