

Building for Life: The Court Approach to 'Design Life' in Construction Contracts

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PRACTICES Offshore Oil and Gas, Offshore Oil and Gas Dispute Resolution, Renewable Energy

An important consideration for structures being built for use offshore and in challenging environments is their expected operational life. As it is difficult to carry out maintenance and repairs offshore, design and build contracts will commonly specify a design life. In the decision of *Blackpool Borough Council v Volkerfitzpatrick Ltd and others*¹, the High Court revisited how English courts will construe a 'design life' requirement in a construction contract.

Facts

In 2009, Blackpool Borough Council ("the Council"), contracted Volkerfitzpatrick ("the Contractor") to design and build a new landmark tram depot on Blackpool promenade, next to the Irish Sea. The depot was brought into operation in Spring 2012.

In early 2015, high winds detached a large section of the roof, and, from the resulting inspections, the Council learned of various issues including early corrosion in the roof space, and signs of failure to the cladding panels. The Contractor presented remedial proposals to address the issues that were not accepted by the Council.

The Council started proceedings against the Contractor contending that the Contractor had to perform substantial remedial works costing in excess of £6 million. The Council alleged that the design and construction of significant parts of the tram depot did not meet the intended design life of 50 years and were not suitable for its exposed coastal location. The Contractor disputed the alleged design life requirement, as the contract specified different 'design lives', and that the parts of the works did not meet their specified life or were otherwise unsuitable.

In the judgment from the Technology and Construction Court, the Council was successful in their claim but were only awarded £1.11 million, a small percentage of the amount claimed.

Design Life Requirement

The court found that the intended design life was 25 years and not 50 years as claimed by the Council. In reaching this conclusion, the judge discussed the meaning and extent of the 'design life' requirement under the contract including the applicable standard of care and maintenance obligations on the Contractor. This involved the analysis of key contractual obligations on minimum design life, suitability and maintenance, all of which were related to the design obligation.

Reasonable Care Standard and Hojgaard Case

The Council argued that strict contractual obligations were imposed on the Contractor and this included a minimum design life obligation. The Contractor submitted that these were reasonable care obligations.

Both parties relied on the Supreme Court decision in *MT Hojgaard v E.ON*² where the contractor had built foundations for offshore wind turbines using due care and professional skill, adhering to good industry practice and to the applicable DNV standard for the design of offshore wind turbines and grouted connections. However, an error contained in the standard meant that the foundations would not last for the required design life of 20 years, thereby causing the contractor to breach a fitness for purpose obligation.

While the judge acknowledged that the Supreme Court decision turned on the terms of that contract, the judge found it provided “*illuminating observations as to the ambit of a design life obligation in a contract*”. He summarised the court’s remarks in *Hojgaard* in respect of the design life obligation as follows: (a) the foundations were designed for a 20-year lifetime, and not an absolute warranty to last for 20 years without replacement; (b) no lifetime of any specified period could ever be guaranteed in practice; and (c) had the contract provided for a design standard, there could be an specific meaning in terms of annual probability of failure.

Taking account of this, the court held that the suitability and design life obligations were not to be construed as a mere ‘reasonable care obligation’ but were of a ‘*strict character*’. However, the judge also accepted that the application of *Hojgaard* would have allowed the Contractor to argue that “*a particular element of the tram depot would not last its minimum design life despite any design which might feasibly have been adopted*” but, like in *Hojgaard*, this was not an issue that had to be decided by the court.

Need for a Contractual Definition

The court considered it important to understand what was meant by ‘design life’. Although two different life expectancies were specified, design life was not defined in the contract, so the court had to refer to the relevant industry standards applicable at the time, one was used to emphasise that the definitions of ‘design life’, ‘service life’, ‘performance’ and ‘durability’ are useful to illustrate the interplay between these items, and another to highlight the definitions of ‘design working life’ and ‘maintenance’.

Anticipated Maintenance v Major Repair

In the second standard, ‘design working life’ was defined as the “*assumed period for which the structure or part of it is to be used for its intended purpose with anticipated maintenance but without major repair being necessary*”, and maintenance as the “*set of activities performed during the working life of the structure in order to enable to fulfil the requirements for reliability*”.

Taking account of these, the judge considered that it was not realistic to assume that a structure was intended to be maintenance free for the whole of its design life, but that it was reasonable to assume that no major repair would be required over that period. This would be a question of fact and degree in the context of the particular case. Here, the court concluded that acceptable maintenance was “*limited to maintenance which is not ‘non-standard’ or not ‘unusually onerous’ having regard to normal construction operations and maintenance requirements which are applicable for works of similar nature*”.

Conclusion

The Blackpool case provides useful guidance on the interpretation of a design life requirement, including the interplay with any maintenance obligation which may sit alongside it. Also, it demonstrates that, as a matter of best drafting practice, a contract should provide a definition of

design life and ensure the contract addresses issues such as service life, performance, durability and maintenance. It should also provide in clear and unambiguous wording where obligations as a whole - and design obligations in particular – are limited to a reasonable care standard only, rather than being a strict obligation, if this is what the parties intend.

¹ [2020] EWHC 1523 (TCC)

² [2017] UKSC 59