Consultant may be liable for non-negligent breach of strict obligations in an appointment notwithstanding that they are subject to an overarching obligation to use “reasonable skill and care”

In this case, the court had to consider the terms of an appointment which required the consultant to use reasonable skill and care on the one hand, and to carry out its design in compliance with an output specification and a delivery plan (akin to a fitness for purpose obligation) on the other hand. Following an adjudicator’s decision in favour of the consultant, the claimant contractor applied for a declaration from the court as to the proper construction of the relevant terms of the appointment.

The appointment related to an EPC contract for the engineering, procurement and construction of an energy from waste plant in Horsham. MW High Tech (“MWHT”) were the EPC contractor. Prior to entering into the EPC contract, MWHT had appointed Haase Environmental Consulting (“HEC”) to provide design services under a letter of intent. HEC completed a basic design proposal which was included in the EPC delivery plan agreed between MWHT and the employer.

MWHT and HEC subsequently agreed a formal appointment and the services carried out by HEC under the letter of intent were subsumed into the appointment. Clause 5.9.1 of the appointment required HEC to use “all the reasonable skill, care and diligence to be expected of properly qualified and competent design professional experienced in the design of works similar in size, scope nature and complexity to the Process Technology.”

The appointment also required HEC to design the EPC works in accordance with the EPC output specification and the EPC delivery plan (together referred to in this briefing note as the “EPC Requirements”). The appointment included the following terms:

Key issues:

+ The case concerned allegations by the contractor of “over-design” by the consultant after the award of the EPC contract in respect of an energy from waste plant in Horsham.

+ Following an adjudication in which the adjudicator had decided in favour of the consultant, the issues before the court included

  + whether the consultant was subject to a strict obligation to provide a design which complied with the EPC contract requirements; and

  + whether the consultant could in principle be liable for additional costs incurred by the contractor as a result of design “betterment” which exceeded the contractual requirements.

+ The court held in favour of the contractor on both issues, subject only to limited qualifications.
11.3 subject to the terms of this Appointment the Consultant shall design, commission and test the Process Technology:

11.3.1 in accordance with the EPC Output Specification and schedule 16;

11.3.2 in accordance with the EPC Delivery Plan.

11.4 subject to the Consultant’s overriding obligations to exercise reasonable skill and care as more particularly provided in Clause 5.9.1

11.4.1 the fact that the Consultant has complied with the EPC Output Specification but not the EPC Delivery Plan shall not be a defence to an allegation that the Consultant has not satisfied the EPC Delivery Plan

MWHT based their tender to the employer on the basic design proposal produced by HEC. After MWHT and HEC had entered into the formal appointment, HEC had developed the design to include features not present in the basic design, including a more highly specified agitator than that allowed for by MWHT in its tender, requiring a greater power input. MWHT alleged that the new features were not required by the EPC Requirements, but had caused MWHT to incur increased costs. As the additional features would not be treated as variations under the EPC contract, MWHT could not recover those additional costs from the employer. MWHT accordingly claimed the additional costs from HEC.

The matter went to adjudication where the adjudicator ruled in favour of HEC stating: “If the design is carried out with reasonable skill and care, then the fact that it would cost M&W more to implement that design cannot be a breach of contract. To say otherwise makes HEC the guarantor of both the design and the price and I think it would require very clear words to place a consultant rather than an EPC contractor in that position.”

MWHT disputed the adjudicator’s decision and commenced proceedings seeking a declaration for an authoritative interpretation of the appointment. MWHT argued that under the appointment there were two separate duties: (i) to use reasonable skill and care in carrying out the services under the appointment and (ii) to design the work in accordance with the EPC Requirements. According to MWHT the latter requirement was a strict obligation and failure to comply, even if could not be shown that HEC had
been negligent, would be a breach of the appointment. MWHT sought a declaration from the court that this was the correct interpretation of the contract.

The court held that on a proper construction of the appointment, the requirement to comply with the EPC Requirements was “subject to the Consultant’s overriding obligation to exercise reasonable skill and care as more particularly provided in clause 5.9.1.” In its analysis of the appointment the court concluded that “[i]n the hierarchy of the principal obligations, the obligation to exercise reasonable skill and care is paramount.” Coulson J, however, found that as a matter of proper contractual construction, the obligation to comply with the EPC Requirements could be read as an independent obligation alongside the over-riding obligation to take reasonable skill and care. The only qualification to the strict requirement to comply with the EPC Requirements would be if it would be negligent for HEC to design in accordance with a certain part of the latter they would not be obliged to comply with that part of the EPC Requirements.

Coulson J’s reasoning may be considered alongside the judgment in Costain v Haswell & Partners Ltd [2009] EWHC 3140 (TCC), although this case was not cited. In Costain the consultant’s appointment contained a duty of reasonable skill and care and a further provision which required that “Any part of the works designed pursuant to this agreement...shall meet the requirements described in the specification.” The court held that the latter obligation was a parallel obligation which was not subject to the duty of reasonable skill and care. Accordingly, any breach of the strict obligation, even if non-negligent, would be a breach of the appointment. Coulson J reached a similar conclusion in MW High Tech, notwithstanding that the “strict” obligations were subject to the obligation to exercise reasonable skill and care.

MW High Tech will be of concern to Consultants since it appears that even if a “strict obligation” is expressed to be subject to an over-riding obligation to exercise reasonable skill and care, it may not be covered by PI insurance. Indeed, a “reasonable skill and care” qualification may actually serve to increase the consultant’s liability rather than reducing it since compliance with a strict obligation could put the consultant in breach of its skill and care obligation.

This judgment should dispel any complacency on the part of consultants who may have taken comfort from earlier case-law in which the courts had been clear that the default obligation of a professional is limited to the exercise of
reasonable care and that it requires special facts or clear language to impose an obligation stricter than that of reasonable care (see for example the Court of Appeal judgment of in Platform Funding v Bank of Scotland plc [2008]).

The lesson for consultants from MW High Tech is clear: in order to be sure that an appointment does not impose “fitness for purpose” and other strict obligations which may not be backed by PI insurance, it is crucial to ensure that any “strict” obligations in the appointment are expressly qualified by wording such as “The Consultant shall exercise the standard of skill and care required by clause [ ] to see that...”.

Coulson J also took issue with the adjudicator’s reasoning in relation to the question of HEC’s potential liability for any additional costs incurred by MWHT as a result of a breach of its obligations under the appointment. He held that HEC could in principle be liable for a failure to comply with the EPC Requirements, and that this would include liability for any costs incurred by MWHT as result of the over-design if it was established that the additional features in question were not required by the EPC Requirements. While Coulson J was not in a position to give a finding on the question of whether HEC was in breach of the appointment (and had not been asked to do so), he gave some pointers as to the types of the evidence which would be relevant in this connection.

The case is a reminder to consultants that the nature and extent of their duty of care will depend on the precise terms of their appointment, and that obligations to comply with contractual specifications should be treated with particular care.

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