

EiB

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The practical guide for environment professionals

Behind the law

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Challenging times

Ross Fairley highlights a High Court decision with important consequences for developers.

In May, judgment was given in *Bailey and others v Secretary of State for BERR and Prenergy Power Limited*, in which the High Court dismissed a judicial review challenge to a consent granted under s.36 of the Electricity Act 1989 for a 350MW biomass plant at Port Talbot. The court rejected the argument that an error in law had occurred in the secretary of state's determination to grant the consent. Importantly, however, a judicial review was also rejected because it had not been brought promptly, despite being lodged within the three-month judicial review period.

In the renewable-energy sector in particular, objectors have increasingly sought to delay and impose further hurdles on a developer by seeking to instigate the judicial review proceedings once the planning permission has been obtained. This is a significant problem for developers because it is generally a lengthy process. The *Prenergy Power* case illustrates that it is possible to get these judicial review challenges disposed of in just over three months.

The case shows that the courts recognise that renewable developers face real commercial pressures and deadlines. As a result, a developer with planning consent should bear the following factors in mind:

- it can be justified in assuming that the scheme

is validly consented and capable of implementation – it helps the cause to have a legally sound audit trail;

- if someone wishes to challenge the consent, a form of pre-action protocol letter should be sent so that the developer can assess whether it is a bona fide challenge;
- the courts are willing to take account of the impact of any delays;
- courts may grant expedited rolled-up hearings to truncate the review process;
- the developer should be at the hearing to help the court understand any complicated technical matters;
- while the usual rule is that a developer has to pay its

own costs, even if successful, in the *Prenergy* case the unsuccessful claimant was ordered to pay a significant proportion of the developer's costs; and

- although a challenge is being brought against the secretary of state, a developer can achieve significant results by being involved in the process.

The *Prenergy* case illustrates that the courts may be “losing patience with” claims that it sees as being brought merely to frustrate and delay construction rather than on legitimate legal grounds.

Burgess Salmon represented Prenergy Power in this matter.



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