

TOO SLENDER A THREAD?

- ▶ The Supreme Court has reversed the Court of Appeal's decision in *MT Højgaard A/S v E.On Climate and Renewables UK Robin Rigg East Ltd* [2017] UKSC 59.
- ▶ The Supreme Court found that MT Højgaard (MTH) had breached a fitness for purpose (FFP) obligation as to the design life of the works. In doing so, the Court adopted the more rigorous of two inconsistent obligations.
- ▶ However, although eagerly anticipated, does this decision set any new precedent?

What is it about?

In our Spring 2017 edition we considered the judgment of the Court of Appeal in this case ([2015] EWCA Civ 407), which concerned the failure of wind turbine foundations designed, fabricated and installed by MTH. The failure arose as a result of a mistake within the relevant industry standard (J101) to which MTH had designed the foundations.

The central issue was whether MTH was under a FFP obligation to achieve a 20 year design life, or instead a lesser obligation to design in accordance with J101 using reasonable skill and care.

The Court of Appeal favoured the latter interpretation. Although the contract terms contained some express FFP wording, the Court held that this wording was subject to a reasonable skill and care qualification. Secondly, although some provisions of the technical schedules appended to the contract required a 20 year design life, the Court considered those provisions to be inconsistent with the requirement to design in accordance with J101, and in any event "too slender a thread" on which to hang an FFP obligation.

By a unanimous decision the Supreme Court reversed the lower court's decision. Firstly, although the contract contained ambiguities and inconsistencies, the Court found that the above technical provisions were effective contractual obligations, irrespective of their location within the technical schedules. As contractual obligations, the Court could not disregard their meaning. Secondly, the Court held that a correct analysis of the contract required that the more rigorous of those obligations must prevail in the event of an inconsistency – namely the FFP obligation to achieve a 20 year design life.

Why does it matter?

It is not uncommon for contracts to contain a number of diffuse design obligations, particularly where the various contract documents are prepared by different authors. When read together, the true meaning of these obligations can be unclear.

This case emphasises the importance of clear drafting, and ensuring that the legal terms of a contract and any appended technical content are aligned. Equally the respective judgments illustrate just how differently an ambiguously drafted contract might be interpreted by different parties, and what extreme results that could produce. For example, the Supreme Court's decision means MTH is liable for the €26.25 million cost of remedial works.

Now what?

The Supreme Court's decision has caused some concern that the courts will now readily adopt a more rigorous obligation in the event of an inconsistency. It is however questionable whether the Supreme Court has set any new precedent in this respect, or whether it was just following existing authorities on contractual interpretation. In particular, although the Court considered a range of authorities that supported a FFP obligation, it stressed that each case must turn on its own facts. In the present case, the Court explained that it was adopting the more rigorous FFP obligation because the express wording of the relevant provisions (which were stated to be minimum requirements) did not support a reasonable skill and care obligation to design in accordance with J101.

Either way, this case will likely encourage contractors (and their insurers) to pay close attention to design obligations, and the corresponding wording of any technical schedules. Employers therefore need to be clear as to what standard of design responsibility is expected, and ensure that this is communicated to tendering contractors (and those involved in preparing contract documents) at an early stage. Equally, care must be taken when negotiating such provisions, to ensure that their meaning is not inadvertently distorted or undermined by the inclusion of poorly drafted amendments.

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