

LIQUIDATED DAMAGES AND RENEWABLES PROJECTS

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A Commercial Court decision earlier this month has considered a number of significant issues surrounding the application of liquidated damages for delay in a renewables context. In addition to upholding the validity of the clauses in question, the court allowed liquidated damages to accrue after termination and also permitted a separate claim to be made for general damages in respect of reduced ROCs accreditations suffered due to delays in commissioning. The decision is likely to be of particular interest to those involved in renewables projects but also has implications for construction projects generally.

ROCs explained

The Renewables Obligation was introduced between 2002 and 2005 principally to support the construction of new renewable energy generation in the UK. Projects that are accredited under the scheme receive a certain number of Renewable Obligation Certificates (ROCs) for each MWh of electricity that is generated for a period of 20 years. ROCs are tradeable and had a value of around £42 per ROC in 2013/2014. The number of ROCs awarded per MWh of electricity produced varies according to the type of generation, and according to the year in which the project is commissioned. Ground mounted solar PV projects that were commissioned between 1 April 2012 and 31 March 2013 received 2 ROCs per MWh for 20 years, whereas ground mounted solar PV projects commissioned the following year (i.e. between 1 April 2013 and 31 March 2014) would only receive 1.6 ROCs per MWh for 20 years. A small difference in commissioning date could therefore have a significant impact on project revenues for the life of the project.

GPP Big Field LLP & Anor v Solar EPC Solutions SL

GPP entered into five EPC contracts with Prosolia UK Ltd for the construction of solar power generation plants at various locations in the UK. The projects ran into problems and Prosolia was ultimately placed into liquidation. GPP subsequently claimed against Solar EPC Solutions SL, Prosolia's Spanish parent, under guarantees given in relation to each of the projects.

GPP primarily claimed for delay related losses in relation to the five projects. The EPC contracts all contained liquidated damages provisions covering delays in commissioning. A number of issues arose as to the application of these provisions, including:

- Whether the amount of damages specified was excessive and unenforceable as a penalty.
- Whether liquidated damages continue to accrue after termination.
- Whether a separate claim in addition to the damages specified could be brought by GPP in respect of a reduction of in the ROCs tariff achieved for certain projects as a result of the delays in commissioning.

Unenforceable penalties?

Solar argued that the same rate of liquidated damages had been specified in each of the EPC contracts (£500 per day per MWp) despite the fact that each of the plants had different outputs and that a variance of 30% in electricity revenue could be expected between them. The clause in question also referred to the amount as a “penalty”.

The court rejected this argument applying the recent Supreme Court decision in *Cavendish Square v Makdessi*. The test was whether the clause was “out of all proportion to any legitimate interest of [GPP] in the enforcement of the primary obligation” and/or whether the sums stated were “extravagant, exorbitant or unconscionable”.

Although there had been no specific negotiation around the £500 figure, a precise calculation of financial losses on a solar project was difficult to produce and the £500 figure was not beyond the maximum loss which might be sustained during a peak generation period. The reference to a “penalty” was not determinative, particularly as the term “Delay Damages” had been used elsewhere.



Liquidated damages post-termination?

One of the EPC contracts was terminated by GPP prior to commissioning being achieved. In that case, GPP argued that the liquidated damages provision continued to apply until commissioning was achieved using alternative contractors. The court accepted this argument in reliance on comments made by the TCC in *Hall v Van den Heiden (No 2)*. In that case, Coulson J (as he then was) noted that an interpretation which brought liquidated damages to an end upon termination would:

“reward the [contractor] for his own default. Take the example of a contractor who has wholly failed to comply with the contract, is in considerable delay, and is facing a notice of termination. The defendant’s case would mean that such a contractor was only liable to pay liquidated damages for delay before the decision was taken to terminate, thereby penalising the employer for trying to get the works completed by another contractor, and rewarding the contractor for sitting on his hands and failing to carry out the works in accordance with the program.”

The above comments have, however, been criticised by commentators and, prior to the present case, do not appear to have been followed in subsequent cases. The Commercial Court would not appear to have been referred a number of other decisions, and notable construction law textbooks, where the contrary position has been adopted. For a more detailed discussion of this topic, please see our earlier Law-Now’s [here](#) and [here](#).

Separate claim for loss of ROCs?

GPP also claimed for losses arising from a reduction in ROCs in addition to liquidated damages for delay. It was common ground that delays in commissioning had led to one project being eligible for 1.6 ROCs/mWh instead of 2 ROCs/mWh and another being eligible for 1.4 ROCs/mWh instead of 1.6 ROCs/mWh. This in turn would reduce the income which could be generated from the plants over the course of the 20 year ROCs accreditation.

Solar argued, among other things, that such a claim was limited by the liquidated damages provision.



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The reduced ROCs accreditation was a direct result of delays to commissioning which were already compensated by liquidated damages. GPP, on the other hand, noted that the EPC contracts contained a separate obligation to achieve the higher ROCs accreditation.

The court agreed with Solar that the failure to achieve the required level of ROCs was purely a consequence of failing to achieve commissioning by the stipulated date and was not therefore an independent breach outside the ambit of the liquidated damages provision. However, *“not without some misgivings”* the court found that the EPC contracts treated *“that part of the loss that relates to the failure to achieve the contracted level of ROCs as falling outside the ambit of the Delay Damages provision”*.

The primary reason for the court reaching this conclusion was that the EPC contracts provided an express right of termination for failing to achieve the required level of ROCs. Upon such a termination the parties were obliged to attempt to agree a revised Price, with guidance being given as to the level of reduction which might be agreed for a

specified reduction in ROCs. This suggested that GPP was intended to be compensated for a reduced level of ROCs separately from the Delay Damages provision.

Conclusion and implications

This decision makes a number of significant findings as to the operation of liquidated damages provisions in construction contracts. The case appears to be the first decision in which a challenge to the validity of liquidated damages provisions has been rejected in a construction context after the Supreme Court’s decision in the *Cavendish Square* case. This may be evidence of a more lenient approach being adopted, although the clause in this case may well have been upheld on the law as it stood prior to the Supreme Court’s decision.

The court’s finding as to liquidated damages continuing to accrue post-termination is controversial and adds support to the decision in *Hall v Van Der Heiden*. It is unfortunate that authorities supporting a contrary approach do not appear to have been cited to the court. This issue is likely to require resolution by the Court of Appeal

in the future.

The upholding of a claim in respect of reduced ROCs outside the liquidated damages provision is highly significant. It is rare for delay related losses not to fall within a liquidated damages provision regardless of whether the delay can be characterised as a separate breach of contract, such as the failure to achieve the required level of ROCs in the present case. Similar issues are likely to arise whenever the commercial viability of a project is premised on government subsidies or approvals which are time sensitive. The court relied heavily on indications of intention found in other parts of the

contracts in the present case and parties would be wise to spell out whether the loss of such subsidies or approvals are to be covered by any liquidated damages for delay.

References

Hall & Anor v Van Der Heiden (No 2) [2010] EWHC 586 (TCC).

Cavendish Square Holding BV v Talal El Makdessi (Rev 3) [2015] UKSC 67.

GPP Big Field LLP & Anor v Solar EPC Solutions SL [2018] EWHC 2866 (Comm).

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