

# Client Update

## UK Supreme Court Finds that Fitness for Purpose Warranty Is Not Limited by Obligation to Comply with Defective Standard

On 3 August 2017, the Supreme Court delivered its judgment in *MT Højgaard A/S v. E.ON Climate & Renewables UK Robin Rigg East Limited and another* [2017] UKSC 59. The court considered the important question of the allocation of risk where a design and build contractor bids on the basis of a defective specification provided by the employer. The court ruled that the defective specification did not absolve the contractor of responsibility for complying with an express warranty of fitness for purpose.

### BACKGROUND

E.ON Climate & Renewables (“E.ON”) had contracted MT Højgaard A/S (“MTH”) to design, fabricate and install the monopile foundations for 60 offshore wind turbine generators. The monopiles consisted of cylindrical steel piles driven into the seabed. Each monopile was topped by a transition piece that consisted of a steel cylinder with a larger diameter. The transition pieces were held in place by a grouted connection in compliance with J101, an international standard for the design of offshore wind turbines and grouted connections produced by Det Norske Veritas. The J101 standard, however, was flawed, and compliance with it resulted in a design that rendered the grouted connection defective. This resulted in the failure of the connections, which necessitated remedial work in the sum of €26.25m.

### THE ISSUE BEFORE THE SUPREME COURT

The issue for determination was whether MTH was liable for the failure of the connections. The contract “required MTH to prepare the detailed design of the foundations in accordance with ... J101”. The Technical Requirements (“TR”), which had been incorporated into the contract, provided “[t]he design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement. The choice of structure, material, corrosion protections system operation and inspection programme shall be made accordingly.”

The central question on appeal to the Supreme Court was whether, despite exercising due care and professional skill, adhering to good industry practice and complying with J101, MTH was nonetheless in breach of contract.

### THE DECISION OF FIRST INSTANCE

The judge in the lower court found that the foundations were required to have a service life of 20 years and that this was in addition to, and not inconsistent with, the obligation to comply with J101. There had been no negligence or want of professional skill by either party. However, since the foundations did not have a service life of 20 years, the judge held that MTH was in breach of contract.

The court made declarations that MTH's design of the foundations and/or grouted connections was:

- not fit for purpose in breach of Clause 8.1(x), which provided that “the Contractor shall, in accordance with this Agreement, design, manufacture, test, deliver and install and complete the Works ... so that each item of Plant and the Works as a whole shall be fit for its purpose as determined in accordance with the Specification using Good Industry Practice”; and
- not wholly in compliance with the Employer's requirements in breach of Clauses 8.1(viii) and (xv), which provided that “the Contractor shall, in accordance with this Agreement, design, manufacture, test, deliver and install and complete the Works ... (viii) so that the Works, when completed, comply with the requirements of the Agreement ... [and] ... (xv) so that the design of the Works and the Works when completed by the Contractor shall be wholly in accordance with this Agreement and shall satisfy any performance specifications or requirements of the Employer as set out in this Agreement”.

### THE DECISION OF THE COURT OF APPEAL

The Court of Appeal reversed the first instance judgment. It held that there was an inconsistency between the requirement to “ensure a lifetime of 20 years in every aspect without planned replacement” and all the other contractual provisions. In particular, the Court of Appeal observed that all the other provisions in the TR were directed towards a design life, noting that “[i]f a structure has a design life of 20 years, that does not mean that inevitably it will function for 20 years, although it probably will.” The court also stated that it would have expected any absolute warranty of quality to be included in the main provisions of the contract, “not tucked away in the [TR]...a detailed document which comes fourth in the order of precedence.”

The Court of Appeal found that Clause 8.1 contained no free standing warranty that the foundations would have a 20-year life. The requirement for the works to be fit for purpose was qualified by the phrase “as determined in accordance with the Specification using Good Industry Practice”. These terms were defined by reference to the requirement to exercise reasonable skill

and care and compliance with J101. The Court of Appeal held that the requirement to ensure a design life of 20 years contained in the TR was inconsistent with all other contractual provisions and was “too slender a thread upon which to hang a finding that MTH gave a warranty of 20 years life for the foundations.”

### THE DECISION OF THE SUPREME COURT

The Supreme Court allowed E.ON’s appeal and restored the order made at the first instance.

The Supreme Court held that the natural meaning of the words in the TR “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.” The Supreme Court stated that the only two arguments available to MTH as to why these words should not be given their natural effect was that: (i) such an interpretation results in an obligation that is inconsistent with MTH’s obligations to comply with J101; and (ii) they were “simply too slender a thread on which to hang such an important and potentially onerous obligation”.

First, as to the inconsistency argument, the court stated:

Where a contract contains terms which require an item (i) which is to be produced in accordance with a prescribed design, and (ii) which, when provided, will comply with prescribed criteria, and literal conformity with the prescribed design will inevitably result in the product falling short of one or more of the prescribed criteria, it by no means follows that the two terms are mutually inconsistent. ... in many contracts, the proper analysis may well be that the contractor has to improve on any aspects of the prescribed design which would otherwise lead to the product falling short of the prescribed criteria, and in other contracts, the correct view could be that the requirements of the prescribed criteria only apply to aspects of the design which are not prescribed. While each case must turn on its own facts, the message from decisions and observations of judges in the United Kingdom and Canada is that 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.

The opening provision of the relevant section of the TR provided that “the requirements contained in this section ... are the MINIMUM requirements of [E.ON] to be taken into account in the design”. It went on to provide that it is “the responsibility of [MTH] to identify any areas where the works need to be designed to any additional or more rigorous requirements or parameters”. The court held that on the correct analysis of these opening provisions, where

there is an inconsistency between subsequent provisions in this section, “the more rigorous or demanding of the two standards or requirements must prevail, as the less rigorous can properly be treated as a minimum requirement”.

Second, the court rejected all of the factors relied upon by MTH in support of its argument that the TR was too weak a basis on which to rest a contention that MTH warranted that the foundations would survive for 20 years, or would otherwise be designed so as to achieve 20 years of lifetime. The court held that the language in the TR was “clear in its terms in that it appears to impose a duty on MTH which involves the foundations having a lifetime of 20 years”.

### TAKEAWAYS

Although each case will turn on its own facts, the Supreme Court’s decision confirms that the courts will generally give full effect to a requirement that an item or work complies with prescribed criteria.

This case serves as a careful and important reminder that, when a contractor agrees to develop a design in accordance with codes or standards specified by an employer and meet the more rigorous requirements of a fitness for purpose clause, the fitness for purpose clause generally will govern. A contractor’s obligations will not be qualified even if the employer has approved a design or specified a design standard that is insufficient to meet other specified criteria.

The court stated that “... 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”. Whether this risk allocation will be applied in circumstances where a contract contains irreconcilable inconsistencies remains to be seen. In the present case, the court found a basis in the contract to resolve potential inconsistencies between the relevant standards and requirements by finding that the more rigorous or demanding standards would prevail.

Parties should consider very carefully whether the language in their contract accurately reflects their intention as regards the allocation of risk. In particular, parties should consider incorporating express provisions that deal with circumstances in which a design requirement contained in a technical schedule might impose a more rigorous obligation than those required by an approved design or specified design standard.

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Please do not hesitate to contact us with any questions.

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