

Design Risk: What Have You Agreed'

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Contractual negotiations for ships and offshore units commonly involve commercial, legal, and technical teams negotiating different parts of the contract. It is however crucial that before the contract is signed, it is read as a whole to ensure consistency in a party's obligations throughout the contract. The UK Supreme Court's judgment in *MT Højgaard A/S v. E.ON Climate and Renewables UK Robin Rigg East Ltd & Others*¹ illustrates the costly consequences for a contractor who fails to do so and agrees in a design and construction contract to ensure the work is "fit for purpose" or exercise "reasonable skill and care" or "due care and diligence" when performing their obligations but also to meet international design requirements, particularly when the latter is found to contain an error.

MT Højgaard ("**MTH**") was contracted by E.ON Climate and Renewables ("**E.ON**") for the design, fabrication and installation of the foundation structures for 60 wind turbine generators for the Robin Rigg offshore wind farm in Scotland. The foundations were designed in accordance with an industry standard for the design of offshore wind turbines ("**J101**") by Det Norske Veritas ("**DNV**"). J101 provided "design fatigue life for structural components should be based on the specified service life of the structure. If a service life is not specified, 20 years should be used."

In addition, the tender requirements provided that "the design of the foundations shall ensure a **lifetime of 20 years** in every aspect without planned replacement" but also to an obligation to comply with J101 to achieve a "design life" of 20 years. In the Contract, MTH agreed to comply with internationally recognised standards and to act "with due care and diligence, in accordance with "Good Industry Practice" and for each item to be "fit for its purpose" but made no reference to the lifetime of the foundations.

The design of the foundations was approved by DNV as certifying authority before the installation began in December 2007. In 2009 an error in J101 was discovered by DNV. Thereafter the foundations started to fail. Proceedings were commenced to determine who would bear the remedial costs of €26.25 million.

First Instance Judgment²

In the Technology and Construction Court, it was held that MTH had to provide foundations which complied with J101 and which had a service life of 20 years. As the foundations did not have a service life of 20 years, the design was not fit for purpose and not wholly in accordance with the requirements of the contract. The defect had arisen as a consequence of a breach of contract, notwithstanding that the foundations were defective through no negligence on the part of MTH.

Court of Appeal Judgment³

MTH appealed and the Court of Appeal overturned the first instance decision. It held that a reasonable person in the position of the parties would know that the foundations had to comply with

J101 and that such compliance was expected but not absolutely guaranteed to produce a life of 20 years. The Court could not ascertain what additional steps a contractor in a similar situation, who is compliant with the tender requirements and J101, could take to ensure the foundations had an “operational life” of 20 years. Furthermore the requirement for a “design life” of 20 years did not equate to a warranty that the foundations would provide an “operational life” of 20 years. The obligations in the contract were, in the Court’s view, “too slender a thread upon which to hang ... a warranty.”

Supreme Court Judgment

The recent Supreme Court judgment unanimously overturned the Court of Appeal’s findings. The central question on appeal was whether MTH was in breach of contract because despite using due care and professional skill, adhering to good industry practice and complying with J101, it had failed to ensure a life for the foundations of 20 years. On this issue, Lord Neuberger said that it was unnecessary to determine whether there was a warranty that the foundations would have a lifetime of 20 years or a contractual term that the foundations would be designed fit to have such a lifetime as neither had been achieved.

The Court also considered that the international design standard, J101, despite containing an error which meant that it would not be possible to comply with the prescribed criteria, did not make it mutually inconsistent with the other terms of the contract. Lord Neuberger went on to say that while such cases turn on their facts “the courts are generally inclined to give full effect to the requirement that the item as produced complies with the prescribed criteria, on the basis that, even if the customer or employer has specified or approved the design, it is the contractor who can be expected to take the risk if he agreed to work to a design which would render the item incapable of meeting the criteria to which he has agreed.” As a result, the contractual risk of complying with J101, although imposed by E.ON and found to be defective, fell to MTH.

The Supreme Court also considered the complex nature of the contractual arrangements and whilst it accepted that these were long, diffuse and multi-authored with detailed descriptions and “belt and braces” provisions, the Court found that “this did not alter the fact that the court has to do its best to interpret the contractual arrangements by reference to normal principles.” The contract imposed a duty on MTH regarding the life of the foundations and the Court did not see this as “an ‘improbable [or] unbusinesslike’ interpretation, especially as it is the natural meaning of the words used and is unsurprising in the light of the references... to the design life of the Works being 20 years, and the stipulation that the requirements... are ‘minimum’.”

Conclusion

For a buyer, the judgment of the Supreme Court ensured that the design contracted for was delivered but had costly consequences for the contractor.

Parties entering into design and construction contracts should consider the following to avoid similar outcomes:

1. Review the contract as a whole including the specification and technical requirements to identify obligations which are not clearly set out in the contract itself
2. Record key obligations in the contract or in documents which are not hidden at the bottom of the contractual hierarchy
3. Consider including a contractual hierarchy setting out which parts of the contract take priority

4. Be consistent but where competing requirements exist, parties should ensure that they satisfy the higher requirements
5. Contractors should consider the extent to which they can mitigate their responsibility for design particularly when they have not produced it or had sufficient time to review it in detail
6. Use clear wording for all contractual terms

¹ [2017] UKSC 59

² [2014] EWHC 1088 (TCC)

³ [2015] EWCA Civ 407