Date: 18 August 2017
Our Ref: EMP0012
Your Ref: LQD4815341

FAO Mr. A Hannon
Official Receiver's Office
The Insolvency Service
2nd Floor,
4 Abbey Orchard Street
London, SW1P 2HT

By Post & Email: tony.hannon@insolvency.gsi.gov.uk;
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Dear Sirs,

EMPOWERING WIND MFC LIMITED IN LIQUIDATION ("EWMFC")

We act for Mr Paul Millinder, and we refer to our client's previous correspondence with you in relation to the above-mentioned company.

1. As you are aware, EWMFC was the subject to a compulsory winding up order on 19 September 2016 on the petition of HMRC in respect of a debt said to be in the sum of £21,400.

2. As you are also aware, an alleged creditor of EWMFC, Middlesbrough Football Club ("MFC") submitted a proof of debt form lodged on 2 February 2017 in respect of a claim of £4,111,874.75.

3. We note that there has already been extensive correspondence between you and our client in connection with these matters. You will be aware, therefore, of our client's position that:

   i. EWMFC has a substantive defence to MFC's claim; and,

   ii. EWMFC has a very substantial claim against MFC.

4. We add that, as it appears clear to us, the vast majority of MFC's claim is contingent liability pursuant to a contract that can, and should, be disclaimed as onerous by the Office Holder.

5. In these circumstances, we write this letter to invite the Official Receiver to:

i. Disclaim the Energy Supply Agreement dated 17 June 2013;

ii. Reject, in whole or in part, MFC's Proof of Debt;

iii. Prosecute, or assign and permit our client to prosecute, EWMFC's claim against MFC.

6. Our client seeks the Official Receiver's voluntary co-operation in these matters. We have advised our client that he has the alternative of an application to court for an order in these terms.

7. Naturally it would be to the mutual benefit of our client and the Official Receiver to agree matters, as an application to court would inevitably entail significant legal costs. In circumstances in which the Official Receiver had a duty to act and has declined to do so, and, therefore, has necessitated an application to court, an order for costs would lie against the Official Receiver.

8. Our client does not wish to appear tendentious, only to stress that there are substantive grounds upon which the Official Receiver can, and in our client's view, should act. In these circumstances, the present lack of decision cannot be allowed to continue for a long or indefinite period. For this reason, our client seeks a substantive decision within 14 days of the date of this letter, after which an application to court will be made.

9. By this letter, we seek to furnish the Official Receiver with sufficient information to allow the Official receiver to make a decision.

Background – The Wind Turbine Project

10. Our client undertook to install a wind turbine on MFC's land, adjacent to MRC's stadium.

11. EWMFC was the special purpose vehicle by which our client was to deliver the project. The intention of the parties was for EWMFC to take a lease of and occupy land adjacent to MFC's stadium. On this land EWMFC would build and commission a wind turbine, which would then be connected to MFC's infrastructure and to the National Grid. The wind turbine would generate free electricity for the stadium and also attract income in the form of the Government subsidy paid for the generation of electricity by this renewable source and in respect of the export of electricity to the Grid.

12. The project was funded by EWMFC using third party funding. A key part of the project's viability was the availability of a Government renewable energy subsidy known as the Feed-in Tariff. The tariff was available up to 31 December 2015. The project was scheduled to complete by 15 December 2015. At that point it would be accredited and gain a vested right to receive the, then, feed in tariff rate for a period of 20 years following accreditation.

13. The wind turbine itself would have enjoyed a minimum working life of 30 years, so further benefit would accrue to the parties for a further ten years following the cessation of the feed-in tariff payments.

14. As a result of the project, MFC would benefit from free electricity and reduced bills, and the subsidy tariff receipts would go to EWMFC and provide a return on investment for both EWMFC and the funder.

15. The benefit to EWMFC would have been considerable – in excess of £9million – this fact, and the fact that MFC's claim pursuant to its proof of debt is disputed in full, should explain why Mr Millinder has been so assiduous in pursuing the matter of EWMFC's claims and defences and why it is not acceptable that the appropriate action is not taken by the Official Receiver, who remains the Office Holder in this instance.

MFC's alleged claims are not due

16. The alleged the debt that MFC seeks to prove in the liquidation is said to have arisen pursuant to the Lease made on 17 June 2013, and varied by Deed on 7 November 2013, between MFC and EWMFC ("the Lease") (**copies attached**), and the Energy Supply Agreement dated 17 June 2013 ("ESA") (**copy attached**).

17. The project was held up, prior to 23 December 2014, by objections from Durham Tees Valley Airport ("DTVA") that the risk of RADAR interference had not been mitigated and by the failure of the local council to act promptly on evidence showing that this was not so.

18. It should be noted that the delay ultimately caused the project to miss the opportunity to gain a higher tariff under the Government's subsidy scheme, but the project remained financially viable and able to complete.

19. In relation to this delay, our client's stance was that MFC should not insist upon the payment of rent, or the payment for electricity in lieu of generation, provided for under the Lease and ESA respectively. This was on the basis that the delay caused by DVTA was an instance of *force majeure*.

20. Following 23 December 2014, our client's position is that delay, and the eventual failure to complete the project, was the result of obstruction by MFC.

The Lease

21. According to the proof of debt lodged by MFC on 2 February 2017, only £80,209.95 of the £4,111,874.75 claimed is sought pursuant to the Lease.

22. Contractual arrangements were such that EWMFC assumed an obligation to pay rent, and liability for paying for the electricity used by MFC after 12 months in lieu of generation. On the

face of it, these sums were due under the Lease notwithstanding the inability to commission the generating station pursuant to the ESA.

23. Matters are clearly not that simple, however. The commercial arrangement or scheme outlined above involved a number of separate agreements, each of which was an essential component of the development. The two most important components of the deal between MRC and EWMFC were the ESA and the Lease, indeed, the Lease had no purpose save for providing the land for the development. Though it suits MFC to view the terms of each agreement in isolation, the reality of the matter was that, where the performance of the ESA was delayed or frustrated, it was an instance of *force majeure* affecting performance of other elements of the arrangement, including the Lease. It follows that EWMFC has a perfectly cogent defence in relation to claims for sums otherwise due under the Lease for the period from September 2014, the point time at which Mr Millinder originally claimed that the project was subject to *force majeure*. It might be that upon investigation, the period of *force majeure* commenced at an earlier date. For however long the project was subject to this *force majeure*, however, performance of EWMFC's obligation to pay rent or other sums pursuant to the Lease should be regarded as suspended.

24. Further, our client contends that MFC was in breach of covenant 6 in Schedule 4, in that it did not assist EWMFC in its attempts to remove the planning condition imposed as a result of DTVA's intervention. MFC cannot expect to stand idly by, in breach of its duty to assist, and yet be rewarded for doing so.

25. From December 2014, the planning issue was resolved, however, enabling the project to go forward. The fact that the project did not complete was, our client maintains, the result of deliberate non-co-operation by MFC, which had clearly lost its appetite for the project by this stage. From the correspondence it is clear that the parties fell to bickering, with our client, who was unrepresented, continually battling against the obstructive and evasive correspondence produced by MFC's lawyers.

26. In retrospect, a clear pattern of deliberate non-co-operation emerges where delays occur and potential exposure for EWMFC accrues, but, at the time, it appeared to Mr Millinder that the successful conclusion of the project, always capable of completion, was almost within his grasp. We deal with MFC's effective sabotage of the project below, but in connection with the Lease, our client's case is clear; where MFC acted to prevent the successful completion of the project, it should not be permitted to enjoy rent under the Lease, and, indeed, it would be inequitable were it to do so.

The ESA

27. The ESA contained EWMFC's agreement to supply energy to MFC.

28. According to the proof of debt lodged on 2 February 2017, the majority of the £4,111,874.75 submitted in the proof, some £4,031,664.80, is due pursuant to clause 3.4.2 of the ESA.

29. This clause provides that if the Start Date for on-site generation has not been achieved within 12 months of entering into the ESA, EWMFC must pay £0.08 per kWh of electricity consumed by MFC. The proof of debt claims this payment from the first anniversary of the ESA (17 June 2014) to the expiration of the ESA's term (17 June 2034).

30. The ESA's termination provisions permit MFC to terminate the ESA, but not EWMFC. It would seem that, by claiming the payment for the full term of the ESA, MFC has elected not to treat the agreement as terminated.

31. The term of the ESA runs from the date of the agreement until the earlier of:

    i. 20 years after the Commissioning Date (which has never occurred); and,

    ii. Termination under clause 7 (which can only be by MFC).

32. MFC is wrong to claim, as it does in the proof of debt form, that it has a claim for payments pursuant to clause 3.4.2 for a period of 20 years, as if this were a fixed-term contract. Clearly it was not, and at the point at which it became clear that the project would not complete, that should have been the end of any contractual entitlement.

MFC causes the project to fail

33. The long-stop date for completion of the project was December 2015, after which, access to the Government's subsidiary would be lost. Both parties were well aware of this.

34. The planning condition, caused by DTVA, was withdrawn in December 2014. It had a knock-on effect in that the delay caused by this issue cost 26% of the projected tariff income under the Government subsidy scheme. This third-party funder was no longer prepared to fund the project as a result of this reduction in income and, so, EWMFC could not complete first round funding.

35. Mr Millinder was able to procure alternative funding, but this required a new SPV company to take on the project, Wind Energy Renewables LLP ("WER"). EWMFC attempted to assign the Lease to WER and to have the ESA novated.

36. MFC objected to this assignment on various pretexts throughout March 2015, even though it should have been quite clear that, without third-party funding, the project could not be delivered. Rather than agree a basis to continue, MFC was content to frustrate progress on the basis that it had rent due under the Lease, and would have its electricity paid for pursuant to the ESA were the Start Date to be delayed beyond a certain point.

37. The second opportunity MFC took to prevent EWMFC's delivery of the project was to raise objections concerning the configuration of the project; in layman's terms, the plumbing where the installation connected to the Grid; i.e. what was required and who was responsible for what. Again, these were not reasonable or necessary objections, and MFC must have

understood that failure to meet Northern Power Grid's requirements would prevent connection and defeat the entire project.

38. Again, while success was tantalisingly close so far as Mr Millinder could see, in retrospect it appears to us that MFC by this stage, if not considerably earlier in 2015, were pursuing an entirely cynical course of action to the detriment of EWMFC, causing it to continue to incur liabilities and shoulder risk for the sake of a project that MFC had no intention of completing.

39. MFC's objections to Northern Power Grid's required configuration dragged on through April and May 2015. The area of disagreement centred on the configuration of MFC's private network. MFC was strongly resistant to the suggestion that it should be responsible for high voltage transformer equipment or the connection to the distribution system (the Grid). MFC sought to rely upon the claim that there was no express or specific contractual obligation to do so. MFC also claimed, quite erroneously, that it would be contrary to standard industry practice for a landowner to do so.

40. MFC's position was entirely unnecessary and unreasonable; it was a Northern Power Grid requirement that the landowner must own its side of the network. EWMFC could, thus, not own MFC's substations, which would provide power to the stadium, or, assume liability for them. These were MFC's dedicated substations and clearly were integral to the stadium. MFC was responsible for maintaining the connection to the Grid, having acquired and paid for these dedicated substations, which formed part of MFC's infrastructure. An asset sale agreement with Northern Power Grid made this clear (**copy attached**). Mr Millinder explained all this in some detail and warned that MFC's "demands make the project non-investable at this late stage".

41. On 9 June 2015, MFC made it clear that they are not going to accept the necessary configuration in terms that sought to pass the blame for this to EWMFC. Mr Millinder had already warned MFC, on 24 April, that delivery times for vital components meant that the configuration needed to be agreed or it would be too late to complete the project y the December deadline for tariff accreditation. By early June 2015, MFC must have realised that, although the tariff accreditation deadline was the end of December, it was already too late to build-out the project. MFC had effectively succeeded in killing off the project in circumstances that, MFC clearly believed, entitled them to claim very considerable sums pursuant to the Lease and the ESA.

42. The final break-down of the project, which prevented commissioning and a Start Date pursuant to the ESA, was caused by MFC, rather than by EWMFC or a third party. The project could have completed but for MFC's failure to co-operate. In summary:

    i. The planning issue was resolved on 23 December 2014 and the delay and loss of the best tariff rate was not fatal to the project;

ii. New funding was in place, or, would have been in place but for MFC's refusal to co-operate with an assignment reasonably required by EWMFC in March 2015;

iii. MFC's refusal to co-operate with the assignment/the conditions it imposed were unnecessary and unreasonable;

iv. EWMFC's position regarding the configuration of the installation was correct/necessary/industry practice, and that, therefore;

v. Throughout April and May, and until the effective demise of the project in June 2015, MFC's position regarding the configuration was incorrect/inconsistent with the requirements of Northern Power Grid/inconsistent with industry practice and that MFC was acting unreasonably in the circumstances.

vi. The wrongful failure/refusal of MFC to agree to the reasonable/necessary/required configuration caused the project to fail and constituted fundamental or repudiatory breach of the ESA by MFC.

43. Had EWMFC enjoyed the benefit of legal representation and advice, it is unlikely that MFC would have been able to engineer such a situation, but, had MFC nevertheless prevented to the completion of the project in this way, with the benefit of legal advice, EWMFC would have understood that it had a right to terminate the ESA and the Lease on the ground of fundamental and/or repudiatory breach on the part of MFC.

44. Further, and in any event, MFC's breach provides EWMFC with grounds to elect to treat the ESA as terminated. Were the company to terminate the ESA, the sum claimed in the proof of debt would be reduced significantly. Clearly the Official Receiver should communicate this election to MFC in the circumstances.

Duty of Office Holders to disclaim onerous contracts

45. Office holders are given wide powers to enable them to perform their functions (ss.165, 167 and Schedule 4 of the Insolvency Act 1986) and (s.314 and Schedule 5 of the Act) these powers include the right to disclaim "onerous property". As a consequence, a liquidator has the power to disclaim a contract where it is unprofitable. When considering whether a contract is "unprofitable", the liquidator must balance the benefit to creditors that the company derives from the contract against the liability that the contract imposes on the company. So, for example a contract is, in principle, unprofitable if it:

i. Requires the company in liquidation to discharge a financial obligation in circumstances where the discharge of that financial obligation is, in some way, detrimental to the interests of the company's creditors.

ii. Contains a financial obligation, compliance with which would prejudice the liquidator's ability to realise the value of one or more of the company's assets and distribute the proceeds to creditors.

46. A liquidator is not obliged to disclaim a contract, but one who fails to disclaim in circumstances where he should, may be treated as having failed in his duties.

47. Pursuant to s.178, a disclaimer:

i. Operates, as from the date of the disclaimer, to determine the rights, interests and liabilities of the insolvent party in, or in respect of, the property disclaimed;

ii. Does not operate, except so far as is necessary for the purpose of releasing the insolvent party from any liability, to affect the rights and liabilities of any other person.

48. Thus, the effect of disclaiming the ESA is to bring to an end MFC's claim for contingent liability pursuant to the ESA. It does not, however, affect EWMFC's accrued rights and, therefore, its ability to pursue claims pursuant to the ESA against MFC, or, indeed, to rely upon such defences as it has to claims made by MFC pursuant to the ESA.

49. A "person interested in the property" to be disclaimed may serve notice on an office-holder requiring him to disclaim it (s.178(5)). Our client may be regarded as an interested person for these purposes, and the Official Receiver should regard this letter as notice pursuant to that section to disclaim the ESA.

Conclusion

50. Our client's primary position in relation to claims pursuant to the Lease and the ESA is that:

i. There should be no liability for rent under the Lease or payments under the ESA whilst the actions of third parties (the local authority and DTVA) prevented the performance of the contractual arrangements between EWMFC and MFC, of which the Lease and the ESA were part.

ii. In any event, there should be no liability for rent under the Lease or payments under the ESA whilst by its own actions MFC delayed and ultimately prevented the performance of the contractual arrangements between EWMFC and MFC, of which the Lease and ESA were part.

On this basis, there are no monies owing by EWMFC to MFC pursuant to the Lease or the ESA and EWMFC has a complete defence to the claim that is the subject of MFC's proof of debt.

51. Further, and in the alternative, as at latest 9 June 2015, the project was incapable of performance due to the actions of MFC, there should be no further liability accrued pursuant to

either the Lease or the ESA. The MFC as landlord had derogated from its grant, and as counter-party to the ESA had committed a fundamental and/or repudiatory breach.

52. On this basis, there are no monies owing by EWMFC to MFC pursuant to the Lease or the ESA and EWMFC has a complete defence to the claim that is the subject of MFC's proof of debt.

53. In the premises, the Official Receiver should reject in its entirety MFC's proof of debt lodged on 2 February 2017.

54. Further and in the alternative, the Official Receiver should elect to terminate the ESA for fundamental and/or repudiatory breach and should, in any case, disclaim the ESA as an onerous contract. This would have the effect of limiting the extent of any claim that MFC might otherwise or on appeal seek to establish. Such a course of action would certainly be in the best interests of the genuine creditors of EWMFC; our client and HMRC.

EWMFC's claim against MFC

55. It will be clear from the matters outlined above that the facts and matters that give rise to a defence to MFC's claims, also represent a cause of action on the part of EWMFC. MFC breached its obligations, express and implied, by acting to prevent the performance by EWMFC of its obligations pursuant to the ESA and the Lease and to render the project incapable of completion.

56. Naturally there is loss to EWMFC that flows from MFC's breach. The nature of this loss would seem to us obvious and uncontroversial; it is the lost profit from the project that would have accrued to EWMFC but for the wrong-doing of MFC that caused the project to fail. This claim is an asset of EWMFC and should be realised for the benefit of all the genuine creditors of the company, and any surplus distributed to the company's contributories.

57. The profit is not speculative. Rather, it can be calculated with a considerable degree of accuracy.

58. The loss in revenue from the wind turbine is calculated based on the net energy production of the wind turbine of 4.62GWh (4,620 Mega Watt Hours) average Net Energy Production per annum, when deployed in accordance with planning permission and taking into account verified wind speeds, over the 20 year tariff lifetime. Net Energy Production means the electricity yield, after accounting for electrical system losses in transporting the electricity from the wind turbine to the local Northern Power Grid network.

59. The feed in tariff rate for the wind turbine was available until 31 December 2015. The turbine was scheduled for commissioning by 15 December 2015. The basis of the tariff rate is therefore fully quantifiable and as listed in OFGEM's website under Renewable Energy Feed in Tariff Information. The Generation tariff from 31 December 2015 is £72.40 / MWh (Mega Watt Hour) and the Export Tariff element of the Feed in Tariff Scheme is £46.40 / MWh.

60. On the basis of these tariff entitlements, a 20-Year FIT Net Operating Position has been calculated after Operating Costs. The Net Operating Position from 31 December 2015 until the Feed in Tariff End Date, 31 December 2035, is **£8,922,394**.

61. With regards to inflation, a 2.5% average rate of Inflation has been applied to the Generation and the Export Tariff and the result is multiplied by the Net Energy Production of the wind turbine each year from 31 December 2015 and until 31 December 2035 (Feed in Tariff End Date).

62. Our client has calculated an additional 5-year Market Value Electricity in relation to the remaining 10years of minimum anticipated operation. The wind turbine has an operational life of 30 plus years under good operational maintenance. On the conservative assumption that the wholesale market price per MWh of electricity is £72.40 / MWh, the market value of electricity over the five years from 31 December 2035 until 31 December 2040 is calculated as Generation Tariff x Net Energy Production less Operating Expenses, plus 2.5% Inflation. The 5-Year Net Operating Position from 31 December 2035 until 31 December 2040 is **£308,702**.

63. Thus, the Cumulative Net Operating Position from 31 December 2015 until 31 December 2040 is the 5 Year Net Operating Position plus the 20 Year FIT Net Operating Position; totals **£9,231,096**. This is the basis of the quantum of EWMRC's claim against MFC, although there might well be further heads of loss, representing consequential damages, though these are unlikely to amount to more than a few 10s of thousands of pounds.

The Legal Position

64. The Official Receiver has the power to reject the proof of debt (Insolvency Rules, 1986, Rule 14.7). An office-holder's decision on a proof may be challenged.

65. There is clearly a defence to the claims, and, there is clearly a corresponding claim, and one of far greater value. Rule 14.25 is potentially of great importance in this regard. It provides *inter alia* as follows:

> ***14.25.***—*(1) This rule applies in a winding up where, before the company goes into liquidation, there have been mutual dealings between the company and a creditor of the company proving or claiming to prove for a debt in the liquidation.*
>
> *(2) An account must be taken of what is due from the company and the creditor to each other in respect of their mutual dealings and the sums due from the one must be set off against the sums due from the other.*
>
> *(3) If there is a balance owed to the creditor then only that balance is provable in the winding up.*
>
> *(4) If there is a balance owed to the company then that must be paid to the liquidator as part of the assets.*

(5) However if all or part of the balance owed to the company results from a contingent or prospective debt owed by the creditor then the balance (or that part of it which results from the contingent or prospective debt) must be paid in full (without being discounted under rule 14.44) if and when that debt becomes due and payable.

66. This right of set-off is clearly extremely important on the facts of this case. As, if and when it is established that MFC owes a balance to the company, this must be paid to the company. After the other creditors are satisfied, any surplus should be available for the members.

Assignment of EWMFC's claims

67. We understand that the Official Receiver has indicated that he might assign EWMFC's claims to MFC. We find this both surprising and inappropriate. The claim subject of this letter lies against MFC, so MFC's purchase of it would merely be in order to suppress it. MFC's claim is for approximately £4M, but is, as we have explained, in fact worth nothing. EWMFC's claim is worth approximately £9M.

68. On this basis, the company is clearly solvent and there should be a considerable surplus available for distribution. In the circumstances, we cannot believe that the Official Receiver is seriously suggesting acting to the detriment of legitimate creditors and the members in this way.

69. The assignment of the claim is necessary in the interests of the company, its genuine creditors and, once these are satisfied, its members. While the claim could be assigned to anyone, save, of course, to the party against which it lies, in practice we do not consider that it would be possible for a third-party to prosecute the claim without the benefit of Mr Millinder's knowledge, expertise and evidence.

What the Official receiver is asked to do

70. The Official Receiver is asked to exercise his powers to reject in whole MFC's proof of debt form lodged on 2 February 2017 in respect of a claim of £4,111,874.75 on the ground that the alleged debt is disputed, that there is a substantive defence to the entirety of the claim and that the claim is in any case extinguished by the set-off of EWMFC's claim against MFC.

71. That, without prejudice to the foregoing and for the avoidance of any doubt, the Official Receiver disclaims the ESA.

72. Agree in principle to an assignment of EWMFC's claims to an entity under the control of our client, and enter into discussions with our client concerning the terms of such an assignment.

73. As this matter has already been the subject of lengthy correspondence and the issues have been fully ventilated by Mr Millinder, we do not think it unreasonable to seek a substantive response from the Official Receiver to this letter with 14 days, i.e. by 4pm, Friday, 1 September 2017.

We look forward to hearing from you.

Yours faithfully,

Prospect Law Ltd

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