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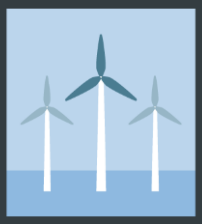
An important Supreme Court judgment for the renewables industry: design life and errors in industry standards



*On 3 August 2017 the Supreme Court handed down judgment in the case between MT Højgaard A/S ("**MTH**") and E.ON Climate and Renewables UK Robin Rigg East Ltd ("**E.On**").*

E.On had engaged MTH to design and install the foundations for 60 offshore wind turbines.

The contract between the parties provided that:

- MTH must use reasonable care and skill.
- the outputs delivered by MTH must be fit for purpose (the purpose being to be in accordance with and as can be inferred from E.On's technical requirements).
- the turbine foundations delivered by MTH must have a 'design life' of 20 years.
- MTH must prepare its detailed design in accordance with an international standard (J101).

It was later discovered that the J101 standard that MTH had followed in designing the wind turbine foundations contained a significant technical error, and in due course a defect emerged in the foundations. This defect was clearly attributable to the error in the J101 standard, which had substantially overstated the load bearing capacity of the foundation connections. E.On carried out £26.25m worth of remedial works on the foundations, the cost of which it claimed from MTH on the basis of breach of contract.

Five key takeaways from the judgment:

1 The meaning of a 'design life' obligation is still not clear, so must be drafted carefully to explain exactly what the parties intend this to mean

2 Where there are different or inconsistent standards in a contract, the more rigorous will apply

3 Errors in an accepted industry standard will not absolve a contractor of responsibility

4 Obligations in technical schedules will be legally binding

5 The literal meaning of the contract will apply – courts will not save a party from a bad bargain

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1. The meaning of a 'design life' obligation is still not clear, so draft carefully to explain exactly what the parties intend this to mean

One of the central questions for the Court was to determine the nature of MTH's obligation in relation to the design of the foundations. The contract included various references to this design life obligation (each worded slightly differently) including:

- the works would be "designed for a minimum site specific 'design life' of twenty (20) years without major retrofits or refurbishments";
- the "design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement"; and
- all "parts of the Works, except wear parts and consumables, shall be designed for a minimum service life 20 years" (sic).

E.On argued that the above provisions, and in particular the reference to "*ensur[ing] a lifetime of 20 years*" amounted to a warranty by MTH that the foundations would last for 20 years. The Court found that whilst "*it would be possible*" to give effect to the design life provisions as a 20-year warranty based on some of the design life wording included in the contract, it preferred the interpretation that they "*did not guarantee that the foundations would last 20 years without replacement, but that they had been designed to last for 20 years without replacement*" (emphasis added).

However, the Court made it clear that in this case it was not necessary to actually decide between these two interpretations (or go into further detail on this issue), because on the facts MTH was in breach either way - it had not designed the foundations to last 20 years.

Spot the difference

1	2
"*The design shall ensure a lifetime of 20 years*"	"*The Plant shall be designed for a minimum design life of 20 years*"

Whilst this judgment does not provide a conclusive determination on the words which will (or will not) amount to a lifetime design guarantee or warranty on the plant (as distinct from just the design), it does make it clear that there are two approaches to "design life" obligations: a warranty/guarantee that a plant will last for 20 years (i.e. option one above), or an obligation to design the plant to last for 20 years (i.e. option two above). The latter will be preferable for contractors, as it is limited to design activities such as decisions on material selection, layout, dimensions, shape and so on, however this limitation may not be acceptable to employers.

Part of the problem in this case was that the contract referred to design life obligations in several places using language which suggested both approaches, making it unclear to the parties (and the Court) which was intended. When using the term design life, both employers and contractors should be very careful to ensure they are clear in the contract which approach is intended.

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2. Where there are different or inconsistent standards in a contract, the more rigorous will apply

MTH argued that the contractual design requirement that the works be carried out to the standard of J101 was inconsistent with the criteria that the works ensure a lifetime of 20 years. The Court held the more rigorous of these two standards (the lifetime of 20 years) must prevail, with the second standard being treated as a minimum requirement.

E.On's case was helped by a provision in the technical requirements specifically stating that the obligations set out therein were "*minimum requirements*". However, the Court made clear that this question would have been decided in the same way even in the absence of such wording based, amongst other things, on the established principle of English law that where there is an inconsistency or error between (i) the design requirements or standards a contractor is required to use, and (ii) the output specification it has agreed to provide, the contractor will be responsible for deviating where necessary from the relevant design/standard in order to provide the required output. Unless the contract specifically states otherwise, this will be true even when the standards have been provided by the client.

3. Errors in an accepted industry standard will not absolve a contractor of responsibility

MTH was held responsible for the rectification works, despite the fact that it had used reasonable skill and care, complied with good industry practice and that the problem emanated from the J101 international standard rather than a failure by MTH.

This was a relatively straightforward issue for the Court to determine, as the technical requirements provided that in addition to complying with J101, MTH had an obligation "*to identify any areas where the works need to be designed to any additional or more rigorous requirements or parameters*". This obligation should have included MTH identifying the error in J101 and the need for a more rigorous approach to ensure that the design met the requirements. However, in reaching its conclusion the Court also referred to the principle set out in section two above – unless a contract states otherwise, it will be the contractor's responsibility to address any inconsistency or error in the specified standards in order to achieve the required output specification.

4. Obligations in technical schedules will be legally binding

MTH used various arguments to try to show that the requirement to design foundations with a lifetime of 20 years should not be binding, including (i) that the parties would not have intended for such a burdensome provision to be "*tucked away*" in the technical schedules, and (ii) as the document was diffuse and multi-authored, the additional and somewhat unclearly drafted requirements relating to the design of the foundations in the technical schedules should be disregarded.

The Court rejected these arguments out of hand, stating that there was a *"powerful case"* from both the wording, and particularly the headings, of the technical requirements that the parties intended them to amount to binding warranties or terms.

5. The literal meaning of the contract will apply – courts will not save a party from a bad bargain

The Court took the opportunity to issue a reminder that parties who enter into contracts will be bound by their bargain. This will be the case even where a party can show that *"an unanticipated difficulty or impossibility"* arose in achieving the result required by the contract.

The Supreme Court agreed with the characterisation of the contract as involving documents of "*multiple authorship*" containing "*much loose wording*". Despite this, it found that it was clear from the wording of the contract and its technical specifications that the contractor had a duty to provide foundations that had been designed with a lifetime of 20 years, notwithstanding the error in the J101 which caused the design issue.

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