What's next for the renewables sector?
News & insight

Welcome

For more information about the issues covered in the newsletter or our wider renewables capability please contact me.

Maria Connolly
Partner and Head of Energy & Renewables

Rooftop solar PV – lease or licence?

When a building owner is thinking about granting a lease or a licence to a FIT generator there are a number of issues that need to be considered.

A lease:

- will grant the tenant exclusive possession of the premises for a fixed period of time;
- is an interest in land;
- binds the purchaser of the building; and
- will provide security of tenure under the Landlord and Tenant Act 1954.

Whereas a licence:

- will grant permission for the licensee to occupy the premises, preventing the occupation from being trespass;
- is a personal right or permission;
- does not create an estate in land; and
- in most circumstance, will not bind the purchaser of the building.

Whilst a licence may be perceived as being quicker and cheaper to put in place, does it offer the building owner and the FIT generator the protection that they require?

The best route?

A licence is merely a personal right and does not attach to the land. If the building owner were to sell the building, the licence would not (except in very limited circumstances) bind the purchaser. Unless a new licence was granted by the new building owner, the FIT generator would be trespassing on the building.

Equally, if there is any intention to sell-on the solar PV installation, a licence arrangement is likely to be unworkable and, instead, a lease would be required.

It is important to remember that calling a document 'a licence' will not make it so. If it exhibits the qualities of a lease, it will be a lease. In the context of rooftop solar PV panels, it is difficult to see how anything other than exclusive possession could be granted and as a result any agreement that is called a licence is probably, in reality, a lease.

However a lease doesn't have to be a complicated, lengthy document. In our view a lease can be just as short and simple as a licence. In fact, to mitigate some of the risks associated with a licence, any such document might actually build in additional provisions for the benefit of the FIT generator, which could result in a licence being longer (and less evenly balanced) than a lease might be.

The risks

The key risk is that the FIT generator could successfully argue that the licence is, in fact, a lease and has security of tenure under the Landlord and Tenant Act 1954. This means that, on expiry of the contractual term, the lease continues and the tenant is entitled to a renewal lease unless the landlord can show that one of the statutory grounds for opposing the lease renewal applies. This outcome may be contrary to what both the building owner and FIT generator intended.

Funders & Lenders

If the building is mortgaged, the lender's consent will generally be required before the owner can grant a lease of any part of it. Lenders will be keen to ensure that the arrangement was validly excluded from the security of tenure provisions of the Landlord and Tenant Act 1954. In addition, lenders who provide finance to FIT generators for the installation of the equipment may require step-in rights in the event that the lease is to be forfeited.

A lease may be the only option where the FIT generator requires third party funding since any funder is likely to require the certainty afforded by a lease arrangement. In relation to debt funding, a lease means that the funder will be able to take security by way of a charge over the leasehold interest.

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The news in brief from NI

The renewables market in Northern Ireland continues to see some interesting and exciting changes. Here are some of the issues to look out for over the coming months.

Contracts for Difference (CfD)

The Northern Ireland Department of Enterprise, Trade and Investment (DETI) along with DECC recently issued a number of consultations on the future of the Northern Irish subsidy schemes for renewables.

What is certain is that, in line with the rest of the UK, Northern Ireland will move to a system of Feed in Tariffs for smaller generation and CfD for larger schemes from April 2017. What remains unclear at this stage is how these will be implemented and, in particular, what the FIT rates may be and whether large generation schemes will have to compete in an all UK CfD auction process. The results of the consultations can be expected later this year.

Planning decisions passed to new 'super councils'

From April 2015 planning decisions for all but the largest (regionally significant) developments passed to Northern Ireland's 11 new 'super councils'. The transition has not been as smooth as hoped with some backlogs in processing applications arising. However, this is perhaps to be expected in the largest change in planning regulation seen in a generation.

As in the rest of the UK, planning decisions now lie with individual councils rather than within the Department of the Environment. How each council will react to renewables applications remains to be seen, but it seems likely that some will be more receptive than others. Until each council formulates its own Local Development Plan, existing regional policy on renewable development will be used to guide decisions; how each council chooses to interpret and apply regional policy remains to be seen.

Expanding grid connections

Grid connection costs and delays in obtaining connections remain a significant limiting factor for many renewables developments. However, Northern Ireland Electricity is pushing on with its plans to develop new regional substation clusters for onshore wind farms, which will allow further approved developments to connect.

DETI has recognised that grid delays should be factored in to the transition from the current Renewables Obligation to CfD but, no doubt, further discussion will be had as to how long such 'grace periods' will be which enable a generator to remain within the Renewables Obligation.

Focusing on solar

Solar – both rooftop and ground mounted – remains an area of significant growth in Northern Ireland, with a number of large schemes now being approved and moving towards development. A major focus for developers at this point is in land and property acquisition through taking out options on land or buildings.

With current Renewables Obligation subsidies set to decrease in October 2015 for sub-50kW installations, there is a particular drive on small rooftop installations at this time. However, even with the slight fall in subsidies, it seems unlikely that the market will be significantly dented.

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Project finance

Renewable energy projects can be complex and a lender financing this type of development will need to consider the legal, technical and commercial aspects of the project.

Typically loans to finance renewables projects are made on a non-recourse basis. The loans are serviced from the cash generated by the project, with the lender only taking security over the project assets (i.e. there is no other revenue stream, piece of real estate, or parental guarantee offered up as security). A special purpose company will be set up to facilitate the project.

Before commercial terms are agreed, the lender will want to know that there is:

1. an agreement with the landowner for the occupation of the property;
2. full planning consent; and
3. evidence that the project is able to connect to the grid.

Once that is established, the lender will rely on professional advisors to undertake a due diligence exercise. The legal elements of this exercise will seek to ensure that the project's contractual arrangements reflect the commercial terms approved by the lender's credit committee and that the risks associated with the development are properly apportioned between the project company and third party contractors.

The facility agreement will set out any matters that will need to be satisfied before funds are made available and will afford a degree of control and monitoring to the lender during construction and operation of the project.

Alongside the facility agreement, the lender will also prepare the security documents; typically comprising a debenture which creates security over all the assets of the project company and a charge over the shares in that company.

The facility agreement will often require the project company to set aside funds in blocked reserve accounts to cover any short term shortfall in loss of revenue. The lender will also want to impose a testing regime in respect of the financial performance of the project company and controls on how any revenue is distributed to shareholders/investors.

The lender will seek to enter into direct agreements in relation to the key project documents (the power purchase agreement, turbine supply and maintenance contracts, balance of plant contracts etc) which allow the lender to step into the shoes of the project company should they need to remedy any defect under those agreements.

Although there is much to consider for this type of project, the path to financial close is well trodden and much can be done to anticipate the key requirements of the lender from the outset. As a result, developers and investors should be confident that good projects will attract financial support and with the right advice can be brought to financial close in good order.

What do our clients say about TLT?

"The TLT team provided excellent support on the solar proposals we are progressing with Veolia. Their extensive experience and attention to detail have assisted enormously."

REG Solarpower

"We have a long-standing relationship with TLT and once again they gave us spot-on advice, responding and understanding the issues that come with solar park developments. It was a real team effort to deliver these high-quality, large scale solar projects on schedule, and I'm pleased that we had TLT with us every step of the way."

Inazin Power

"Long term infrastructure development JV's such as Skylark invariably give rise to complex legal and commercial issues. TLT's advice and support was essential to the successful outcome of these negotiations."

Ecotricity

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Community Energy: discussing the impact of two 5MW projects on community energy schemes?

New rules came into force in April which will allow two 5MW (or smaller) renewable energy projects to secure accreditation under the FIT scheme, even where they share a grid connection, as long as at least one of the projects is owned by a particular kind of 'community organisation'.

It has been widely assumed that these new rules will allow the two projects to secure FIT accreditation even if they are located on the same premises (e.g. in two parts of the same field). However, there is a degree of uncertainty on this point due to the absence of clear guidance from Ofgem.

Given the impending degression of FIT rates which apply to stand-alone (non building wired) solar projects, we anticipate something of a rush among solar developers to secure preliminary FIT accreditation, and so lock into existing FIT rates, by the end of June.

The need to secure preliminary accreditation for these purposes will not only apply to projects structured on a standard, single project company basis, but also to shared grid/community projects. The only difference here is that, following the grant of preliminary accreditation, community organisations will benefit from a longer tariff guarantee period (12 months, rather than the 6 months which applies to regular project companies).

Developers will need to give careful thought, as soon as possible, to the feasibility of pursuing shared grid projects in which one of the project vehicles is a community organisation.

Identifying community organisations

The most immediate issue, given the need to identify the relevant 'community organisation' for the purposes of any application for FIT accreditation, is to incorporate a suitable legal entity. For the purposes of the rules, a community organisation covers the following where there are 50 or fewer employees:

- a community interest company ("CIC");
- a community benefit or co-operative society ("bencom"); or
- a charity.

Given the stringent rules and lengthy period it can take to incorporate a charity, it is not expected that this would be an attractive option and that the focus will largely be on the choice between a CIC or a bencom.

RenewableUK Connect — The networking event for renewables in the UK

Hosted by TLT LLP, Bristol, 10 September 2015

Established in 2007, RenewableUK Connect has built a reputation as the networking event for renewables in the UK. RenewableUK hold four Connect events annually, often with associated workshops. They provide excellent networking opportunities for members, with non-members welcome to attend by invitation.

The events are free to attend but prior registration is essential. If you are interested in attending please email *events@TLTsolicitors.com* and we will send you further details nearer the time.

A CIC or a bencom?

A CIC is a type of limited liability company which is owned by its shareholders and incorporated in a very similar way to a standard limited company. In addition, an application must be made to the CIC Regulator providing evidence that the CIC will satisfy a community interest test (i.e. that its activities will benefit the community) and an annual report must be submitted to the CIC Regulator which records the CIC's activities.

A fundamental element of a CIC is an 'asset lock' (i.e. that it cannot transfer its assets for less than market value). It is possible for the CIC to pay dividends to its shareholders but those dividends are capped at 35% of the distributable profits. In addition, the maximum level of interest that a lender to the CIC is able to claim for any performance related interest is 20%.

A bencom on the other hand is not governed by standard company law but is regulated by and registered with the Financial Conduct Authority (FCA). The FCA will only register a bencom as a community benefit society if it is satisfied that the business of the society is intended to be conducted for the benefit of the community.

The bencom does not have shareholders but has 'members', of which it must usually have at least three. No member can hold more than £100,000 in shares and the power of the members is equal. The bencom must use its assets to further the society's business and dividends to members are not permitted. However, there can be a limited return on the shares provided such return does not amount to a motivation in itself to acquire shares.

Community Energy continued...

Return on investment

As mentioned, a key feature of both CICs and bencoms is the restriction on distribution of assets/profits from the entity. As a result, when considering the feasibility of developing projects via a community organisation in order to benefit from the FIT rules, careful thought will need to be given as to how any developer looking to bring forward the 'community' side of the overall, shared grid project can achieve an acceptable return on any contribution to the cost of that project.

It may be that developers will need to look at what funding or other services it might seek to offer the community vehicle in return for a fair level of margin, funded out of the community organisation's FIT/electricity revenue streams.

Other considerations

Insofar as there is a need for each of the two project vehicles sharing the grid connection to be able to 'stand on its own feet' contractually and attract separate funding, careful thought will also need to be given to the way in which the two vehicles make use of the shared connection and any other shared assets or access points.

In many cases, we would expect it to be necessary for a bespoke agreement to be put in place between the two entities, granting rights and imposing obligations in relation to the shared connection and addressing the consequences of a worst case default or insolvency scenario affecting one of the two entities.

This may need to touch not only on the grid connection agreement relating to the shared connection, but also to metering arrangements and the basis on which power generated by each project can be exported to the grid and sold to a PPA provider via the shared connection.

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Recent projects

Over the last six months we have been involved in some really interesting projects including working with:

- **REG Holdings Ltd** on the property aspects of the sale of its 10MW Denzell Downs wind farm project.The wind farm located in Cornwall was sold to BlackRock Renewable Income UK, a fund managed by BlackRock, for a total enterprise value of £24.4 million. < read more >
- **Ecotricity** on a refinancing deal to boost its renewables pipeline. Ecotricity has just completed a significant refinancing of its existing portfolio of wind and solar projects, raising just short of £70 million as part of its long-term commitment to the UK's renewables industry. < read more >
- **Inazin Power Ltd** on the property aspects for three solar parks. All three solar parks were successfully commissioned and built on time to beat the Renewables Obligation deadline. Low Carbon, who invests in, owns, and operates renewable energy projects will be the solar parks' investor. < read more >
- **REG Solarpower** on the land agreements for three solar projects with Veolia, the UK's leading waste management company. The sites are on restored landfill sites and have an expected combined installed capacity of approximately 60MW. < read more >

In other news...

- We continue to expand our Energy & Renewables team with the hire of planning & environment partner, Andrew Ryan. Andrew has extensive experience advising on the acquisition, development and funding of numerous solar, wind and anaerobic digestion projects including a 30MW wind farm in Co. Tyrone, two major energy from waste plants in Belfast and a 1.5MW anaerobic digestion facility in Dungannon. < read more >
- We have advised on one third of the UK's solar projects either in the pipeline, contracted or built.

The news in brief from Scotland

Visual impact is the talk of the town

Planning consent for the proposed 11 turbine scheme at Loch Hill has been refused at appeal. The decision was judicially reviewed unsuccessfully. The Court of Session ruled that there was “no question of any illegality or procedural impropriety such as would justify quashing the decision”.

There were two reasons for refusal namely, the landscape impact of the development and cumulative visual impact when viewed with the adjoining Knockman Hill windfarm. In this context it was said: “The differences in turbine size, rotor blade diameter and speed would result in visual discordance, significant in local range views, and notable in medium range views from the west, and to a lesser degree from the south west”.

The Court’s view was that: “The reporter was entitled to conclude that the cumulative impact on visual amenity was sufficient to render the proposal contrary to the development plan, and that, in itself, this justified refusal of planning permission. In short, we can detect nothing which would even suggest that the reporter’s decision is susceptible to a successful legal challenge, hence the appeal was refused.”

Fund launch to support geothermal research

Local Energy Scotland and the Scottish Government have launched a fund to support research into geothermal capacity to meet some of the needs of local communities in Scotland. The grant is limited to £50,000 per project. The fund is being run as part of the Low Carbon Infrastructure Transition Programme which supports potential projects from across the public, private and community sectors through the various stages of their development. The results of the first applications are expected shortly.

Scottish ground mounted 5MW (or below) and rooftop solar market continues to develop

Scotland installed 32% more solar in 2014 than 2013 and the increase this year is likely to be even more substantial. In response to the growth of Scottish solar, large PV companies have established offices in Scotland, with the Solar Trade Association also launching a Scottish division of the trade association.

Scotland’s hydro sector is likely to slow down by the end of the year

Around 65MW of small-scale hydro has been installed in the UK since 2010 but the predicted rate of degression means that this may not continue. Hydro developers are trying to get schemes consented as quickly as they possibly can. Current hydro issues will be discussed in Perth on 2 June at the conference organised by Scottish Renewables.

Legal Update

Recent Scottish legislation, which has yet to be implemented, has introduced a time limit of three months for judicial review applications, starting from the date that the grounds giving rise to the application for judicial review arose. It is expected that this level of certainty will create a “risk period” for judicial review of developments. The expectation is that new draft rules will be issued in July of this year with the new procedure taking effect in September.

The ability to complete documents in original and counterpart in Scotland is just around the corner. Final implementation legislation was expected in May.

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