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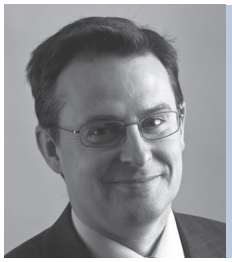

BY ROSS FAIRLEY
partner, Burges Salmon LLP

BY WILL WOODALL
senior associate, Burges Salmon LLP

THE GOVERNMENT'S INTRODUCTION OF THE Feed-In Tariff (FIT) for small-scale renewables in April 2010 has led to frenzied activity in the relatively new sector of solar photovoltaic (PV) energy. Since April 2010, many start-up companies have emerged, and there has been a rush to install solar panels to take advantage of tariffs available. However, it has not all been smooth sailing for the solar sector.

Increasingly, large corporates and businesses are being approached to host solar developments or are considering their own solar PV installations. The focus of this article is to provide in-house lawyers with a briefing on what to consider if their business or company is considering rooftop solar PV systems, and to look at some of the practical, commercial and legal issues that building owners and renewable developers are likely to face. The market is moving quickly and some areas of solar PV, such as electricity sale agreements, are complex. Having a law firm on board that has wide experience of these arrangements saves time – something that is crucial given the FIT timescale.

FIT

The FIT was established in April 2010 by the Labour government. Tariffs are available for projects below 5MW relating to wind, anaerobic digestion, hydro and solar PV. The FIT is a fixed tariff, set at different levels for each technology and index linked. The length of FIT support varies for the technologies, and is set at 25 years for PV solar. Depending on the size of installation, the tariff may vary. The government originally aimed to provide a support level that would give a return on investment of 5-8%. The FIT is paid by licensed electricity suppliers and, through a process called levelisation, Ofgem ensures that the burden of the FIT is spread evenly across suppliers proportionate to the amount of electricity supply customers each one has. The FIT is made up of two payments: a generation tariff payable for each kW/h generated, and the much smaller (currently 3.1p) export tariff for electricity exported to the network. Hosts and developers can choose not to export and instead provide the electricity on site, thereby not receiving the 3.1p; or 'opt out' of the export tariff and take their chances on getting a better price through a bespoke power contract with a supplier.

The government initially planned to review the FIT every four years. However, it has had to make a number of changes prior to its stated review period to try and temper the enthusiasm for solar PV, as the uptake from the public and businesses was dramatic, particularly for large-scale greenfield, ground-mounted solar. The result of these early stage reviews by the government is that the FIT now only really incentivises 50kW and below installations, and even that may be subject to change following the government's announcement earlier this year that it will conduct a full-scale review of the whole FIT regime and implement those changes in 2012.

PLANNING

A developer or occupier considering installing its own system will need to consider whether planning is required for the installation. Planning for solar PV is generally a lot easier than for many other renewables. Permitted development rights exist for domestic microgeneration and works to industrial buildings, warehouses and offices, though you always need to check that these permitted development rights have not been removed by order or do not apply because the building is listed or in a conservation area. If permitted development rights are not available, a planning application will need to be made in the normal way. The key issue for solar developments is visual impact and glare.

CONSTRUCTION ISSUES

For those looking at procuring their own systems, it is worth briefly touching on some of the construction issues that relate to solar PV installations. One of the key issues is whether the roof can handle the weight of the solar panels. Surveys will often be undertaken, and an understanding of what risks the installer will take and what they require in terms of surveys and reassurance is important. Solar contracts for rooftop spaces are typically turnkey contracts rather than split construction contracts; however, there may be a situation where the company considering an installation procures the panels itself and asks an installer to fit them. Some key areas of construction risk include:

- advance payments for kit and reservation of kit;
- implications of delayed delivery, particularly as this may mean missing a FIT deadline and falling under a reduced tariff;

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- performance warranties of the panels, and the length and duration of such warranties;
- remedies for defects and operations; and
- maintenance issues.

Deadlines are important when it comes to the FIT. Not only has the government indicated it will undertake unplanned reviews of the tariff to bring down the levels of incentives offered, but the standard FIT model itself has built-in reductions in tariff after certain deadlines. This has been partly responsible for the huge rush and growth in the sector, and the frenzied installation activity. Once the plant has been commissioned, the tariff applying to it at the commissioning and accreditation date is the one that it will have for the life of the plant (25 years) so there is a tremendous incentive to fit these panels while taking advantage of the high rates available.

CONTRACTUAL STRUCTURES

The two most common types of contractual structure are presented below. In addition, there are various ways in which solar PV rooftop projects can be structured as joint ventures. However, these are outside the scope of this article.

Lease to developer

The building owner (the landlord) leases roof space to the developer of the PV system (the developer). The developer purchases the solar PV system (the equipment) and procures its installation. There may be an occupational tenant (the tenant) already leasing the building from the landlord (more details on this below). Most of the landlord and tenant issues discussed in the remainder of this article relate to a situation where there is a lease of the rooftop to a developer. Further complications occur if there is a tenant in the building already.

The landlord owns the equipment

In this structure, the landlord is investing in the equipment itself. The existing arrangements with the tenant may need to be varied. The landlord contracts directly with the supplier and installer of the equipment. If there is no tenant, this structure will be much simpler than that described in the paragraph above.

PRACTICAL ISSUES

Access

The developer will need to consider how access is to be obtained. This is particularly important during the installation phase, when a crane may be required. The landlord will need to grant rights for the crane to occupy their land and for the necessary rights to be granted over other parts of the building for installation, servicing and removal of the equipment. If the crane is going to stand on third-party land or a public highway, a crane or highways licence (as appropriate) and, possibly, rights of oversail will be required. Some solar PV panels are small enough to be carried into position via stairs or the lift.

Cables/grid connection

The developer needs to liaise with the landlord regarding where the cables will run, where the inverters, meters and other ancillary equipment will be located and where the connection to the distribution network will be sited.

The installation will draw power from the building's supply as well as generating electricity. This will need to be connected and metered.

Type of installation and attachment to the roof

There is a wide variety of types of solar PV equipment. These range from roofing panels that actually replace the existing roof, to panels on frames that are anchored to the roof. There are different degrees of attachment and intrusiveness into the roof structure. These will need to be considered and the relevant drafting will need to be incorporated into the lease.

COMMERCIAL ISSUES

Payment structures

There are two basic structures, though each structure has many different variants. The main structures are:

a) The 'free solar model': the developer pays a nominal rent, but the landlord is entitled to use electricity generated by the equipment, either for free or at a greatly reduced price. If the consideration for the developer being allowed to use the roof is to be free/reduced electricity, the landlord should consider whether the developer should commit to a minimum level of generation from the equipment. The developer receives the FIT income.

b) The developer pays a standard rent, normally expressed in pounds per square metre of roof covered by the system. This rent would normally be reviewed or increased in line with the Retail Price Index. The landlord then pays for any electricity it uses. The developer receives the FIT income.

Treatment of surplus electricity

Some solar PV systems will be sited on roofs of buildings that are able to use all electricity generated by the equipment. In these cases there is often a bespoke energy supply arrangement between the developer and host, and, because there may be no export to the electricity network, no revenue will arise from the FIT export tariff. Of course, there may be a revenue stream from the host depending on the deal that has been struck. These arrangements are often complicated and revolve around finding suitable payment structures and electricity indices.

In most cases there will be times when the landlord will not be able to use all the electricity being generated by the system. The parties will need to consider how they are going to deal with surplus electricity. Normally it will be sold directly into the distribution network operator's (DNO) system. Both the physical connection to this system and the contractual arrangements with the DNO will need to be considered. An electricity supply agreement will usually be put in place between the developer and the landlord that is using the electricity from the system (or the building occupier if applicable) as above. If there are substantial volumes of excess electricity, the developer may opt out of the export tariff and enter a power purchase agreement for the export with a counterparty.

To simplify administration and metering, FIT allows small installations of 30kW or less to avoid the need for an export meter and the FIT licensee (supplier) will simply 'deem' 50% of the electricity produced by the equipment at the premises to have been exported to the grid and pay the export tariff accordingly.

LEGAL ISSUES

Lease structure

In addition to the issues discussed above, the parties will need to consider whether any major issues need to be dealt with before the lease is granted. This will then dictate

whether the parties will want to enter into an option agreement, which will give contractual rights to the developer to draw down a lease of the areas required for the installation of the equipment if these issues are successfully dealt with. If there are significant planning issues, it is likely that the developer will want to take an option to enable it to require the landlord to grant a lease when planning permission is obtained.

Also the parties will need to consider whether any changes are required to reflect the developer's planned company structure. The developer may want to take the lease of the installation in the name of a special purpose vehicle company.

Generally a sub-lease arrangement will add complexity to the project as the developer is likely to want a longer sub-lease term than the amount of time remaining on the headlease to the existing building occupier. This would create a land law problem as a sub-lease cannot be granted for a longer term than a headlease without taking effect at law as an assignment of the headlease. Even if there is a long lease of the building, the developer will have concerns about the headlease being forfeited, as would any funder from whom the developer has borrowed money for the purchase of the equipment. Therefore the freehold owner will need to work out a way of granting a headlease of the relevant areas to the developer.

Definition of premises

The parties will need to consider which areas need to be demised and also the definition of 'premises' in the lease of the equipment. Depending on the current ownership of the building (such as whether it is owner occupied or already leased to a tenant, and whether the existing lease demises the roof or not) and the type of equipment, the premises may include the roof itself or the airspace above the roof, with the right to intrude into the roof with bolts etc in order to attach the equipment. A variation of the existing lease may need to be agreed with the tenant.

Dilapidations/repair/reinstatement

At the end of the term of a commercial lease there are usually negotiations between the landlord and tenant about the liability of the tenant for dilapidations. The tenant's repairing and dilapidations obligations may be complicated by the installation of the equipment.

Also, if the building is new and there are warranties from the roof installer in favour of the tenant or the landlord, these might be invalidated by the installation of the equipment. A warranty could potentially be obtained from the installer of the equipment to cover this.

Generally, the developer will want to produce schedules of condition of the roof and any other areas that are to be occupied by equipment before the equipment is installed and then after it is installed. This will provide good evidence as to what repairs will be the responsibility of the developer or installer in the future.

The developer will be normally also be responsible for repairing any damage caused to the roof in installing, maintaining or removing the equipment. If the landlord needs to repair the roof for reasons unconnected with the equipment, the equipment may need to be temporarily relocated. A *de minimis* level of disruption to the equipment during the landlord's repair works could be agreed.

The lease of the equipment will also need to deal with the obligations of the respective parties for reinstatement of the roof to its previous state. The lease may contain a right for the landlord to require the developer to leave the equipment on the roof, in the ownership of the landlord, rather than remove the equipment.

Insurance

The installation of the equipment could have an effect on the existing insurance policy in place over the building. This effect should be considered and the developer could be asked to contribute to any increase in the landlord's insurance as a result of the installation of the equipment. The developer should also have its own insurance policy in place for third-party liability and, potentially, the costs of any interruption to the tenant/landlord's business.

Other lease terms

1) Landlords will generally require the lease of the equipment to be contracted out of the protection of the Landlord and Tenant Act 1954, which means that the developer will not have an automatic right to a new lease at the end of the term of the lease of the equipment.

2) The developer will want the lease of the equipment to contain a declaration that the developer will remain the owner of the equipment. This is due to the requirements of the FIT regulations, which state that the accredited party (to whom FIT payments are made) must be the owner of the equipment.

Fundability

The developer will want to ensure that various clauses are included in the lease to enable the development to be funded, either through project finance or asset finance. In particular, the lease termination and the forfeiture provisions will need to be carefully considered, and an obligation on the landlord to enter into direct agreement with the funder should be included.

Redevelopment of the premises

The interface between the lease of the equipment and any existing lease of the building will need to be considered. Some landlords, particularly where the building is coming to the end of its serviceable life, will want new leases for tenants or developers to include provisions allowing them to redevelop the building. The parties will need to negotiate what will happen if the landlord wants to redevelop, and who bears the costs. With some types of equipment it may be possible for it to be relocated to an alternative suitable area while the redevelopment takes place.

Some developers would want the landlord to be responsible for any loss of earnings in the event of a redevelopment of the building or major repairs being required.

CONCLUSION

This article has discussed some of the issues surrounding rooftop solar PV projects. Clearly, each project will be different, with a different contractual structure and different existing property arrangements. The UK solar PV sector is moving fast and it is a challenge to keep on top of market practice in FIT contract arrangements and the changing regulatory position.

By Ross Fairley, partner, and Will Woodall, senior associate, Burges Salmon LLP. E-mail: ross.fairley@burges-salmon.com; will.woodall@burges-salmon.com.