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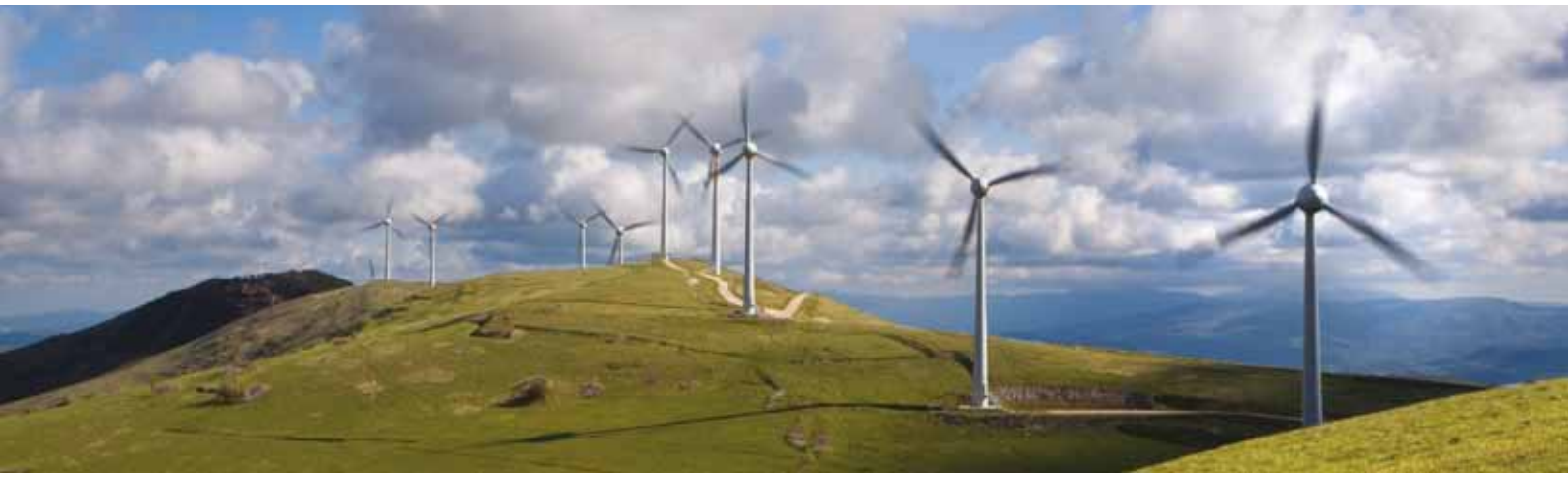
May 2014

Renewables Focus



Rollits and renewables

Renewable energy has become a rapidly growing and evolving industry. It certainly has not been around forever but its beginnings may go back further than many would imagine.

Whilst there may have been other renewables adventures before this, our first involvement that we can recall was with combined heat and power (CHP) plants in the mid-1990s. Typically sited near a horticultural or agricultural operation, they did (and do) what the name suggests – converting unneeded plant material into heat and power.

Next came the wind turbines. Initially our work was involved with landowners who were approached by developers. An option and lease were agreed and if planning permission was granted the lease permitted and governed the construction and operation of the turbines. Subsequently more landowners self-developed and we became involved with the commercial and banking arrangements. We now also act for developers of wind turbines.

More recently we have been involved with anaerobic digestion and other bio-mass projects, solar photo-voltaic projects for developer and land owner hydro-electric schemes and tidal projects. Whilst we have had no direct involvement in the offshore element of wind power generation we have acted for several land owners affected by the onshore infrastructure including the crossing of land by the cables carrying the power generated.

We are now seeing the start of legal work for the carbon capture scheme known as the Yorkshire and Humber Cross Country Pipeline transporting waste emissions from the likes of Drax power station to its storage under the North Sea. Easements are being granted by land owners enabling the pipe to pass to the Yorkshire coast.

Fracking and shale gas extraction is clearly not a renewable energy source, but we are also having increasing numbers of conversations with land owning clients about the possible benefits of a fracking operation on or near their land, and of course the possible implications.

Neil Franklin (above) and the Rollits Renewables Team (below left)

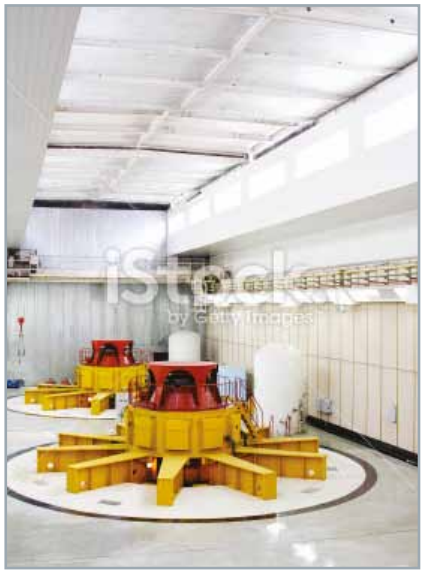
With the recent announcement of the impending development by Siemens on the Humber and the possible arrival of other large renewable organisations this makes for a very exciting time commercially for the region and the city of Hull – as Diana Johnson, MP for Hull North recently said… *"Hull, the City of Culture and Energy!"*

Neil Franklin

Also in this issue

Renewables: Get the basics right

Whether trying to capture wind, harness the power of the sun and the tides or unlock the secrets of hydrogen power, huge sums of money have been and continue to be invested in renewable technology. Given that the technology is often complex and the manufacture, installation and maintenance of equipment involves a number of parties, large swathes of land and significant cost, it is vital that the rights and obligations of all parties are fully understood.



Whilst parties do of course remain largely free to enter into oral agreements (except in relation to land), in this increasingly litigious world, it is inadvisable to do so. Whilst a discussion between parties may deal with what they may regard as the key issues – for example, what is being purchased, the price being paid and when the item being purchased is to be delivered – often the finer details are overlooked.

What if delivery of turbine blades occurs late? Who is responsible, if anyone, for any knock on delays and/or losses arising from the delay? If the parties are based in different countries, what law governs the contract and which Court has jurisdiction for any dispute? Renewables technology, especially large scale projects, involves large machinery and equipment. Who does it belong to and/or who is responsible for removing it if the technology does not achieve the financial returns expected, resulting in a venture no longer being viable and/or one of the parties becomes insolvent? These are all issues which can, and indeed have, arisen in matters that the Rollits Renewables Team have been involved with.

Uncertainty surrounding these underlying terms that put the meat on the bones of any agreement can lead to time consuming and costly disputes. There is always the potential for a dispute in any relationship. Parties can, however, take steps at the outset to reduce the likelihood of a dispute arising, including:-

Full and frank discussion: Parties will often have their own idea as to what each party's rights and obligations are, but their understanding of such rights and responsibilities may not be the same as that of their fellow contracted party.

Proactive advice: Taking specialist advice at an early stage, particularly before any binding agreement has been entered into, reduces the risk of time consuming costly disputes. Whilst reactive advice (that is, advice provided after a problem has arisen) may enable a dispute to be brought to a swift conclusion, proactive advice may avoid the problem arising in the first place. For example, if entering into a lease of land for a wind or solar farm, take advice on what steps can be taken to limit a tenant's ability to transfer the lease to a less financially secure third party,

Contract: The rights and obligations of each party should be recorded in a bespoke contract which reflects the parties understanding of what is required of each party to the agreement. Whilst the contract cannot guarantee that no dispute will arise, properly drafted it should significantly reduce the risk of any dispute and provide a mechanism for the prompt resolution of any dispute.

Whilst taking the steps set out above may seem like common sense, it is surprising how frequently these steps are not taken. Disputes are time consuming and extremely costly, particularly when there is no written record of the intention of the parties. Take time at the outset to take specialist advice on all aspects of any proposed renewables project whether it be for personal use or a business venture; otherwise, any intended costs saving or financial windfall (pardon the pun) could be swallowed up by the fallout arising from any future dispute.

Chris Drinkall

The green option

Whether you are looking at larger scale wind energy or solar power projects or even harnessing the potential in rivers, the main underlying legal documents required usually look very similar. With wind and solar, normally you would be looking at an option agreement, followed by a lease of the land in question, although this is not the case when landowners are installing their own turbine(s) or solar panels.

The first step in the process is usually for a developer to identify suitable land upon which to site a turbine or turbines or where a solar farm can be located. There are a number of professionals who identify sites for suitable development, either acting solely for a particular developer or acting on their own account so that they can then approach developers directly.

Once a site is identified heads of terms will be negotiated and it is not long before the costs required to take the matter any further (site surveys, technical investigations and planning applications) will be at such a level that the developer will need to know it has a binding deal with the landowner to take a lease of the site to safely incur those costs.

This is when the option will be negotiated. A developer will usually want to see the legal title to the site and then produce a draft form of option which will say that, if certain conditions are met, the landowner must grant a lease, on terms already agreed, to the developer. This allows the developer to expend cash in carrying out surveys, investigations and in progressing its planning application.

The form of option and lease does differ depending on each project but all cover similar aspects of the transaction and will need to be adapted in each matter to deal with the specific legal issues affecting the land along with the commercial deal agreed.

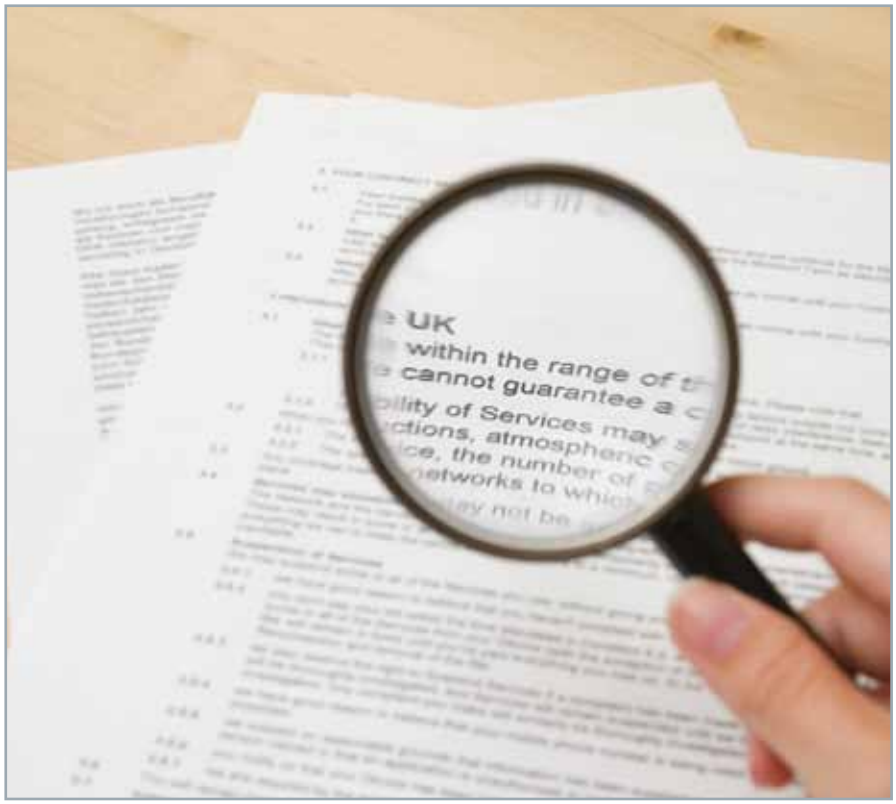
In reality it is better for parties to work pragmatically together to agree the documents within the constraints that apply to both solar and wind development.

Rollits has acted for both developers and land owners in a number of situations which gives a good perspective and enables us to work commercially and sensibly to protect the relevant parties' interests against the backdrop of what can, realistically, be commercially agreed.

Chris Crystal

Whose terms apply?

Whenever you are seeking to enter into a contract on your standard terms as part of a renewables venture – whether it be with a supplier, sub-contractor or customer – it is essential to ensure that those terms are incorporated into the agreement between the parties. Otherwise your terms will not apply to the contract and you could find that the other party's terms in fact apply.



It is common for businesses to have standard conditions of sale/supply (where they are providing goods or services) and standard conditions of purchase (where they are purchasing goods or services). Either way, if you wish such a document to form part of your contract then the conditions must be brought to the attention of the other party before the contract is made.

A contract is made when one party unconditionally accepts the other party's offer to buy or sell goods or services (as the case may be). You should be aware that, if you receive a copy of the other party's conditions on the back of a quotation or purchase order form and do not reject those conditions before the contract is expressly accepted or performed, you may find that you have accepted the other party's conditions.

Depending on the circumstances, you may also be held to have accepted the other party's conditions even if they are only **referred to** in documentation provided by the other party (e.g. a specific website URL from which the conditions can be downloaded).

If you use conditions of sale, it is particularly important to note that printing your conditions on invoices is only of limited application. This is because invoices are sent after the contract has been made, which is usually too late.

In some cases it is not possible for the parties to agree upon the terms that will apply to the contract – for example, if a supplier repeatedly rejects the customer's conditions of purchase and the customer likewise refuses to accept the supplier's conditions of sale. If the transaction still goes ahead in these circumstances, in contract terms there could be a number of possible legal outcomes, including that the parties could be deemed to have entered into a contract on some other terms that are not expected.

Businesses should therefore ensure that their respective sales and purchasing teams are reminded that they should never accept an order or quotation in the expectation that any unreasonable terms can be amended at a later date (as that will only be possible if the other party agrees). You also should ensure that your staff do not carry out any act that could indicate acceptance of the order or quotation until a formal agreement has been signed (if appropriate) and you are satisfied as to the terms that apply.

James Peel

On-shore wind farms and the planning process

On 17 December 2013 new regulations came into force to ensure that community engagement takes place for on-shore wind farm proposals before a planning application is submitted.

The measure applies to planning applications for the construction of more than two wind turbines, or a wind turbine exceeding 15 metres to hub height. In such developments, the Applicant will be required to undertake pre-application consultation and then submit to the Local Planning Authority alongside the planning application, proof of the public consultation, the responses to the consultation and how these responses were taken into account.

The intent is that by allowing communities to have a greater say at an early stage the Applicant will be able to consider much earlier whether to pursue a proposal and what changes they should consider before putting forward formal plans.

The real question is whether this represents a further example of the Government putting in place measures that are particularly detrimental to on-shore wind development.

There can be little doubt that the planning process represents one of the biggest obstacles to the future of new on-shore wind development. National Planning Policy originally suggested a presumption in favour of renewable energy development (unless material considerations dictated otherwise) on the basis that applicants would not be required to demonstrate the overall need for such projects (although it was recognised that development on the Green Belt would be deemed inappropriate in most cases).

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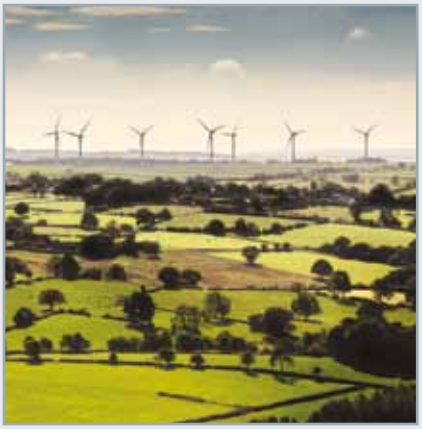


Appropriate business structure for a renewables project

One of the most important decisions for a client to take once they have decided to embark on a renewables Project, whether that be installation of wind turbine, bio gas generator or other scheme, is determining the best business structure through which the Project should be commissioned and run.

It is important to get this decision right from the outset as it can have significant financial, administrative and succession consequences going forwards.

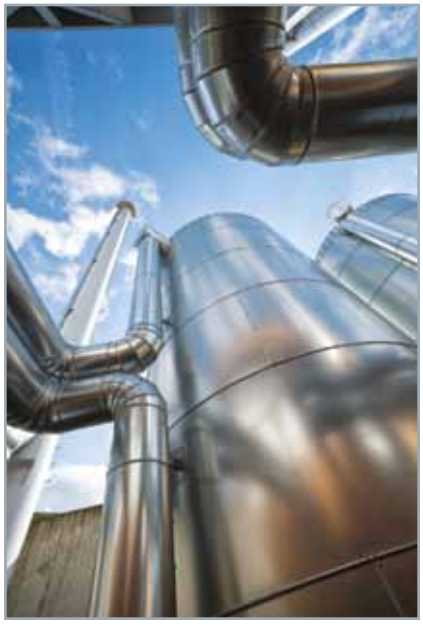
The most common forms of business structure used are:

- **Sole Trader**;
- **Partnership**; and
- **Limited Company**.

Below is a brief summary of each of these structures. Each set of circumstances will of course be different and one structure may be more appropriate for a Project than another depending on those circumstances.

Sole Trader
This is the simplest structure through which the Project can be run. There is no need for separate company registration and many of the other business formalities associated with setting up a company are not required. Any profits or losses generated by the sole trader are for the account of that individual, and the business of a sole trader is not distinct from the individual's personal affairs. A consequence of this is that if there are any liabilities (for example debts etc) then these are automatically also a liability of the individual.

Partnership
A Partnership is one or more individuals (or corporate entities) working together with a view to making profit. The Partners agree to share the profits in predetermined percentages; there will also often be a Partnership Agreement setting out the responsibilities and expectations that each Partner has of the others. A downside of a Partnership is that as with a sole trader, Partners are legally liable to pay the debts of the Partnership, and each Partner is "jointly and severally" liable for Partnership debts so it may be that if one Partner is unable to meet a liability of the Partnership then the other Partners will have to do so on that Partner's behalf.



Limited Company
The crucial distinction between a limited company and a Partnership or sole trader is that a limited company is a legal entity in its own right, distinct from its owners (shareholders). The limited company will enter into contracts in respect of a Project on its own behalf and, on the flipside, will incur liabilities on its own behalf.

When a Company generates profits these belong to the Company until such time as they are distributed to the shareholders by way of dividend or paid out to satisfy the company's overheads such as employee wages etc.

Unless personal guarantees are given by directors and/or shareholders then the Company will be responsible for its own liabilities and there is limited recourse to shareholders should the Company be unable to meet those liabilities.

There are additional administrative duties in relation to running a Company such as filing annual accounts and an annual return at Companies House together with additional PAYE obligations relating to employees.

In conclusion it is important to ensure at the beginning of a Project that the structure/vehicle through which the Project is to be undertaken and administered is given careful thought to ensure the most efficient and advantageous structure is utilised.

John Flanagan

On-shore wind farms and the planning process continued from page 3...

Further guidance published by the Government has since made it clear that the need for renewable energy should not automatically override environmental protections and the planning concerns of local communities. With this in mind, the Applicant must therefore continue to consider issues such as noise, safety, interference with electromagnetic transmission, ecology, heritage, shadow flicker, energy output and cumulative landscape and visual impacts within any application for wind development, whilst at the same time undergoing meaningful public consultation.

There is the obvious concern that as the requirements imposed on Applicants within wind farm development applications increase, the costs of making such an application may be disproportionate to the chance of obtaining planning approval or indeed the value of the development.

David Myers

Information

If you have any queries on any issues raised in this newsletter, or any renewables matters in general please contact Neil Franklin on 01482 337250.

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this newsletter useful.

If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

The law stated is as at 3 May 2014.

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