

# Bird & Bird & GPP Big Field and other v Solar EPC Solutions

*Case Update*

*Important new court decision for solar EPC contracts: guarantor liable for delay damages and price reduction*

## Key Summary

- No big surprises in the judgment – it confirms a lot of existing case law, but is a useful confirmation of how the courts approach some key issues in solar EPC contracts.
- The delay damages were not a penalty: as commercially experienced entities the parties were able to assess the commercial implications of the damages.
- On evidence, failure to secure planning permission was the reason for the delay (not local protests).
- Albeit not directly relevant to the decision, the judgement makes it clear that failure to give required notice of a force majeure event could prevent a claim for relief.
- Drafting a guarantee clause as an indemnity gives important protections to the beneficiary as it gives the guarantor limited scope to avoid its guarantee obligations.
- A price reduction (for failure to achieve ROC accreditation) can be a separate and additional remedy to delay damages: it depends how the contract is written.

## *Case summary*

The dispute concerned five EPC contracts entered into between GPP Big Field (Employer), Prosolia UK Ltd (EPC Contractor – now insolvent) and Solar EPC Solutions SL (Guarantor). The EPC contracts were for the construction of five solar plants. The Employer claimed against the Guarantor for damages for late and/or non-completion of four of the solar plants. The EPC Contractor counter-argued that the delay had been caused by local residents' protests, and that this was a force majeure event under the EPC contract entitling them to relief from liability for the delay. This counter-argument was rejected. The Guarantor was therefore held to be liable for the delay damages, although it was partially successful in counterclaiming for outstanding amounts owed to it as a result of performance of works under the EPC contracts.

## Delay damages

The Guarantor argued that the "delay damages" clause contained in the first EPC contract amounted to a penalty clause, meaning that the clause either did not protect a legitimate business interest or, if it did protect such interest, was exorbitant or unconscionable. The High Court found that the clause did not exceed a genuine attempt to estimate loss in advance and was not a penalty clause. The court noted that such delay damages clauses were common in construction contracts and that the parties were in a position, as commercially experienced entities, to assess the commercial implications of the clause.

## Force majeure

The Guarantor claimed that a force majeure event had caused the delay, in the form of local protests against the construction of the solar farm. The Guarantor argued that the protests amounted to "disturbance, commotion or civil disorder" or "acts of...sabotage". However, the court did not find any evidence that protests were the reason for delay, instead finding that the EPC Contractor's assessment that it was unlikely to secure planning permission or other consents for its plans was the reason for delay. The court found that in any event the EPC Contractor had failed to give sufficient notice of force majeure to the Employer.

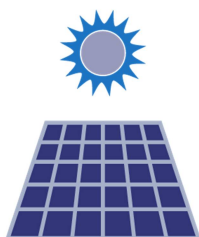
## Parent Company Guarantor or Indemnifier?

The Guarantor also sought to defend itself by relying on two forms of protection afforded to guarantors. Firstly, the Guarantor claimed to be discharged from any liability because the Employer failed to disclose "unusual features" before the Guarantor entered into the guarantee. Secondly, the Guarantor also argued that it should be discharged from its obligations because the route of the cable had been varied without consultation, that this changed the contractual obligation and that, therefore, The Guarantor as guarantor was no longer liable under the EPC contract.

The court found that the relevant guarantee clause created a "separate and independent obligation and liability", as well as being an indemnity. The court found that protections claimed by the Guarantor did not apply to indemnities.

## Renewable Obligation Certificates (ROC)

The Employer also sought delay damages under two of the EPC contracts because they failed to achieve accreditation for contractually stipulated levels of ROC certificates, which was held to be a consequence of the EPC Contractor's failure to commission and hand over the solar plant on time. The court found that the parties had contemplated that the Employer may be entitled to compensation through price reduction and that this was totally separate to any entitlement to delay damages. It was therefore permitted for the Employer to recover both the price reduction and the delay damages.



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