

From: [REDACTED]
To: [Cleve Hill Solar Park](#)
Cc: [REDACTED]
Subject: Deadline 5 Court documentation to support GREAT's Open Floor Representation
Date: 20 September 2019 17:28:43
Attachments: [CL-2018-000640 approved.pdf](#)
[Filing - Amended Particulars of Claim.pdf](#)
[Toucan v Wirsol CL-2018-000640 order \(1\) 220519.pdf](#)
[Court Case Wircon.pdf](#)

Hi Hefin,

Please find attached the follow up documentation, on behalf of GREAT, referred to at Lut Stewart's Open Floor representation on 10 September. This includes:

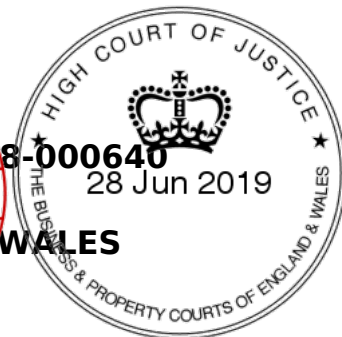
- GREAT's statement about the court case
- Amended Particulars of Claim
- Consent Order (29 June 2019)
- Order for Directions (17 May 2019)

Kind regards,

Marie

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)**

CLAIM NUMBER: CL-2018-000640



**Before MR JUSTICE WAKSMAN
25 June 2019**

CL-2018-000640

**(1) TOUCAN ENERGY HOLDINGS LIMITED
(formerly known as Rockfire Energy Holdings Limited)**

**(2) TOUCAN GEN CO LIMITED
(formerly known as RFE Gen Co Limited)**

Claimants

and

**(1) WIRSOL ENERGY LIMITED
(2) WIRCON UK SOLAR ASSETS GMBH
(3) WIRCON GMBH**

Defendants

and

**THE COMPANIES LISTED IN SCHEDULE 1 TO THE DEFENCE AND
PARTICULARS OF ADDITIONAL CLAIMS**

Third Parties / Defendants to Additional Claims

CONSENT ORDER

UPON the Claimants' application for security for costs by application notice dated 19 March 2019 and the Defendants' application for security for costs by application notice dated 12 April 2019

AND UPON the Defendants' application by application notice dated 5 April 2019 for an order that the time for them to file evidence in response to the Claimants' application for security for costs be extended to 12 April 2019 ("**the Extension of Time Application**")



AND UPON the Parties each agreeing to provide security for costs in accordance with the terms of this Consent Order

IT IS ORDERED BY CONSENT that:

1. The Defendants shall give security for the Claimants' costs of the Counterclaim by providing to them a £1,221,972 bond from Euler Hermes in the form agreed between the parties (a copy of which is annexed hereto as Annex 1).
2. The Claimants shall give security for the Defendants' costs of the Claim by paying the sum of £1 million into their solicitors' (TLT LLP's) client account, which sum shall be held therein subject to an undertaking given by TLT LLP in agreed form (a copy of that undertaking is annexed hereto as Annex 2).
3. The Extension of Time Application be granted.
4. Costs in the Case.

25 June 2019



Claim No: CL-2018-000640

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF
ENGLAND AND WALES
COMMERCIAL COURT (QBD)

BETWEEN

**(1) TOUCAN ENERGY HOLDINGS
LIMITED**
**(formerly known as Rockfire Energy Holdings
Limited)**

(2) TOUCAN GEN CO LIMITED
(formerly known as RFE Gen Co Limited)

Claimants

and

(1) WIRSOL ENERGY LIMITED
(2) WIRCON UK SOLAR ASSETS GMBH
(3) WIRCON GMBH

Defendants

draft/AMENDED
PARTICULARS OF CLAIM

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BS1 6TP
Ref: 104D/CP13/104005/5

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Claim No: CL-2018- 000640

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)**

BETWEEN:

**(1) TOUCAN ENERGY HOLDINGS LIMITED
(formerly known as Rockfire Energy Holdings Limited)**

**(2) TOUCAN GEN CO LIMITED
(formerly known as RFE Gen Co Limited)**

Claimants

- and -

(1) WIRSOL ENERGY LIMITED

(2) WIRCON UK SOLAR ASSETS GMBH


(3) WIRCON GMBH

Defendants

**draft/AMENDED
PARTICULARS OF CLAIM**

Introduction

1. The First Claimant (“**Toucan**”) and Second Claimant (“**RFE**”) are entitled to damages from the First Defendant (“**Wirsol**”), the Second Defendant (“**Wircon UK**”) and the Third Defendant (“**Wircon**”) arising out of the sale to RFE of 19 solar parks which were vested in certain companies (“**the SPVs**”) within the same group of companies as the Defendants.
2. The Defendants are liable to the Claimants on the following bases:

- 
- 2.1 Wircon UK and Wircon are liable to RFE for breach of warranty under the sale contracts dated 25 May 2017 (“**the SPAs**”); and
- 2.2 following the assignment by the SPVs of the benefit of their claims to Toucan, Wirsol is liable to Toucan for breach of the contracts entered into by Wirsol for the construction and commissioning of the solar parks (“**the EPC Contracts**”) and for their operation and maintenance (“**the O&M Agreements**”).

The Parties

3. Toucan is a company incorporated under the Companies Act 2006 (originally under the name Rockfire Energy Holdings Limited) with its registered office at Mountbatten House, Grosvenor Square, Southampton, SO15 2JU. It changed its name to Toucan Energy Holdings Limited on or about 15 May 2018. Toucan operates in the United Kingdom renewable energy sector.
4. RFE is a company incorporated under the Companies Act 2006 (originally under the name RFE Gen Co Limited) with its registered office at Mountbatten House, Grosvenor Square, Southampton, SO15 2JU. It changed its name to Toucan Gen Co Limited on or about 4 May 2018 and is a wholly owned subsidiary of Toucan.
5. Wirsol is a company incorporated under the Companies Act 2006 with its registered office at Unit 5e Park Farm, Chichester Road, Arundel, West Sussex, BN18 0AG. It is a 75% owned subsidiary of Wircon and part of the Wircon Group of companies. Wirsol operates in the renewable energy industry, primarily undertaking the construction, development and operational management of renewable energy assets, including solar energy generating installations) in the United Kingdom and Northern Ireland.
6. Wircon UK is a company registered in Germany with its registered office at Schwetzingen Str. 22-26. 68753 Waghauzel, Germany. It is a wholly owned subsidiary of Wircon and part of the Wircon Group of companies.
7. Wircon is a company registered in Germany with its registered office at Schwetzingen Str. 22-26. 68753 Waghauzel, Germany.



8. In or about 2015 and 2016 the Defendants decided to acquire ~~and~~ develop various sites in England as solar energy parks and accordingly entered into agreements to acquire interests in various sites through various companies specifically set up for that purpose. In particular each of the 1519 SPVs specified in Schedule 1 hereto acquired interests in and developed the 1519 sites therein set out (“**the Solar Parks**”).
9. The SPVs in ~~Part 1 of~~ Schedule 1 hereto were wholly owned subsidiaries of ~~WEL one of Wircon~~ Solar Assets 1 Holdco Limited. ~~The SPVs in Part 2 of Schedule 1 hereto were wholly owned subsidiaries of WEL and Wircon~~ Solar Assets 2 Holdco Limited. ~~WEL Wircon~~ Solar Assets 1 Holdco Limited and ~~WEL Wircon~~ Solar Assets 2 Limited (together “**the Holdcos**”) were respectively wholly owned subsidiaries of Wircon Solar Assets 1 Topco Limited and Wircon Solar Assets 2 Topco Limited (respectively “**Topco 1**” and “**Topco 2**”, together “**the Topcos**”) which were in turn wholly owned subsidiaries of Wircon UK.
10. At all material times Mark Hogan (“Mr Hogan”) was:
 - 10.1 a director of Wircon Solar Assets 2 Topco Limited and of the SPVs listed in ~~Part 2 of~~ Schedule 1 hereto;
 - 10.2 a significant minority shareholder in and director of Wirsol describing himself as “the managing shareholder” thereof; and
 - 10.3 principally responsible for the acquisition and development of the Solar Parks on behalf of the Defendants.

Associated Contracts

11. On 16 July 2015, the SPV which owns the Solar Park at Outwood (at that time called MSP Outwood Limited) (“**the Outwood SPV**”), entered into an option agreement under which the owners of certain land (“**the Option Site**”) adjacent to the Outwood Solar Park granted to the Outwood SPV the option to take a lease of the whole of the Option Site (“**the Outwood Option Agreement**”). The expiry date of the Outwood Option was 16 July 2017.
12. Between October 2015 and January 2017, in connection with the procurement of finance for the acquisition and development of the Solar Parks, each SPV entered into (amongst other contracts) in respect of each of the Solar Parks:



- 12.1 the EPC Contracts, for engineering, procurement, ~~and~~ construction and installation contracts with a contractor whose obligation it was under the relevant EPC Contract, in summary, to “...*design, engineer, procure, manufacture, install, construct, test and Commission the Works and remedy any defects therein and perform its other obligations in accordance with the provisions of [the EPC Contract] ...*” (clause 3). The contractor in respect of 15 of such contracts was Wirsol. Brief details of each of the EPC Contracts are set out in Schedule 2 hereto; and
- 12.2 the O&M Agreements, for the operation and maintenance agreements with a contractor, under which the contractor agreed to provide maintenance, monitoring and repair services for the relevant Solar Park (Recital B). The contractor in respect of 15 of such agreements was Wirsol. Brief details of each of the O&M Agreements are set out in Schedule 3 hereto.
13. On 10 June 2016 the Topco 1 and on 20 January 2017 Topco 2 each entered into a Loan Facility Agreement (respectively “**Facilities Agreement 1**” and “**Facilities Agreement 2**”, together “**the Facilities Agreements**”) with Bayerische Landesbank (“**BLB**”) as Lender, under which BLB agreed to make available total borrowings of £82,343,202 for the purpose, in summary, of financing the construction and development of the Solar Parks. The sums ultimately borrowed were £82,290,000 and were lent on to the SPVs via the Holdcos.

Relevant terms of the EPC Contracts

14. Each of the EPC Contracts was in materially the same form and contained the following relevant express terms:¹

4. The Contractor

4.1 Contractor’s General Works Obligations

The Contractor shall design, execute, install, test, Commission and complete the Works in accordance with this Contract and shall remedy any defects in the Works, in each case:

- (a) in accordance with Good and Prudent Practice;*

¹ References to clause numbers are to the numbers of clauses in the EPC Contract for Five Oaks Solar Park. References to defined terms are, *mutatis mutandis*, to the terms as defined in the EPC Contract for Five Oaks Solar



- (b) in accordance with all relevant Standards and codes of practice to which the Contractor would be expected to have regard;*
- (c) in accordance with the Employer's Construction Requirements and the other terms and conditions of this Contract;*
- (d) in compliance with all applicable laws and permits;*
- (e) in a manner that is not likely to be injurious to health or cause damage to property.*

When completed, the Works shall meet the requirements as set out in paragraph 2.4 of Schedule 1 (Employer's Construction Requirements) and the Contractor warrants that it has designed the Works to have a minimum design operational life of 25 years under the operational conditions set out in the Employer's Construction Requirements, provided that the same are operated and maintained (and, where relevant, replaced) in accordance with the operational and maintenance manuals received in accordance with Clause 5.7 (Operation and Maintenance Manuals) and provided that the individual component parts set out in Clause 4.5 (Key Sub-Contractor) shall only be warranted for the periods set out in that Clause 4.5.

...

The Contractor shall, whenever required by the Employer, submit details of the arrangements and methods which the Contractor proposes to adopt for the execution of the Works and remedying any defects to the Employer..."

4.9 Quality

The Contractor shall institute a quality assurance system to demonstrate compliance with the requirements of this Contract.

5. Design

5.1 General Design Obligations

The Contractor shall be deemed to have scrutinised, prior to the Base Date, the Employer's Construction Requirements (including design criteria and calculations, if any). The Contractor shall carry out and be responsible for the design of the Works and for the accuracy of the Employer's Construction Requirements, except as stated below.

5.2 Contractor's Documents

The Contractor's Documents shall comprise the technical documents specified in the Employer's Construction Requirements

5.3 Contractor's Undertaking

The Contractor undertakes that the Contractor's Documents, the design, execution, installation, testing, Commissioning and completion of the Works, the remedying of defects and the Works when completed will be in accordance with:

- (a) all applicable Laws, Permits, licences and approvals;*
- (b) the documents forming this Contract, as altered or modified by any Variations;*
- (c) good and prudent practice;*
- (d) the technical specification and requirements of the Connection Agreement;*



...

5.4 Technical Standards and Regulations

The Contractor undertakes that the Contractor's Documents, the design, execution, installation, testing, Commissioning and completion of the Works, the remedying of defects and the Works when completed will comply with the applicable technical standards (as described in the Employer's Construction Requirements), the "Applicable Standards"...and other standards specified in the Employer's Construction Requirements applicable to the Works, or defined by the applicable laws.

Where there is any conflict between any of the standards or Laws specified in the preceding paragraph, the highest of the conflicting standards or Laws shall apply...

5.8 Design Error

If errors, omissions, ambiguities, inconsistencies, inadequacies or other defects are found in the Contractor's Documents, they and the Works shall be corrected at the Contractor's cost...

...

7 Plant, Materials and Workmanship

7.1 Manner of execution

The Contractor shall carry out, or shall procure the carrying out of the manufacture of the Plant, the production and manufacture of Materials, and all other execution of the Works, the remedy of any defects and provisions of Spares:

- (a) in the manner (if any) specified in this Contract;*
- (b) in a proper workmanlike and careful manner, in accordance with Good and Prudent Practice;*
- (c) with properly equipped facilities and non-hazardous Materials, except as otherwise specified in this Contract; and*
- (d) using new materials and proven technology and excluding prototype components or equipment.*

...

8.2 Time for Completion

The Contractor shall complete the whole of the Works...within the Time for Completion for the Works

...

8.6 Delay Damages

If the Contractor fails to comply with ...

- (a) Sub-Clause 8.2 (Time for Completion)...*

The Contractor shall ... pay Delay Liquidated Damages to the Employer for this default. These Delay Liquidated Damages shall be at the daily rate of (in the case of sub-paragraph (a) above) four hundred and fifty pounds sterling (£450) per MW Peak (on a pro rata basis for each day which shall elapse between the Time for Completion and the date that the Taking-Over Certificate is issued or deemed to have been issued...

...

9.6 Adjustments after Taking Over

At any time after the Defects Notification Period, the Contractor may notify the Employer that it wishes to make adjustments to the Works to improve its performance and/or



availability. The Employer may in its absolute discretion and at such times and on such terms as it may specify (in its absolute discretion) agree to such proposals.

...

11 Defects Liability

11.1 Completion of Outstanding Works and Remedying Defects

In order that the Works and Contractor's Documents shall be in the condition required by this Contract (fair wear and tear excepted) by the expiry date of the Relevant Defects Notification Period or as soon as possible thereafter, the Contractor shall perform:

...

(b) all work required to remedy defects or damage (including damage caused by the defect and damage arising from the investigation or repair of the defect or damage) as may be notified by the Employer or of which the Contractor is otherwise aware on or before the expiry of the Defects Notification Period; and

(c) any work required to remedy a Systemic Defect.

Each Party shall notify the other Party in writing...as soon as practicable after becoming aware of the existence of a defect or damage occurring as a result of a defect or a Systemic Defect.

The Contractor shall execute all work referred to in paragraphs (a) and (b) above in accordance with this Contract as soon as reasonably practicable...

If there is a Systemic Defect, the Contractor shall execute all work referred to in paragraph (c) to ensure that the Systemic Defect is rectified by the replacement of the components in the Works subject to the Systemic Defect.

11.2 Cost of Remedying Defects

...

All work referred to in sub-paragraph (b) and sub-paragraph (c) of Sub-Clause 11.1 (Completion of Outstanding Works and Remedying Defects) shall be executed at the risk and cost of the Contractor, if and to the extent that the work is attributable to:

(a) the design of the Works;

(b) Plant, Materials or workmanship not being in accordance with this Contract;

(c) improper operation of maintenance which was attributable to matters for which the Contractor is responsible (under sub-clauses 5.5 (Training) to 5.7 (Operation and Maintenance Manuals) or otherwise;

(d) any act, omission, neglect or default of the Contractor or any Contractor Personnel or any failure by the Contractor to comply with any other obligation.

11.4 Failure to Remedy Defects

If the Contractor fails to undertake any work referred to in sub-paragraph (b) of Sub-Clause 11.11 (Completion of Outstanding Works and Remedying Defects) within a reasonable time, a date may be fixed by (or on behalf of) the Employer. The Contractor shall be given reasonable notice of this date.

If the Contractor fails to perform the work referred to in sub-paragraph (b) of Sub-Clause 11.11 (Completion of Outstanding Works and Remedying Defects) by this notified date and this remedial work was to be executed at the cost of the Contractor under Sub-Clause 11.2 (Cost of Remedying Defects), the Employer may (at its option):

(a) carry out the work himself or by others in a reasonable manner and at the Contractor's



cost; and the Contractor shall subject to Sub-Clause 2.4 (Employer's Claims) pay to the Employer the Costs reasonably incurred by the Employer in remedying the defect or damage;

...

(c) if the defect of damage deprives the Employer of substantially the whole benefit of the Works or any major part of the Works or directly contributes to the performance of the Works falling below the any of the Minimum Performance Guarantee, reject the Works and terminate this Contract...

15 Termination by Employer

15.1 Notice to Correct

If the Contractor fails to carry out any of its obligations under this Contract, the Employer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time.

15.2 Termination by Employer

The Employer shall be entitled to terminate this Contract if:

(a) the Contractor fails to comply with ...a notice under Sub-Clause 15.1 (Notice to Correct)

...

(g) the Contractor commits a material breach of any of its obligations under this Contract, which:

(i) in the case of a remedial breach is not remedied by the Contractor with fourteen (14) days of receipt by the Contractor of a notice of such breach from the Employer; or if the Contractor provides the Employer with a remedy plan (for the purposes of this Sub-Clause 15.2(g)(i) a Remedy Plan) [acceptable to the Employer] the Employer shall not be entitled to terminate the Contractor's employment under this Contract in accordance with the paragraph below as a result of such breach unless either:

(A) the Contractor fails to comply with the terms of the Remedy Plan;

(B) the Contractor fails to remedy the effects of such breach to the satisfaction of the Employer on or before the Remedy Date; or

(C) (in the case of a remediable breach whether or not it has been the subject of a Remedy Plan) the Contractor commits a breach that is substantially the same as the original breach with two (2) months of the date of the original breach; or

(ii) in the case of an irremediable breach, results in the expiry of fourteen (14) days from the service of notice of such breach by the Employer.

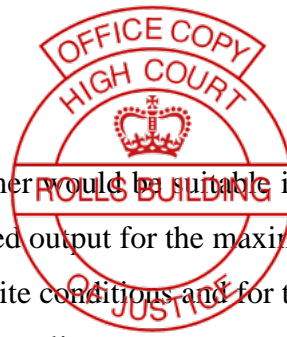
15. The Employer's Construction Requirements, in accordance with which the Contractor was required under the EPC Contract to design, execute, install, test, Commission and complete ~~to~~ the Works and remedy any defects therein were set out in detail in Schedule 1 to the EPC Contract. The Claimants will rely on the EPC Contracts, including their accompanying Schedules, at trial for their full terms and true effect, but in summary in relation to the Employer's Construction Requirements:

15.1 Paragraph 2.4 provided that the Works were to be "new, proven and safe" and



“designed for high availability, reliability and efficiency”

- 15.2 Paragraph 2.5.1 provided that the Contractor was to be responsible (amongst other things) for all design, engineering, equipment procurement and supply, testing and all other services and supply in order to provide a turnkey solution for the Project in accordance with the Contract.
- 15.3 Paragraph 2.11 provided that the Contractor was to comply with all applicable UK statutory and regulatory requirements.
- 15.4 Paragraph 2.12 provided that the Works were to be designed for a minimum operating life of at least 25 years.
- 15.5 Paragraph 2.17 set out the climatic conditions to be used as the basis for the design and layout of the Solar Parks.
- 15.6 Paragraph 3.1 provided that all materials, plant and other supplies to be incorporated in the Works were required to be of a standard proven design and comply with the Employer’s requirements.
- 15.7 Paragraph 3.2 provided that all equipment and systems were required to have sufficient margin to cater for equipment and system deterioration; that the Works were to be designed so that no single fault would cause the failure of any duty equipment; and that the design was to incorporate adequate redundancy to achieve high reliability and availability.
- 15.8 Paragraph 4.1 provided that electrical equipment used in the Works was: (a) required to comply with all applicable codes and standards; and (b) required to include protective relays and systems to detect all credible faults on each item of plant and equipment and their primary interconnections and arranged so that on functioning only faulty apparatus was removed from the circuit.
- 15.9 Paragraph 4.2 provided that it was the Contractor’s responsibility to ensure that their detailed design of the systems met the Employer’s operational requirements and achieved all stability and fault level criteria and that adequate redundancy of systems was built into the design to meet or exceed the reliability and availability requirements of the EPC.
- 15.10 Paragraph 4.4 provided that the Contractor was responsible for the full design and installation of major electrical equipment.



15.11 Paragraph 4.4.5 provided that each transformer would be suitable in all respects to operate without injurious heating at its rated output for the maximum load curve provided by the PV system under the site conditions and for the transformer on any ratio operating with daily cycling.

15.12 Paragraph 4.4.7 provided that all dry type transformers were required to be designed for natural air cooling.

15.13 Paragraph 4.4.9 provided, amongst other things, that switchboards were required to be sectionalised by the provision of a bus section circuit breaker.

15.14 Paragraphs 6.1 & 6.2 set out both the required basic functions of the monitoring system and identified specific functionality required of it, including that the system should be capable of (but not limited to) processing specified data including at least string voltage, output current of string, inverter current output and voltage, combiner boxes output and voltage, transformer status, temperature data, all available data from installed meters and pyranometers and all available data from the G59 protection device.

15.15 Paragraph 8.2 provided that civil works, including security fences, gate and all finishing and landscaping shall be designed for a minimum working lifetime of not less than 25 years such that, during that period, major structural repair shall not be required.

Relevant terms of the O&M Agreements

16. Each of the O&M Agreements was in materially the same form and contained the following relevant express terms:

20. Termination

...

20.5 The Employer may terminate the employment of the Contractor under this Agreement by written notice if any of the following events of default occur:

...

20.5.3 breach by the Contractor of its obligations under Clauses 3.2, 19, 23 and 24;

20.5.4 the Works Contract is terminated pursuant to Clause 15 or clause 16 of the Works Contract

and this Agreement will terminate on the day falling 30 Business Days after the date the Contractor receives the written notice referred to in this Clause 20.5 (during such period the Contractor shall continue to provide the Services).



24. *Sub-contracting*²

24.1 *The Contractor shall be entitled to sub-contract the performance of the whole or any part of the Services to any sub-contractor, provided that such sub-contractors and the terms and conditions of their appointment have first been approved by the Employer in writing, such approval not to be unreasonably withheld.*

Relevant terms of the Facilities Agreements

17. Facilities Agreement 1 contained the following relevant express terms:

31.2 Project Works

31.2.1 Each Obligor must not make any change to the configuration of its Project, reduce the total installed capacity for the Projects or repower or extend the Projects without the Majority Lender's consent.

31.3 Operation and maintenance

The Obligors must:

31.3.1 operate and maintain, or ensure the operation and maintenance of, its Solar Assets in a safe, efficient and business-like manner and (in each case) in accordance with the Project Documents to which it is party...

31.5 Project Documents

31.5.1 Each Obligor must:

31.5.1.1 exercise, maintain and force its rights and comply with its material obligations under each Project Documents to which it is a party to the standard expected of a Reasonable and Prudent Operator.

18. Facilities Agreement 2 contained the following relevant express terms:

30.2 Project Works

30.2.1 Each Obligor shall procure that:

30.2.1.1 the construction, development, commissioning [is] in accordance with the relevant EPC Contract...

...

30.2.3 Each Obligor must not make any change to the configuration of its Project, reduce the total installed capacity for the Projects or repower or extend the Projects without the Majority Lender's consent

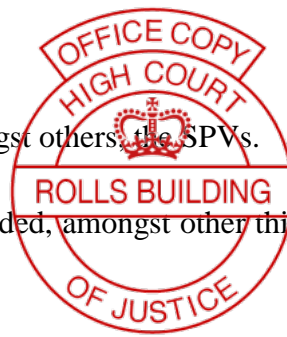
30.3 Construction, operation and maintenance

The Obligors must:

30.3.1 construct, operate and maintain or ensure the construction, operation and maintenance of, its Solar Assets in a safe, efficient and business-like manner and (in each case) in accordance with the Project Documents to which it is party...

19. In each case:

²Clause 24 in relation to the SPV subsidiaries of Topco2 provided for sub-contracting either to an Approved Subcontractor or with prior approval from the Employer



- 19.1 The definition of “*Obligors*” included, amongst others, the SPVs.
- 19.2 The definition of “*Project Documents*” included, amongst other things, the EPC Contracts.

Wirsol’s breaches of the EPC Contracts

20. Wirsol was in breach of the terms of the EPC Contracts in the respects mentioned in paragraphs 21 to 28 hereof **and in the appended Scott Schedule**. The breaches described therein represent the best particulars currently available to the Claimants, who reserve the right to supplement them if and when further defects are discovered.

Undersized transformers and/or associated equipment

21. In breach of clauses 4.1, 4.9, 5.1, 5.3, 5.4, 5.8, 9.6 & 11.1 of the EPC Contracts and paragraphs 2.4, 2.5.1, 3.1, 3.2, 4.2, 4.4 & 4.4.5 of Schedule 1 to the EPC Contracts (at least) each of the Wrea Green, Cranham, Wilbees, Moor House, Otherton, Five Oaks, Outwood, Newton and Widehurst Solar Parks the transformers, busbars and Woodward relays installed are, in combination and when operated at appropriate settings, of insufficient capacity to allow the transformers to operate at their rated output for the maximum load curve provided by the PV systems on any ratio (“**the Capacity Defect**”).
22. As a result, Wirsol was forced, at (at least) the Five Oaks, Outwood, Newton and Widehurst sites, to cap the input to the transformers to avoid the transformers ‘tripping out’ at maximum load, with a consequent reduction in the capacity of each affected Solar Park to export power to the Grid, and/or adjust the settings on the protection equipment to levels above those approved by the manufacturer.

Use of forced air cooled transformers

23. In breach of clauses 4.1, 4.9, 5.1, 5.3, 5.4, 5.8 & 11.1 of the EPC Contracts and paragraphs 2.4, 2.12, 3.1, 3.2, 4.4.5 & 4.4.7 of Schedule 1 to the EPC Contracts, at 13 of the 15 Solar Parks Wirsol installed transformers which relied on forced air cooling.

Design / construction of transformer substations

24. In breach of clauses 4.1, 4.9, 5.1, 5.3, 5.4, 5.8 & 11.1 of the EPC Contracts and paragraphs 2.4, 2.5, 2.11, 2.12, 2.17, 3.1, 3.2, 4.4.7 and/or 4.4.9 of Schedule 1 to the EPC Contracts the sub-stations housing the transformers at each of the Solar Parks with



the exception of those at Lisburn, Carrowdore and Balcombe were defective in that the sub-stations:

- 24.1 were inadequately insulated or otherwise equipped to ensure that: (a) the environment in which the transformers were operating could be maintained at a maximum relative humidity of 93%, as they were required to do under IEC 60071-11 and (b) the temperature of the cooling air at no time dropped below minus 5° centigrade;
- 24.2 were designed in a way which rendered them prone to water ingress; and
- 24.3 used plywood flooring which was prone to rot on prolonged exposure to damp and did not allow for easy access for re-treating.

Lack of HV and LV circuit breakers

25. In breach of clauses 4.1, 4.9, 5.1, 5.3, 5.4, 5.8 and 11.1 of the EPC Contracts and paragraphs 2.11, 3.1, 3.2, 4.1 and 4.2 of Schedule 1 to the EPC Contracts, the systems installed at all sites other than those at Lisburn, Carrowdore and Balcombe failed to include sufficient and/or appropriately situated HV and LV circuit breakers to ensure:
 - 25.1 that the electrical equipment complied with the “Requirements for Electrical Installations” BS7671-2008 and all other applicable codes and standards, in particular Regulation 11 of the Electricity at Work Regulations 1989; and/or
 - 25.2 that the electrical equipment included protective relays and systems to detect all credible faults on each item or plant and equipment and their primary interconnections, and arranged so that on functioning only the faulty apparatus was removed from the circuit.

Lack of on-site roads

- 25A. In breach of the requirements of clause 4.1 of the EPC Contracts and paragraph 8.3.3 of Schedule 1 at each or all of the Solar Parks Wirsol failed to design and/or construct the required or any permanent on-site roads.

Combiner box MCB ratings

26. In breach of clauses 4.1, 4.9, 5.1, 5.3, 5.4, 5.8 and 11.1 of the EPC Contracts and paragraphs 2.11, 3.1, 4.1 and 4.2 of Schedule 1 to the EPC Contracts, the miniature

circuit breakers housed in the combiner boxes installed at all sites other than those at Lisburn, Carrowdore and Balcombe were not sufficiently rated and therefore non-compliant with Regulation 5 of the Electricity at Work Regulations 1989.



Inadequate monitoring systems

27. In breach of the requirements of clauses 4.1, 4.9, 5.3, 5.8, 7.1 and 11.1 of the EPC Contracts and paragraphs 2.5, 3.1, 6.1 and 6.2 of Schedule 1, the monitoring systems installed at the Solar Parks were defective in that, variously, the following data was not available: (a) string voltage; (b) string output (wattage), both current output and voltage, only power data being provided; (c) combiner box voltage, with power output of the combiner boxes and/or voltage of the inverter grouping boxes not being provided; (d) transformer status; (e) all meter information, energy level from the export meter only being displayed (in some cases mislabelled) and/or only power data being provided and/or no data for low voltage meters being provided; (f) all available data from the G59 protection device; (g) data from temperature probe measuring overheating of oil.

Inadequate landscaping and related works

- 27A. In breach of the requirements of clause 4.1 and 5.3 of the EPC Contracts and paragraphs 3.18, 4.5.1 and 8.2 of Schedule 1, the landscaping, site finishing and cable installation works at the Carrowdore and Lisburn sites were defective in that: cable was in places buried only 5cm below ground; ground under solar panels was not seeded properly; hedging failed; and flimsy fencing was utilized that will not last 25 years.

Failure to design for a minimum operating life of at least 25 years

28. In addition to individually constituting breaches of the EPC Contracts, the defects identified in paragraphs 21 to 258 above each or collectively result in Wirsol being in breach of clause 4.1 of the EPC Contracts and paragraphs 2.1, 2.4 and 2.12 of Schedule 1 of the EPC.

Failure to pay Delay Liquidated Damages

- 28A. In the case of 14 Solar Parks Wirsol failed to comply with Sub-Clause 8.2, failing to meet the Time for Completion in each case. Under Clause 1.1 the Time for Completion was 6 months after the Target Commissioning Date specified in each EPC. Pursuant to Clause 8.6 the calculation of Delay Liquidated Damages is the sum of (i) the difference, in terms of days, between the Time for Completion and the date of issue of the Taking

Over Certificate; (ii) multiplied by the plant capacity (MW Peak); (iii) multiplied by the specified figure of £450. Accordingly, Wirsol was not liable to pay Delay Liquidated Damages as calculated in the table below.



SPV	Target Commissioning Date (TCD)	Time for Completion (TCD + 6months)	Taking Over Certificate issue date	Days late	Plant capacity (MW Peak)	Delay damages per MW Peak (£)	Amount Due (£)
Balcombe Solar Ltd	31-Mar-16	30-Sep-16	18-Oct-16	18	4.96	450	40,176
Carrowdore Solar Ltd	10-Feb-17	10-Aug-17	09-Oct-17	60	5.98	450	161,487
Cranham Solar Ltd	09-Dec-16	09-Jun-17	20-Jul-17	41	3.00	450	55,313
Eckland Lodge Solar Ltd	15-Dec-16	15-Jun-17	11-Aug-17	57	3.66	450	93,802
Five Oaks Solar Farm Ltd	31-Mar-16	30-Sep-16	25-Oct-16	25	5.00	450	56,239
Home Farm Solar 1 Ltd	20-Jan-17	20-Jul-17	02-Aug-17	13	4.99	450	29,174
Lisburn Solar Ltd	10-Feb-17	10-Aug-17	04-Oct-17	55	20.54	450	508,439
Moor House Farm Solar Ltd	01-Dec-16	01-Jun-17	17-Aug-17	77	4.92	450	170,305
Newton Solar Farm Ltd	31-Mar-16	30-Sep-16	04-Nov-16	35	4.99	450	78,545
Outwood Solar Ltd	31-Mar-16	30-Sep-16	04-Nov-16	35	4.97	450	78,278
Widehurst Solar Ltd	21-Jan-17	21-Jul-17	26-Sep-17	67	4.99	450	150,328
Wilbees Solar Ltd	21-Oct-16	21-Apr-17	04-Aug-17	105	5.00	450	236,156
Woodhouse Solar Ltd	10-Jan-17	10-Jul-17	04-Aug-17	25	4.98	450	56,014
Wrea Green Solar Ltd	31-Oct-16	30-Apr-17	17-Aug-17	109	4.88	450	239,315
Total							1,953,570

28B. Notwithstanding a demand being made by letter dated 15 February 2019, the said sums were not paid by Wirsol and Wirsol has, to date, failed to comply with its obligations under Clause 8.6.



Failure to pay Performance Ratio Damages

29. Pursuant to clause 9, each of the EPC Contracts guaranteed minimum performance levels (“**the Guaranteed Performance Ratio**”) of the Solar Parks, to be assessed according to the methodology set out in Schedule 7 thereto, at one year after the Taking Over Certificate (“**the Intermediate Acceptance Test**”), and at two years after the Taking Over Certificate (“**the Final Acceptance Test**”).

30. Clause 9.7 provided as follows:

“Any failure to comply with the Guaranteed Performance Ratio shall result in the Contractor paying Performance Ratio Damages to the Employer at the rate of 2% of the Contract Price for each 1 % shortfall (prorated on any fractions of 1 %) subject to an overall cap of 14% of the Contract Price (the “Performance Ratio Damages Cap”) such Performance Ratio Damages to be payable within 28 days of the completion of the Performance Test to which they relate.”

31. The Performance Ratios for the Five Oaks and Balcombe sites on the Intermediate Acceptance Test were below the Guaranteed Performance Ratio and, pursuant to clause 9.7, Performance Ratio Damages (“**PRDs**”) of £213,377.65 (Five Oaks) and £211,489.15 (Balcombe) therefore became payable. As a result of Wirsol’s failure to make payment of the said PRDs, calls were made and payments received under the respective Performance Bonds, despite which there remains a shortfall in the PRDs owing of £61,061.35 (Five Oaks) and £84,869.85 (Balcombe), totalling £145,931.20. In the premises, the SPVs are entitled to and claim the total sum of £145,931.20 as PRDs.

32. Further, the performance of the Balcombe site remains below the Guaranteed Performance Ratio and, but for Wirsol’s breach of the EPC Contracts (leading to their termination as set out in paragraphs 43 to 46 below) a further sum of **approximately not less than** £169,191.32 ~~would have~~ **will** become payable following the Final Acceptance Test.

The Defendants’ knowledge of the defects

33. The Defendants were well aware of the defects mentioned in paragraphs 21 to 28 hereof which constituted serious defects in the design and/or construction of the Solar

Parks and of the consequent breaches of the EPC Contracts. In particular in this regard the Claimants will rely on the following:



33.1 Mr Hogan is qualified in electrical engineering, has many years' experience in the industry and, as mentioned in paragraph 10 hereof, was principally responsible for the acquisition and development of the Solar Parks. In the premises, it is to be inferred that he understood the principal deficiencies in their design and the significance of such defects in relation to compliance with the requirements of the EPC Contracts.

33.2 In relation in particular to the Capacity Defect:

- (a) emails dated between 11 April 2017 and 12 June 2017 passing variously between members of the Wircon Group, including Mr Hogan, and Burnell, the company which had provided the transformers, in which the said defect and the possible consequences thereof at the Five Oaks, Outwood and Newton sites were discussed. By way of example only, in an email dated 23 May 2017 (i.e. two days prior to the SPA) it was stated that:³

“The EPC contract states in schedule 1 clause 4.4.5 that the ‘transformer will be suitable in all respects to operate without injurious heating at its rated output for the maximum load curve provided by the PV system’ please see expert below. The inverters are currently being capped as the transformers are not able to take the rated maximum output for the PV system and is so therefore a defect that is under the EPC liabilities”

- (b) a monthly O&M Report for April 2017 for the Newton Solar Park which at pages 2 and 20 recorded that a ‘G59 trip’ had been experienced on 10 April 2017 “*due to the Woodward overcurrent relay being set too close to the operating parameters*”.

33.3 In particular, the Defendants will have known of the facts, circumstances and subject matter of the failure to design the Works at all but two of the sites (excepting Lisburn and Carrowdore) to have a minimum design operational life of a period of 25 years such knowledge arising given the nature and extent of the defects as stated in the Scott Schedule and through the medium of Mr Hogan including prior to the date of the SPA.

The sale of the Solar Parks pursuant to the SPAs

³ The relevant email chain is attached Schedule 5 hereto



34. In or about March 2017 negotiations commenced for the sale of the Solar Parks to Toucan and RFE which were conducted on behalf of the Wirsol Group primarily by Mr Hogan supported internally by a team drawn primarily from Wirsol.
35. Upon the conclusion of those negotiations the following agreements were entered into on 25 May 2017:
- 35.1 the SPAs made between: (1) Wircon UK as Seller; (2) RFE as Purchaser; and (3) Wircon as Seller's Guarantor whereby RFE acquired the entire issued share capital of the Topcos for an aggregate deemed consideration under the SPAs of approximately £53.5 million; and
- 35.2 an agreement ("**the ALE Contract**") made between (1) Wirsol (2) RFE and (3) Toucan whereby Wirsol agreed to seek **Asset Life Extensions including as part thereof** extensions of the terms of the leases of the Solar Parks and Toucan agreed to make a payment to Wirsol if such **Asset Life E**extensions were obtained.

Relevant terms of the SPAs

36. To the extent relevant to the present claims, the two SPAs were in materially the same form and contained the following relevant express terms:⁴

10. Warranties

10.1 The Seller warrants to the Purchaser in relation to the Group Companies in the terms of the Warranties.

10.2 The Seller acknowledges that the Purchaser is entering into this Agreement...in reliance upon the Warranties.

10.3 Each of the Warranties shall be separate and independent and shall not be limited by reference to any other Warranty or any other provision of this Agreement.

37. Pursuant to clause 8 of the SPAs Wircon agreed, irrevocably and unconditionally, as principal obligor, to guarantee all of Wircon UK's liabilities and obligations under the SPAs.
38. The Warranties given by Wircon UK in Schedule 4 to the SPAs included (amongst other things) Warranties that:

"No Group Company is party to or subject to any material agreement, arrangement, obligation or commitment except the Contracts"
("Warranty 14.1")

⁴ References to defined terms are, *mutatis mutandis*, to the terms as defined in the SPAs.



“...Each of the Contracts is valid and binding and has been complied with in all material respects by the relevant Group Company... So far as the Seller is aware, there are no events or circumstances likely to give rise to the termination, rescission, avoidance or repudiation of any of the Contracts and no notice of termination or of intention to terminate has been given or received in respect of any of them.”
 (“**Warranty 14.3**”)

39. For the purposes of Clause 10 of the SPAs, the Warranties contained in Schedule 4 therein and Schedule 5 therein (Limitation of Seller’s Liability):

39.1 “*Contracts*” means those contracts specified in schedule 6 to the SPAs. In each case, Schedule 6 includes the Facilities Agreement, the EPC Contracts, the O&M Agreements and the PPAs;

39.2 “*Disclosed*” means “*fairly disclosed (with sufficient details to enable a reasonable purchaser to identify and reasonably evaluate the nature and scope of the matter disclosed) by the Disclosure Documents (and “Disclosure” shall be construed accordingly)*”

39.3 “*Disclosure Documents*” means “*the Disclosure Letter and the DVD-rom(s) copy (or copies) of the Data Room collated by or on behalf of the Seller, the index of which will be agreed and signed for identification as soon as reasonably practicable after Completion between the Seller and Purchaser (each acting reasonably) on the basis that the index will include all documents to which the Purchaser and its advisers have accessed prior to the date of this Agreement...*”

39.4 the definition of “*Group Companies*” includes the respective SPVs.

40. Clause 17 of Schedule 5 of the SPAs provided as follows:

2. Disclosure

2.1 The Seller shall not be liable in respect of a Claim (save for any claim under the Tax Deeds) to the extent that such Claim, or its subject matter, arises from or in connection with, or consists of, any fact, matter or circumstance which has been Disclosed.

17. Knowledge

17.1 For the purposes of [the SPAs] where the expression “so far as the Seller is aware” or “to the best of the knowledge, information and belief of the Seller” or an similar expression qualifies any Warranty or statement, a matter is within the awareness, knowledge, information or belief of the Seller if it is within the actual knowledge and after due and careful enquiry in the context of [the SPAs] of Mark Hogan, Dr Peter Vest, Markus Wirth, James Richardson, Andrew Standing and Simon McCarthy.

17.2 The Purchaser shall not be entitled to make a Claim (other than a Tax Claim) after Completion in respect of any matter, fact or circumstance with the actual knowledge of the Purchaser and the Purchaser’s employees.



Wircon's and Wircon UK's breaches of the SPAs

41. Wircon UK and Wircon were in breach of Warranty 14.1 in that the list of Contracts in Schedule 6 of the SPA did not include the Outwood Option Agreement. Wircon UK and Wircon are accordingly liable to RFE for the said breach in circumstances where the relevant information was not Disclosed and RFE did not have actual knowledge of it.
42. Wircon UK and Wircon were in breach of Warranty 14.3 in that:
 - 42.1 as mentioned in paragraph 3324 hereof ~~the Defendants were RFE was~~ well aware of the defects in the design of the Solar Parks and of the consequent breaches of the EPC Contracts; and
 - 42.2 as evidenced by the fact that as mentioned in paragraphs 45 and 46 hereof Wirsol did not remedy such breaches and that as a result the EPC Contracts were terminated, it was well aware that Wirsol was unlikely to be willing to remedy such defects so that these breaches were likely to give rise to the termination by the SPVs or repudiation by Wirsol of the EPC Contracts; and
 - 42.3 as a result of the breaches of the EPC Contracts set out at paragraphs 21 to 28 above, the Holdcos, the Topcos and/or the SPVs were in breach of the terms of the respective Facilities Agreements identified in paragraphs 17 and 18 above, and Wircon UK and Wircon were thereby in breach of Warranty 14.3;
 - 42.4 save in respect of those arising from: (a) the Capacity Defects at the Five Oaks, Newton and Outwood site, and (b) the use of forced air cooling, Wircon UK and Wircon are accordingly liable to RFE for the said breaches of Warranty 14.3 in circumstances where the relevant information was not Disclosed and RFE did not have actual knowledge of it.

Relevant terms of the ALE

42A. The ALE contained the following relevant express terms:

2. The Purchaser [RFE] agrees and authorizes Wirsol Energy Limited (“WEL”) to use all reasonable endeavours (A) to seek an Asset Life Extension (as defined in paragraph 10 below) for each of the Projects listed in the schedule to this deed on behalf of Subsidiaries [the SPVs]...

...



10. **“Asset Life Extension”** means the extension of the asset life of a Project from its asset life as at the date of this deed (as set out in column four of the Schedule), by a minimum of five years, as evidenced by the following:

(a) an extension of the term of the lease of the Property...

...

(c) a copy of up to date planning permissions in connection with the ongoing operation, maintenance and decommissioning of the Project allowing...for an electricity generation period which extends asset life of the Project as at the date of this deed (as set out in column four of the Schedule) by an additional five years.

...

SCHEDULE 1

Asset Life Extension

[Table containing in the fourth column entitled:] *Current Operational Expiry Date*

42B. The contractual subject matter, *inter alia*, of the ALE was, therefore, the extension of the asset life of the Solar Park being an extension of the Current Operational Expiry Date. This was to be evidenced by, but not limited to, an extension of the term of the lease on the relevant Property if obtained.

42C It was an implied term of the ALE (implied as a matter of common sense and/or for reasons of business efficacy and/or to reflect the unexpressed but common intentions of the parties) that the obligations in the EPC Contracts and the O&M Agreements would continue and be complied with throughout the extended asset life of the Project including, without limitation, the Contractor’s General Works Obligations at Clause 4.1 of the EPC Contracts, including the warranty of a minimum design operational life of 25 years, and the Contractor’s Undertaking at Clause 5.3 of the EPC Contracts.

42D Further, or in the alternative, it was a condition precedent (“Condition Precedent”) to Toucan’s obligation to pay for any Asset Life Extension, that the Works would operate in accordance with the terms and obligations contained in the EPC Contracts and the O&M Contracts throughout any extended asset life of the Project.

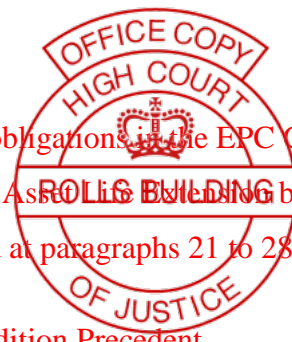
Wirsol’s breaches of the ALE/failure to satisfy the Condition Precedent

42E In breach of the said express and/or implied terms and/or Condition Precedent of the ALE, Wirsol failed:

42E.1 to use all reasonable endeavours to seek or procure Asset Life Extensions;

42E.2 to evidence the Asset Life Extensions by procurement of lease extensions of a minimum of five years;

42E.3 to procure the continuation and compliance of the obligations of the EPC Contracts and the O&M Agreements throughout the period of the Assets Building by, amongst other matters, the breaches by Wirsol particularised at paragraphs 21 to 28 above; and/or 42E.4 in the premises, failed to comply with the said Condition Precedent.

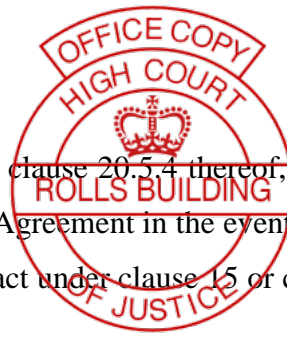


Termination of the EPC Contracts

43. Between 15 February 2018 and 30 July 2018 the SPVs served on Wirsol a total of 49 notices pursuant to clauses 11.1 and 15.2 of the EPC Contracts requiring Wirsol make good various defects within a reasonable period (“**the EPC Defect Notices**”). A table summarising the defects underlying each of the 49 EPC Defect Notices is at Schedule 4 hereto.
44. On 16 August 2018, each of the SPVs served on Wirsol notices under clause 15 of the EPC Contracts (“**the Clause 15 Notices**”) notifying the SPVs that:
 - 44.1 Their failure to remedy the defects notified in the EPC Defect Notices gave the SPVs the right to terminate the EPC Contracts.
 - 44.2 Under clause 15.1 of the EPC Contracts the SPVs had a further 14 days to remedy the defects set out in the EPC Defect Notices, failing which the EPC Contracts would be terminated under clause 15.2(a) and/or 15.2(g)(i) thereof.
45. In a letter from its solicitors dated 30 August 2018 Wirsol responded to the Clause 15 Notices falsely asserting that the defects identified in the EPC Defect Notices were either: (a) not breaches of the EPC Contracts; or (b) minor breaches which had been, or would shortly be, remedied.
46. By a letter from their solicitors dated 3 September 2018 (“**the EPC Termination Notice**”), each of the SPVs gave notice to Wirsol that, in light of its failure to remedy all the defects identified in the EPC Defect Notices and/or provide acceptable Remedy Plans therefore, each of the EPC Contracts was terminated.

Termination of the O&M Agreements

47. By a letter from its solicitors dated 3 September 2018 (“**the O&M Termination Notice**”) each of the SPVs gave notice to Wirsol of the termination of the respective O&M Agreements:



- 47.1 In the case of all such contracts, pursuant to ~~clause 20.5.4 thereof~~, under which the SPV was entitled to terminate the O&M Agreement in the event of the termination of the corresponding EPC Contract under ~~clause 15 or clause 16~~ thereof; and/or
- 47.2 In the case of the O&M Contracts relating to the Solar Parks at Lisburn, Five Oaks, Outwood and Wrea Green, pursuant to clause 20.5.3 thereof, under which the SPV was entitled to terminate the O&M Agreement in the event of a breach by Wirsol of its obligation to obtain written consent for the appointment of any sub-contractor.⁵
48. Pursuant to clause 20.5 of the O&M Agreements, the said termination became effective on 16 October 2018.
49. By a letter from its solicitors dated 5 September 2018 Wirsol responded to the O&M Termination Notice falsely stating that the SPVs had no proper basis for terminating the O&M Agreements, falsely asserting that the O&M Termination Notice amounted to a repudiatory breach and purporting to accept that repudiation.

Wirsol's breaches of the O&M Agreements

50. On or about 6 September 2018 Wirsol, in breach of their obligations under clause 20.5 of the O&M Agreements to continue to provide O&M provision thereunder up to but not including 16 October 2018 being 30 business days after the O&M Termination Notice, abandoned the Solar Parks leaving the HV equipment unmonitored and unmaintained, thereby making it impossible for them to discharge their functions under the O&M Agreements leaving the SPVs with no option but to deenergise the Solar Parks.

Loss and damage

51. Wirsol's breaches of the EPC Contracts have caused the SPVs loss and damage in that:
- 51.1 the effect of the defects is that the income which the Solar Parks have generated has, since May 2017, been less than it should have been. The best estimate the Claimants are presently able to provide of this loss is £120,000 per year; this loss will continue until about mid 2021 when the Claimants estimate the defects

⁵ Or, in the case of Lisburn, use an Approved Subcontractor.



will have been remedied and amounts in total to £480,000.

51.2 remedying the defects will cost about ~~£9,451,000~~ £10,615,000 (including VAT of £1,769,000). ~~£1,575,000~~. An estimate of the costs of remedial work, defect by defect, is stated in the appended Scott Schedule;

51.2A the Solar Parks are blighted by the defects and/or the breach of the 25 year design operational life obligations and the current consequent litigation. Mere payment of the remedial costs and remediation attempts will not remove the blight. The Solar Parks when purchased were flawed assets and remain so. The best present estimate of the difference in value between the Solar Parks as warranted and the true value at the completion date is £18.9 million;

51.3 as a result of the said breaches the Topcos were in breach of the terms of the Facilities Agreement. As a consequence the Topcos decided to repay and refinance the amounts outstanding thereunder, totalling principal and interest of some £80,589,700, which sums were repaid on 31 August 2018. The reduction in value arising from that refinancing will amount to about £7.7 million. That loss in value will be passed on by the Topcos via the Holdcos to the SPVs.

51.3A as set out in paragraphs 28A and 28B above, Wirsol has failed to pay Delay Liquidated Damages in the sum of £1,953,570.

51.4 as set out in paragraph 31 above, Wirsol has failed to pay PRDs in the sum of £145,931.20.

51.5 as set out in paragraph 32 above, but for Wirsol's **breach of the EPC Contracts, leading to their termination, repudiatory breach** the relevant SPVs would have been entitled to a further approximately £169,191.32 by way of PRDs.

51.6 the total loss suffered accordingly is ~~about £18 in excess of £20~~ million. Further particulars of that loss are set out in Schedule 6 hereto.

52. As a result of Wirsol's breaches of the O&M Agreements the SPVs have suffered loss and damage in that:

52.1 they have suffered a loss of any income during the period for which the Solar Parks are forced to be off-line as a result of the lack of O&M provision from 6



September 2018 to date and continuing until early October 2018 by which date the Claimants estimate that they will have arranged alternative O&M provision. The best estimate the Claimants are currently able to provide of this loss is £792,929; and

- 52.2 they will incur the cost of bringing the Solar Parks back on-line once alternative O&M provision has been arranged. The best estimate the Claimants are able to provide of this loss is £299,520 (including VAT of £49,920).
- 52.3 the total loss suffered accordingly is about £1,092,449. Further particulars of that loss are set out in Schedule 7 hereto.
- 53. Wircon and Wircon UK's breaches of the SPA have caused RFE loss and damage in that:
 - 53.1 as a result of the breach of Warranty 14.1, the Outwood Option Agreement was allowed to expire without being exercised, thereby denying RFE the chance to exploit the opportunity of developing the Option Site as an additional solar park. The best estimate the Claimants are currently able to give of the value of that lost opportunity is £3 million.
 - 53.2 as a result of the breaches of Warranty 14.3 referred to in paragraph 42 above, the actual value of RFE's shares in the Topcos was less than their value had the warranties been true. The best estimate the Claimants are presently able to provide of that reduction in value is £6.7 million.
 - 53.3 the total loss suffered as a result of the breaches of warranty is accordingly about £9.7 million.

53A. Wirsol's breaches of the ALE have caused Toucan loss and damage in that:

53A.1 No Asset Life Extensions have been or were procured;

53A.2 No lease extensions of a minimum of five years were procured; and

53A.3 In such sum equivalent to any sums that it may hereafter be determined that Toucan is obliged to pay under the ALE.

The assignments of the SPVs claims to Toucan

- 54. By written assignments dated 25 September 2018, each of the SPVs assigned absolutely

to Toucan the benefit of its claims against Wirsol under the EPC Contracts. Written notice of those assignments was given to Wirsol on 28 September 2018. Toucan accordingly claims against Wirsol under the EPC Contracts as assignee. Toucan will give credit as appropriate for sums paid to the SPVs under the terms of the Performance Bonds provided in support of the EPC Contracts.

55. By written assignments dated 25 September 2018, each of the SPVs assigned absolutely to Toucan the benefit of all its claims against Wirsol under the respective O&M Agreements. Written notice of those assignments was given to Wirsol on 28 September 2018. Toucan accordingly claims against Wirsol under the O&M Agreements as assignee.

Interest

56. The Claimants are entitled to interest on the damages awarded to them pursuant to section 35A of the Senior Courts Act 1981 at such rate and for such period as the court thinks fit.

AND TOUCAN ~~THE CLAIMANTS~~ CLAIMS:

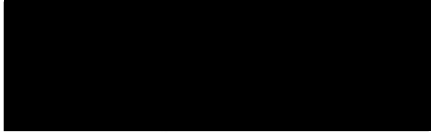
1. ~~A declaration that the ALE agreement dated 25 May 2017 has lapsed or ceased to be enforceable at the suit of Wirsol.~~
2. Damages to be assessed.
- 3.2- ~~Delay Liquidated Damages in the sum of £1,953,570 pursuant to paragraph 28A above.~~
4. ~~Performance Ratio Liquidated Damages~~ in the sum of £145,931.20 pursuant to paragraph 31 above.
- 5.3- Interest as aforesaid.
- 6.4- Such further and other relief as the Court sees fit to grant.

AND RFE CLAIMS:

1. Damages to be assessed.
2. Interest as aforesaid.
3. Such further and other relief as the Court sees fit to grant.



The Claimants believe that the facts stated in these **Amended** Particulars of Claim are true:

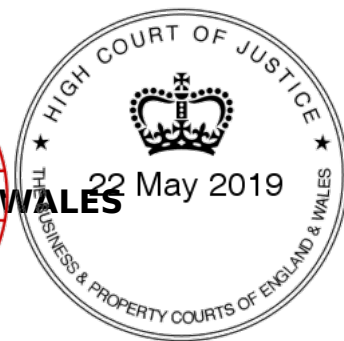


Name: *ANDREW WILLIAMS*

Position held: *DIRECTOR*

Dated: *20/3/2019*

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)**



Before Mrs Justice Cockerill

CL-2018-000640

17 May 2019

**(1) TOUCAN ENERGY HOLDINGS LIMITED
(formerly known as Rockfire Energy Holdings Limited)**

**(2) TOUCAN GEN CO LIMITED
(formerly known as RFE Gen Co Limited)**

Claimants

and

**(1) WIRSOL ENERGY LIMITED
(2) WIRCON UK SOLAR ASSETS GMBH
(3) WIRCON GMBH**

Defendants

and

**THE COMPANIES LISTED IN SCHEDULE 1 TO THE DEFENCE AND
PARTICULARS OF ADDITIONAL CLAIMS**

Third Parties / Defendants to Additional Claims

ORDER FOR DIRECTIONS

UPON the hearing of the first CMC in the proceedings

AND UPON hearing Leading Counsel for the Claimants and Third Parties, and Counsel for the Defendants

IT IS ORDERED that:

Trial Date and Estimated Length



1. The trial is to be listed on the first available date after 1 October 2020.
2. The estimated length of trial is 21 days. This includes pre-trial reading time of 3 days.
3. By 4pm on 24 May 2019 the parties must attend the Commercial Court Listing Office with their availability in order to obtain a fixed date for trial.

Disclosure Pilot Scheme

4. The Claimants shall serve a draft List of Issues for Disclosure using section 1A of the Disclosure Review Document pursuant to PD 51U 7.2 by 4pm on 7 June 2019.
5. The Defendants shall serve a response to the Claimants' List of Issues using section 1A of the Disclosure Review Document pursuant to PD 51U 7.5 by 4:00pm on 21 June 2019.
6. Any party proposing Model C Extended Disclosure must complete section 1B of the Disclosure Review Document and provide it to the other parties no later than 4pm on 19 July 2019.
7. Any party provided with a completed Section 1B in this way must respond by 4pm on 2 August 2019 by completing the "response" column either agreeing to the request or giving concise reasons for not agreeing to the request pursuant to PD 51U 10.5.
8. The parties shall exchange drafts of Section 2 of the Disclosure Review Document (including costs estimates of different proposals, and where possible estimates of likely amount of documents involved) by 4pm on 16 August 2019 pursuant to PD 51U 10.6.
9. The Claimants shall file a single joint Disclosure Review Document by 4pm on 30 August 2019 pursuant to PD 51U 10.8.



10. The parties must file a signed Certificate of Compliance by 4pm on 4 September 2019 pursuant to PD 51U 10.9.
11. By 18 September 2019, the parties shall seek to identify, discuss and agree the scope of any Extended Disclosure and resolve any disputes over the scope of Extended Disclosure sought pursuant to PD 51U 7.6 and 10.7.
12. In the event that the parties agree the scope of Extended Disclosure, the Claimants shall file a Consent Order at Court to give effect to the agreement by 30 September 2019.
13. Either party may apply for a hearing for guidance from the Court in relation to the scope of Extended Disclosure pursuant to PD 51U 11 should further guidance be required from the Court in the event that the parties are unable to resolve disputes between them.
14. The parties must comply with an Order for Extended Disclosure pursuant to PD51U 12 by 1 November 2019 by:
 - (1) service of a Disclosure Certificate;
 - (2) service of an Extended Disclosure List of Documents; and
 - (3) production of the documents in accordance with PD 51U 12(3) and 13.
15. A party may not without the permission of the Court or agreement of the parties rely on any document in its control that it has not disclosed at the time required for Extended Disclosure.

Length of Pleadings

16. The Claimants and Defendants each have permission, pursuant to paragraph C1.2 of the Admiralty & Commercial Courts Guide, to rely upon pleadings in excess of 25 pages. Such permission is limited to the current length of the relevant pleadings as follows:



- 16.1. The Amended Particulars of Claim (excluding schedules) - 27 pages;
- 16.2. Amended Defence, Counterclaim and Particulars of Additional Claims - 69 pages;
- 16.3. Amended Reply, Defence to Counterclaim and Additional Claims - 39 pages.

Scott Schedule

17. The Claimants shall serve on the Defendants an amended Scott Schedule by 4pm on 31 May 2019.
18. The Defendants shall serve on the Claimants their response to the Scott Schedule by 4pm on 28 June 2019.
19. The Claimants shall serve on the Defendants their reply to the Scott Schedule by 4pm on 26 July 2019.

Witness Statements

20. Any application to adduce evidence in a witness statement in excess of 30 pages shall be issued by 20 December 2019, such application to be made by reference to the issues within the List of Issues which it is proposed the relevant witness will deal with.
21. Signed statements of witnesses of fact, and hearsay notices where required by CPR 33.2 are to be exchanged not later than 4pm on 3 February 2020.
22. Short supplemental witness statements of fact, and hearsay notices where required by CPR r.33.2, are to be exchanged by 4pm on 24 February 2020.
23. Unless otherwise ordered, witness statements are to stand as the

evidence in chief of the witness at trial



Expert Evidence

24. The Claimants/Third Parties and the Defendants each be permitted to call up to one expert from each of the following fields of expertise: (1) electrical engineering; (2) transformers design; (3) solar/power asset valuation; and (4) quantity surveying.
25. The experts in each field are to meet and discuss the technical issues within their competency before preparation of their reports, which meeting shall take place by 21 February 2020.
26. A joint memorandum of the experts setting out the issues on which they agree and the issues on which they disagree, giving brief reasons for the disagreement, is to be completed by 4pm on 10 April 2020.
27. Signed reports of experts, limited to issues of disagreement, are to be exchanged simultaneously by no later than 4pm on 8 May 2020.
28. Quantity surveyor experts are to continue meeting following exchange of reports and to produce a supplementary joint memorandum by no later than 4pm on 22 May 2020.
29. Any short supplemental expert reports are to be exchanged simultaneously by no later than 4pm on 5 June 2020.
30. If the experts' reports cannot be agreed, the parties are to be at liberty to call expert witnesses at the trial, limited to those experts whose reports have been exchanged pursuant to paragraph 28 above.

Schedules of Loss

31. By 4pm on 15 June 2020 the Claimants and Defendants must



exchange schedules of loss.

32. In the event of challenge, the challenging party must send a counter-schedule of loss to the other party by 4pm on 29 June 2020.

Progress Monitoring

33. The progress monitoring date will be 6 July 2020. Each party is to provide a completed progress monitoring information sheet to the Commercial Court Listing Office at least 3 days before the progress monitoring date (with a copy to all other parties).
34. At least 3 days before the progress monitoring date, the parties must each send to the Court (with a copy to all other parties) a progress monitoring information sheet.

Pre-Trial Review

35. There will be a pre-trial review no later than 4 weeks prior to the first listed day of the trial with a time estimate of 90 minutes (to be fixed at the same time as the date for the trial is fixed pursuant to paragraph 5 above).
36. At least 2 clear days before the pre-trial review, the Claimants must file a draft timetable for the trial (to be agreed if possible). Any parts of the timetable which are not agreed must be identified and short explanations of the disagreement must be given.
37. At least 3 clear days before the pre-trial review the Claimants must file and send to the other party or parties preferably agreed and by email:
- 37.1. draft directions
 - 37.2. a chronology
 - 37.3. a case summary.



Trial arrangements

38. No later than 8 weeks before the date fixed for trial the Claimants shall send the Defendants a draft bundle index for the trial bundle for the use of the Judge, in accordance with Appendix 7 of the Commercial Court Guide.
39. The Defendants shall send any comments on the draft index no later than 7 weeks before the trial date.
40. The Claimants shall provide the trial bundle in electronic or hard copy form (or part electronic, part hard copy) to the Defendants no later than 6 weeks before the trial date.
41. The Claimants shall file with the Listing Office a trial bundle in electronic or hard copy form (or part electronic, part hard copy) for the use of the Judge and the witness box at least two clear days before the start of the designated reading period and in any event at least 7 days before the date fixed for trial.
42. Each party is to lodge a completed pre-trial checklist not later than 3 weeks before the date fixed for trial.
43. The Claimants shall provide their dramatis personae and chronology to the Defendants for comment no later than 12 days before trial.
44. The Defendants shall provide their comments on the dramatis personae and chronology no later than 8 days before the trial.
45. Skeleton arguments shall be filed by the parties not less than 5 clear days before the trial. Dramatis personae (agreed if possible) and chronology (agreed if possible), shall be filed by the Claimants not less than 5 clear days before the trial date.
46. A single reading list (approved by all advocates) and a composite bundle of photocopied legal authorities shall be filed by the

Claimants not less than 4 clear days before the trial date.



Settlement

47. If the dispute or part of the dispute is settled the parties must immediately inform the Court, whether or not it is then possible to file a draft Consent Order to give effect to the settlement.

Extension of time limits

48. The parties may, where CPR rule 2.11 applies, agree to extend any time period to which the proceedings may be subject for a period or periods of up to 28 days in total without reference to the Court, provided that this does not affect the date given for any case or costs management conference or pre-trial review or the date of the trial. The parties shall notify the Court in writing of the expiry date of any such extension.

Costs

49. Costs in the case.

Commercial Court Guide

50. Save as varied by this order or further order, the practice and procedures set out in the Admiralty & Commercial Courts Guide are to be followed.

Restoration of CMC

51. Liberty to restore the Case Management Conference.

17 May 2019

**Submission of documents following the GREAT representation at the Open Floor
Hearing on 10th September 2019**

Background

1. The public documents referred to in the Open Floor Hearing on 10th September 2019 relate to Case No: CI-2018-000640 in the High Court of Justice, Business and Property Courts of England and Wales Commercial Court (QBD) (“the Case”). The parties in the Case are:

(1) TOUCAN ENERGY HOLDINGS LIMITED
(2) TOUCAN GEN CO LIMITED

CLAIMANTS

and

(1) WIRSOL ENERGY LIMITED
(2) WIRCON UK SOLAR ASSETS GMBH
(3) WIRCON GMBH

DEFENDANTS

The Case concerns disputes that have arisen following the sale by Wirsol / Wircon companies of 19 solar parks to Toucan (a reputable British investment vehicle) in May 2017.

There is also information in the public domain to challenge the assertion of Hive Energy that it is “responsible for installation” of 300 MW of generating solar parks (as claimed in s. 1.5.1 of the Planning Statement).

Toucan’s claims

2. The claims in the Case are particularised under a number of heads. They specify
- a. Wirsol’s breaches of EPC contracts in relation to 15 of the 19 solar parks by:
- Installing undersized transformers and/or associated equipment
 - Using forced air cooled transformers contrary to contract specifications
 - Allowing faulty design / construction of transformer substations, including: inadequate insulation; that the substations are prone to water ingress; and have unsuitable flooring
 - Failing to install sufficient High Voltage and Low Voltage circuit breakers
 - Failing to install on-site roads as required in the relevant permissions
 - Installing inadequate combiner box MBC ratings
 - Installing inadequate monitoring systems
 - Installing inadequate landscaping and related works

- Failing to design for a minimum operating life of at least 25 years
- Failing to pay liquidated damages
- Failing to pay performance ratio damages

As a result of these breaches, the relevant Wirsol EPC agreements have been terminated, following service of 49 defect notices.

- b. Breaches by Wircon and Wircon UK of the Sale and Purchase Agreements whereby they sold the solar parks to Toucan, including claims under the warranties that they:
 - failed to disclose defects in the design of the projects, of which they were aware
 - failed to disclose that Wirsol would not remedy the defects
 - caused breaches of certain facilities agreements with Bayerische Landesbank, who provided finance to Wircon / Wircon UK for construction of the projects.
 - c. Wirsol's failure to satisfy other obligations, including in relation to securing asset life extensions for the solar parks sold to Toucan.
 - d. Wirsol's breaches of the O&M agreements for the solar parks, resulting in loss and damage to Toucan. The O&M agreements for the relevant solar parks were terminated in October 2018.
3. The value of Toucan's claims is for more than £20m in damages. This represents around 30% of the value that Toucan placed on the 19 solar parks at the time of acquisition.
 4. The Case is listed to go to trial in October 2020. Wirsol and Wircon are subject to a court order for "security for costs" of this litigation in the sum of £1.22 million, meaning that the High Court has been satisfied that the Wirsol / Wircon defendants do not have sufficient substance for the litigation to proceed, without providing a bond to satisfy any later costs award.
 5. The Wirsol / Wircon companies are defending the claims and have counterclaimed.
 6. The decision in the Case will, based on the timetable for the Cleve Hill application, be made after the Secretary of State is scheduled to have given a decision (and possibly any judicial review that may follow).

Wirsol's history of regulatory issues with OfGEM

7. In the court papers, Toucan highlights concerns around the Widehurst solar park, specifically that Wirsol failed to disclose to Toucan the content or conclusions of OfGEM's audit into the commissioning and qualification under Renewables Obligations legislation which at the time of November/December 2017 had been rated by OfGEM as "unsatisfactory" and "the lowest of the four ratings". OfGEM reported that "**major issues of non-compliance were found**". These included, but were not limited to, "safe performance of this switchgear". The equipment at

Widehurst subsequently failed disruptively in July 2018 resulting in significant downtime for the solar park. Wirsol does not contest this.

Hive's experience

8. Hive Energy has expertise in identifying sites, securing grid connections, land rights and planning permissions. Hive invariably sells projects once they are ready to build (evidence of this can be found at Companies House).
9. Contrary to statements in writing (see above) and at the hearing on 17 July 2019 made on behalf of the applicant, Hive does not have experience in constructing or operating solar parks; nor does it therefore understand the risks associated with those stages of development. If Hive has been involved in any project at any stage post ready to build, it is a very minor exception to their normal practice.

Relevance of the Toucan claim and Wirsol's past compliance breaches

10. Wirsol presents itself, in the DCO application and in oral submissions at the hearing on 17 July 2019, as a competent and experienced developer and EPC contractor.
11. Mr Hogan, one of the directors of Cleve Hill Solar Park Limited was a director with responsibility for the issues now being raised by Toucan. He is named in the Case as a key person in the associated events.
12. In the Cleve Hill Solar Park Funding Statement (Document Reference 4.2 – November 2018) on page 3, para 6, it states: "Wirsol is a highly experienced solar park developer, constructor and operator across the UK and Australia. Wirsol has built and operates 24 solar parks across the UK."
13. Wirsol has failed to disclose the significant concerns around competence and even trustworthiness (as a result of non-disclosure) identified by Toucan.
14. Of equal, or greater, significance Wirsol has failed to disclose its history of non-compliance with OfGEM regulations. These regulations are the key protection for the public purse in relation to the payment of subsidies for solar parks.
15. On page 4, para 9 of the Funding Statement, the applicant asserts that "it is clear that CHSLP will have access to sufficient funding to carry out the Project".
16. Wirsol/Wircon are involved in developments in Australia that appear to have extended their business risks. It appears that they are concerned about these risks, they may have over-expanded their business and are over-exposed to possible financial downside..
17. In the light of the above, the Graveney Rural Environment Action Team (GREAT) has the following concerns:

- a. the Examining Authority cannot rely on Wirsol's design experience, proposals regarding materials to be used in the construction of the Cleve Hill project, operational experience, or health and safety record. Wirsol does not meet an acceptable standard;
- b. the Examining Authority should be concerned regarding Wirsol's ability to adhere to contractual or other commitments. The Toucan claim raises material issues around Wirsol's delivery;
- c. the Examining Authority should not rely on Wirsol's statements generally since they have been disingenuous at best in describing their competence and their experience and have failed to disclose a material issue with their wider business. It is simply untrue to say that Wirsol operates 24 solar parks, when in fact the number is 5.
- d. When combined with the OfGEM non-compliance issue, Wirsol's credibility and suitability falls away;
- e. If only a proportion of Toucan's claims are successful, the financial impact on Wirsol will be significant and may even destroy their business.

Relevance of Hive's experience

18. Hive Energy have "oversold" their experience with heavily exaggerated claims. Given the scale of the project, and given the weakness of Wirsol's claim to be able to deliver the project, Hive's own lack of experience leaves the applicant as a whole exposed and unqualified.

Relevance of experience and importance of accurate and transparent disclosure

19. The applicant may argue that experience is not a planning matter; GREAT says that it is and that the applicant has made it one. The Examining Authority should also be concerned that Hive are not being open with the limits of their experience. As with Wirsol, Hive should come to the planning process in a transparent way and they have not. The authority is entitled to expect accurate information.

Importance of financial standing generally

20. The Cleve Hill development will be the largest solar park in the United Kingdom. Opponents of the development have raised numerous issues regarding the scale of the development and, in particular, around the cost of maintaining and ultimately decommissioning the plant to the necessary standards.
21. During the community liaison meetings, the developers have repeatedly stated that this development is a "marginal project". There is a genuine concern, in light of Wirsol's troubles and Hive's inexperience, that the developer will not be in a position to adhere to conditions that are imposed on it, or deliver in the way that it pretends to, in practice.

22. GREAT opposes the development. However, if permission is granted, then significant conditions must be imposed (for example, through de-commissioning and compliance bonds) to ensure compliance.

Enclosures (being court documents relating to the Case):

- Amended Particulars of Claim
- Consent Order (29 June 2019)
- Order for Directions (17 May 2019)