"Fitness for Purpose" Obligations in Construction Contracts

The Supreme Court decision in *MT Højgaard v E.ON*

By Paul Buckingham

In a rare decision concerning a construction contract, the Supreme Court held that a "fitness for purpose" obligation contained within a schedule to a construction contract was to be given its natural meaning and effect, and that the warranty of fitness was not inconsistent with the other terms of the contract.

The ruling sets aside the decision of the Court of Appeal and restores an earlier judgment of the Technology and Construction Court, which had held that the fitness for purpose obligation required the contractor to achieve a result, namely that the foundations would last for 20 years. The case affirms the position that the courts are inclined to give full effect to the terms of a contract and to a requirement that a product complies with the contractual specification.

Background

The matter arose out of the construction of the Robin Rigg offshore wind farm, located in the Solway Firth on the North West coast of Britain. MT Højgaard ("MTH") was engaged as the design and build contractor for the foundations by the operator, E.ON Climate and Renewables ("E.ON"). The windfarm was to be built to the offshore code DNV-OS-J101, which included guidelines for the design of the grouted connection between the transition pieces and the monopiled foundations. One of the inherent characteristics of the code was that it provided for a probabilistic design, which did not guarantee performance. In other words, there was always an inherent risk that the foundation might fail if, for example, the 100 year wave came in the first operational year of the windfarm. This meant that there was always a risk of failure, albeit a very low risk (being in the range 10-4 to 10-5), which had to be allocated contractually between the parties.

However, in 2009, slippage of the transition pieces at the Egmond aan Zee windfarm led to the discovery of a fundamental problem within the code: the calculation of the axial strength for plain pipe grouted connections was overestimated by a factor of about ten, with the result that connections designed to the code were bound to fail (although this problem did not affect two UK offshore windfarms which had been designed using shear keys within the grouted connection).

In 2010, E.ON inspected the Robin Rigg windfarm, noted that slippage had occurred and notified MTH of a defect under the contract. The parties subsequently reached agreement on the cost of remedial works in the sum of €26.25 million, leaving it for the court to decide which of them should bear the cost.

Procedural History

In the Technology and Construction Court, Mr Justice Edwards-Stuart held that MTH had not been negligent in the design of the grouted connection but that it was nonetheless responsible for the cost of the necessary rectification work by reason of a breach of the "fitness for purpose" obligation within the contract with E.ON. MTH appealed.

The Court of Appeal allowed MTH's appeal, deciding that there was no 'fitness for purpose' obligation within the contract. It noted that the industry expected compliance with the well known J101 standard, but that it was also generally known that compliance with J101 did not

guarantee that the foundation would have an operational life of 20 years. It said that, whilst two paragraphs of the Technical Requirements at first sight constituted a 20 year warranty, all the other provisions of the contract pointed the other way, referring to a 'design life' and the requirement to exercise reasonable skill and care in the design of the foundations. The Court of Appeal considered that the paragraphs within the Technical Requirements were "too slender a thread" upon which to hang a finding that MTH had warrantied a 20 year lifetime for the foundations. E.ON appealed to the Supreme Court.

> *"The primary question which the court had to answer was whether the clause ... meant that MT Højgaard had warrantied a 20 year lifetime for the foundations, or that MT Højgaard only had to design with reasonable care and diligence."*

"Fitness for Purpose" Obligation

MTH's general obligations were set out in the Conditions of Contract as follows:

> ***"8.1 General Obligations***
> *The Contractor shall, in accordance with this Agreement, design, manufacture, test, deliver and install and complete the Works:*
>
> *(i) with due care and diligence expected of appropriately qualified and experienced designers, engineers and constructors (as the case may require);*
> *...*
>
> *(x) so that each item of Plant and the Works as a whole shall be free from defective workmanship and materials and fit for its purpose as determined in accordance with the Specification using Good Industry Practice..."*

Within the Technical Requirements (which the parties agreed was the intended reference to the Specification in clause 8.1(x)), it stated that:

> ***"3.2.2.2 Detailed Design Stage***
> *The detailed design of the foundation structures shall be according to the method of design by direct simulation of the combined load effect of simultaneous load processes (ref: DNV-OS-J101)....*
>
> *The design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement. The choice of structure, materials, corrosion protection system operation and inspection programme shall be made accordingly."*

The primary question which the court had to answer was whether the clause 8.1(x), when read with clause 3.2.2.2 of the Technical Requirements, meant that MTH had warrantied a 20 year lifetime for the foundations, or that MTH only had to design with reasonable care and diligence following the design methodology in J101.

In giving the judgment of the court, Lord Neuberger was of the view that the natural meaning of paragraph 3.2.2.2 of the Technical Requirements involved MTH warranting either that the foundations would have a lifetime of 20 years or agreeing that the design of the foundations would be such as to give them a lifetime of 20 years. In those circumstances, he considered that there were only two arguments realistically open to MTH as to why the paragraphs should not be given their natural meaning, both of which were mutually reinforcing.

> *"... where different or inconsistent standards were imposed, the correct analysis was that the more rigorous or demanding of the two requirements must prevail..."*

The first argument was that the warranty would be inconsistent with the obligation to comply with J101. Lord Neuberger reviewed the approach of the English (and Canadian) courts and concluded that they were generally inclined to give full effect to a requirement that an item produced complied with the prescribed criteria on the basis that, even if the employer had specified or approved the design, it is the contractor who would be expected to take the risk:

> *"...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."*

He noted that compliance with J101 was stated in the contract to be one of *the "**MINIMUM** requirements" of E.ON* and concluded that, where different or inconsistent standards were imposed, the correct analysis was that the more rigorous or demanding of the two requirements must prevail (as the less rigorous standard could properly be treated as a minimum requirement):

> *"...if there is an inconsistency between a design requirement and the required criteria, it appears to me that the effect of para 3.1(ii) would be to make it clear that, although it may have complied with the design requirement, MTH would be liable for the failure to comply with the required criteria, as it was MTH's duty to identify the need to improve on the design accordingly."*

The second argument was that the operative paragraphs were *"too slender a thread"* upon which to hang such an important and potentially onerous obligation. Whilst the contract was long and multi-authored, Lord Neuberger did not believe that it altered the court's approach to the proper interpretation of the contractual documents:

> *"...the court has to do its best to interpret the contractual arrangements by reference to normal principles. As Lord Bridge of Harwich said, giving the judgment of the Privy Council in Mitsui Construction Co Ltd v Attorney General of Hong Kong (1986) 33 BLR 7, 14, "inelegant and clumsy" drafting of "a badly drafted contract" is not a "reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language that they have used interpreted in the light of the relevant factual situation in which the contract was made", although he added that "the poorer the quality of the drafting, the less willing any court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention."*

Applying those principles, Lord Neuberger considered that paragraph 3.2.2.2 was clear in its terms in imposing a duty on MTH that the foundations would have a lifetime of 20 years. He was *"not impressed"* with the argument that it would be surprising that the operative obligation was in an essentially technical document, rather than being spelled out in the contract itself, nor was he persuaded by the argument that the operative obligation should not have been *"tucked away"* within the Technical Requirements. Lord Neuberger thought that it was *"scarcely surprising"* that a provision in the Technical Requirements addressing specific conditions at the detailed design stage included a provision of fitness for purpose.

> *"...parties would be well advised to ensure that the operative words are clear and unambiguous."*

He also did not see why this could be said to be an improbable or unbusinesslike interpretation that should be given no meaning:

> *"I accept that redundancy is not normally a powerful reason for declining to give a contractual provision its natural meaning especially in a diffuse and multi-authored contract (see In re Lehman Bros International (Europe) (in administration) (No 4) [2017] 2 WLR 1497, para 67). However, it is very different, and much more difficult, to argue that a contractual provision should not be given its natural meaning, and should instead be given no meaning or a meaning which renders it redundant."*

E.ON's appeal was accordingly allowed and the order of the TCC restored, holding that MTH had warrantied that the foundations would have a 20 year life.

Conclusions

It is typical in construction contracts, both domestically and internationally, for the purpose of the project to be defined in the technical requirements of the contract.[1] The Supreme Court has confirmed that there is nothing inherently wrong with allocating risk in this way, although parties would be well advised to ensure that the operative words are clear and unambiguous.

In addition, the Supreme Court has confirmed that in contracts of double obligation, whereby there is an express contractual performance warranty in addition to a requirement that the contractor complies with a particular specification put forward by the employer, that the more onerous of the obligations is enforceable, even where the defect is the result of the employer's specification.

1 see, for example, the approach in the FIDIC Yellow Book (1999 Edition) and the IChemE Red Book (2013 edition)