

Renewable Energy briefing

Challenges to renewable energy consents - promptness and prejudice

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A recent High Court decision has important consequences for energy developers facing challenges to their development consents. The Court's recognition of the prejudice suffered by the developer from a late challenge gives guidance on managing the delays that have become associated with such actions.

What happened in the *Bailey* case

On 23 May 2008 judgment was given in *Bailey and others v Secretary of State for BERR and Prenergy Power Limited*, in which the Court dismissed a judicial review challenge to a consent granted under s36 of the Electricity Act 1989 for a 350MW biomass plant in Port Talbot. In dismissing the claim the Court looked into, but comprehensively rejected, the arguments that an error of law had occurred in the Secretary of State's determination process. At the same time the claim was also rejected because it had not been brought promptly, despite it having been lodged within the 3 month period.

A swift resolution

The challenge in *Bailey* was lodged on 15 February 2008 and was finally disposed of on 23 May, just over 3 months later. This timescale was achieved against a present expectation in the Administrative Court that the two stage process of permission and full hearing in judicial review means that once a challenge has been lodged it could be 6-9 months before the permission stage is determined and a further 6 months before the substantive hearing of the claim (12 to 18 months in total).

The evidence filed on behalf of the developer setting out the steps that had been taken in reliance upon the permission granted (including expenditure incurred, that could have been avoided had earlier notice been given of the challenge) resulted in the Court ordering an expedited rolled-up hearing of the challenge. It was also instrumental in persuading the Court that the challenge had been unreasonably delayed and should be dismissed.

What delay means to energy schemes

Whilst the impacts of such delays are felt across all types of development, they are particularly severe for holders of renewable energy consents where the key infrastructure works such as grid connection and turbine procurement require significant and often urgent financial commitment and are themselves subject to substantial lead-in times. Each stage of the development must be secured sequentially and uncertainty over any stage will impact upon the date that the scheme will be operational and its ability to contribute to the Government's targets for the production of renewable energy.

Lessons that can be learned from *Bailey*

Whilst increasingly developers have approached the three month judicial challenge period as one that they just have to sit out, waiting to see if a challenge will be made, *Bailey* is recognition by the Court of the real commercial pressures that developers face in that time. As a result of *Bailey* a developer having just received a development consent should bear these five factors in mind:

- (a) Developers are justified in assuming their scheme is validly consented and capable of immediate implementation. Written confirmation that the decision is legally sound is a worthwhile addition to the developer's audit trail at this point.
- (b) To put a developer on notice of a challenge a formal pre-action protocol letter should be sent, so the developer can assess if the claim is bona fide, and whether any action can be taken to overcome the claimant's concerns and avoid a challenge.
- (c) If a challenge is made, the Court is willing to listen to developers that put their case on the effects of delay in bringing the action upon their schemes. Evidence of that sort of prejudice can be instrumental in challenges being dismissed.
- (d) The Court is also willing to grant developers

expedited rolled-up hearings, to truncate the review process and allow disposal of the challenge within a few months of it being lodged.

- (e) The Court may well be assisted by the developer being present at the hearing to assist the Court in understanding the more complicated technical matters contained in the Environmental Statement supporting the scheme.
- (f) Whilst the usual rule is that a developer participating in a judicial review has to pay its own costs, even if successful, in *Bailey* the unsuccessful claimant was ordered to pay a significant proportion of the developers costs because of the important role the developer had played in the conduct of the case.

Is all this worth a developer getting involved in defending a challenge when the local planning authority or Secretary of State will be the principal respondent defending the consent? With the sums of money that are at stake in energy schemes and the prospect that correctly managed, developer input can provide the Court with a further significant ground to uphold a consent, many developers will feel that participation in the case is an opportunity that they dare not miss.

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