The devil is in the detail: Supreme Court rules on fitness for purpose, overturning the Court of Appeal decision in MT Højgaard A/S

Contractor held to be in breach of contract for a fitness for purpose obligation which was to be determined by reference to a ‘Technical Requirements’ schedule, despite the main contract terms including obligations to use due care and professional skill and to comply with international design standards.

In a judgment issued on 3 August 2017, the Supreme Court has overruled the Court of Appeal decision in the case of MT Højgaard A/S v E.ON Climate and Renewables UK Robbin Rigg East Limited and Anor [2017] UKSC 59, restoring the TCC first instance finding that the contractor (MT Højgaard A/S) was liable to comply with a fitness for purpose obligation contained within a technical requirement schedule, despite potentially conflicting obligations to exercise “due care and professional skill” and compliance with international standards contained within the main contract terms. This decision will have consequences for the interpretation of construction contracts which incorporate technical requirements or specification documents. It is also a timely reminder that dual obligations (such as reasonable skill and care and fitness for purpose warranties) and onerous duties, may be contained in often overlooked schedules or documents referred to in main contract provisions.

Background

On 20 December 2006, MT Højgaard A/S (“MTH”) and E.ON Climate & Renewables UK (“E.ON”) entered into a written contract (“the Contract”), under which MTH was engaged to design, fabricate and install the foundation structures for 60 offshore wind turbines at the Robin Rigg offshore windfarm in
Solway Firth. Having been selected as the design and build contractor of the wind farms (the “Works”), MTH began in 2007, with construction of the wind turbine foundations.

The Contract comprised what appeared to be conflicting obligations and technical requirements. The conditions of the Contract required MTH to design, manufacture, test, deliver and install and complete the Works using due care and professional skill and also to ensure that the Works were fit for purpose. Fitness for purpose was to be determined by reference to adherence with the Technical Requirements (“the Technical Requirements”). The Technical Requirements formed part of the Employer’s Requirements of the Contract and were below the conditions of the Contract in the order of precedence.

The Technical Requirements required the foundations to be designed so that they:

1. complied with an international standard for the design of offshore wind turbines, known as J101; and,
2. ensured a lifetime of 20 years in every respect.

The Technical Requirements stated that these obligations were a “MINIMUM.” The Contract and J101 also included separate obligations to achieve a design life of 20 years.

The Works were completed in 2009. Shortly thereafter, the foundation structures for the offshore wind farms failed well within 20 years as a result of a calculation error which was contained within J101, and not known about at the time the Contract was entered into. The calculation error meant that the strength of the foundation structures had been substantially over-estimated. The parties agreed that E.ON would develop a scheme of remedial works which were commenced in 2014. The dispute concerned who should be responsible for the costs of the remedial works, which were valued at €26.25 million.

E.ON issued proceedings in the TCC for the recovery of the remedial works costs. MTH argued that it had exercised due care and professional skill and complied with its contractual obligations to produce a design compliant with J101. E.ON submitted that the foundations did not achieve a lifetime of 20 years, which is what E.ON alleged MTH had warranted.
The Technology and Construction Court decision

In April 2014, the TCC found in favour of E.ON primarily on the grounds that:

(i) the Contract required the Works to be fit for purpose;
(ii) fitness for purpose was to be determined by reference to the Technical Requirements; and
(iii) the Technical Requirements required that the design of the foundations should ensure a lifetime of 20 years in every aspect without planned replacement; and,

as the Works were not in compliance with the above, MTH were liable for the remedial works costs.

The Court of Appeal decision

MTH appealed and the Court of Appeal overturned the TCC first instance decision in May 2015. The Court of Appeal held that if one was confined to the Technical Requirements, MTH’s obligation to ensure a lifetime of 20 years appeared to be a warranty that the foundations would function for 20 years.

However, given the inconsistencies between the obligations under the Technical Requirements (which required MTH to achieve a lifetime of 20 years) and the Contract (which required MTH to exercise “due care and professional skill” and achieve a design life of 20 years), the Court of Appeal held that this requirement of the Technical Requirements was “too slender a thread” upon which to hang a finding that MTH had given a lifetime warranty of 20 years for the foundations. (To read our article on the Court of Appeal’s decision, please click here.)

The Supreme Court decision

E.ON appealed the Court of Appeal decision. E.ON submitted that the Contract did impose a fitness for purpose obligation on MTH amounting to a warranty that the foundations should have a lifetime of 20 years. In defence, amongst other points, MTH contended that the Technical Requirements were “in their nature technical rather than legal” and could not impose onerous obligations over and above the contractual obligations, in the absence of like terms being included within the Contract itself.

The central question before the Supreme Court was whether, in light of the obligation to ensure a lifetime of 20 years in the Technical Requirements,
MTH was in breach of contract despite MTH using “due care and professional skill”, adhering to Good Industry Practice and complying with J101.

By a unanimous decision, the Supreme Court overturned the Court of Appeal’s decision and restored the first instance TCC decision; MTH was liable for the fitness for purpose obligation. The Supreme Court held:

- The natural meaning of a “lifetime of 20 years” amounted to an agreement by MTH that (i) the foundations would have an actual lifetime of 20 years; or (ii) that they would be ‘designed’ to have a lifetime of 20 years. However, as the foundations did not have a lifetime of 20 years nor did their design ensure one; the effect of the Technical Requirements was to render MTH liable.

- The Technical Requirements were incorporated into the Contract as, amongst other things, they were included in the contractual documentation.

- There are a number of authorities where contractors accepted obligations to produce an item in accordance with a prescribed design and to comply with a prescribed criteria; “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”.

- There was no inconsistency between the requirements in the Technical Requirements (to achieve a lifetime of 20 years) and the Contract/J101 (to achieve a design life of 20 years). The Technical Requirements expressly provided only a “MINIMUM” obligation. It was MTH’s responsibility to identify areas where the Works were needed to be designed in a “more rigorous or demanding” way. As such, the obligation in the Technical Requirements would “prevail” over the “less rigorous” provisions in J101 and the Contract.

- The “too slender a thread” argument held by the Court of Appeal should be dismissed. The Supreme Court was “not impressed” with MTH’s argument that the Technical Requirements were only technical documents, not intended to impose additional further and
onerous obligations as they were not set out in express terms in the Contract itself. The Supreme Court concluded that it was clear from the terms of the Contract that the provisions of the Technical Requirements were intended to be of full contractual effect.

Comment

The decision by the Supreme Court in the *MT Høegh A/S* case will have significant implications in the interpretation of construction contracts. Construction contracts regularly incorporate specifications, technical documents and employer’s requirements; sometimes with more onerous obligations than the conditions of contract themselves.

The judgment highlights that obligations, such as fitness for purpose warranties, which are “tucked away” in technical specifications and/or schedules to a contract can still impose additional duties on contractors and/or consultants, despite overarching obligations in the primary contract documents to exercise reasonable skill and care.

The judgment also highlights that contracts can impose dual obligations. For those with design responsibility, this calls into question whether a reasonable skill and care or fitness for purpose obligation takes precedence. Further, we often see fitness for purpose obligations which are “subject to reasonable skill and care”. Following this case, in our view, there is a real risk that the “subject to reasonable skill and care” wording does little to water down a fitness for purpose warranty given the risk of dual obligations.

With this in mind, contractors and consultants alike are advised to review their obligations carefully to ensure they are properly drafted to reflect what the parties understood the contract to require. It is important to review, from a legal point of view, ‘technical’ schedules and documents referred to in or appended to contracts to ensure that duties, obligations and scope are no wider than intended by the contracting parties. This is because, as was demonstrated in this case, the literal interpretation of contract provisions may be given weight by the courts. Parties may also wish to consider express wording in contract conditions to address how (if at all) technical schedules or appendices affect contractual obligations. This may include wording giving priority to the contractual provisions over the technical standards and highlighting that the technical schedules impose no greater or longer lasting duties.

For further information please contact:

**Nathan Modell**
Partner
T: +44 (0) 20 7469 0442
E: n.modell@beale-law.com

**Simii Sivapalan**
Solicitor
T: +44 (0) 20 7469 0403
E: s.sivapalan@beale-law.com

**Sophie-Rose Bowen**
Trainee Solicitor
T: +44 (0) 20 7469 0413
E: s.bowen@beale-law.com

August 2017