

Cordells Rompotis

August 2017

Construction Law Case Note

Design & Build Design Liability

MT Højgaard A/S v E.ON Climate & Renewables & Ors [2017] UKSC 59

In a decision handed down on 3rd August 2017, the Supreme Court of England found a contractor liable to the employer for the design of foundation structures of two offshore wind farms notwithstanding that the design complied with J101, an international standard specified in the technical requirements.

Facts

J101 is an international standard for the design of offshore wind turbines published by Det Norske Veritas, an independent classification and certification agency based in Norway, providing "an internationally acceptable level of safety by defining minimum requirements for structures and structural components". However, the contract imposed a more stringent standard, requiring that the foundations be designed to last for 20 years.

Para 3.2.2.2(ii) of the technical requirements required that "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 foundation structures failed shortly after completion of the project. It was discovered that the axial capacity of the grouted connections in wind farm foundations at various locations had been substantially over-estimated. This was due to an error in the equation contained in J101 and adopted by MTH in the design and construction of grouted connections.

Court of Appeal decision

In finding the contractor not liable for the failed grouted connections, the court below held that there was an inconsistency between the so-called warranty on the part of MTH that the foundations will function for 20 years on one hand and all the other contractual

provisions on the other hand, and that the other contractual provisions should prevail. The former was described as "too slender a thread upon which to hang a finding that MTH gave a warranty of 20 years life for the foundations".

The employer appealed.

Supreme Court decision

Overturning the Court of Appeal, the Supreme Court held the contractor liable to the employer for the failed foundations.

Lord Neuberger concluded that the contractor could 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. This conclusion was supported by the fact that the contract specifically provided that :-

The requirements ... are the MINIMUM requirements of E.ON to be taken into account in the design;

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; and

The Contractor's Foundation Design Basis document may include "departures from ... standards" (J101 is expressly treated as a "standard" in the technical requirements).

The court rejected the argument that there was tension between the terms imposing a lifetime of 20 years and the other contractual provisions.

Where there are different or inconsistent standards or requirements, the correct analysis, instead of concluding that they are inconsistent, is that the more rigorous or demanding of the two standards or requirements must prevail, as the less rigorous could properly be treated as a minimum requirement.

As to the inconsistency between a design requirement and the required criteria, the court was of the view that it was the contractor's duty to identify the need to improve on the design.

Finding that the contract was clear in its terms in that it imposed a duty on the contractor to ensure the foundations had a lifetime of 20 years, the Supreme Court stated that this could not be said to be an "improbable or unbusinesslike" interpretation.

Accordingly, while the contractor may have complied with the design requirement, the contractor was liable for the failure to comply with the required criteria.

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