

UK Supreme Court upholds fitness for purpose warranty

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Earlier this month the UK Supreme Court in *MT Højgaard AS v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2017] UKSC 59 held that a contractor had warranted a twenty year service life, via a fitness for purpose obligation, despite the fact that the service life specification was set out in the depths of a technical document. This is the most prominent case in a number of recent judgments where the UK courts have considered fitness for purpose obligations.

Under a fitness for purpose obligation in a construction contract, the contractor guarantees that the works will comply with whatever requirements the employer specifies in the contract. If the contractor fails to meet the employer's requirements it will be in breach of the warranty, even in the absence of any negligence on its part and regardless of how diligently it tried to meet the employer's requirements.

Background to the Supreme Court case

The background to the dispute is as follows:

- Under a contract for €101.45 million, *E.ON Climate and Renewables UK Robin Rigg East Ltd*, and *E.ON Climate and Renewables UK Robin Rigg West Ltd* ("**E.ON**") engaged *MT Højgaard A/S* ("**Højgaard**") as contractor to design and build 60 offshore wind turbines in the Solway Firth ("**Contract**").
- The turbine foundations were found to be defective shortly after completion. E.ON considered Højgaard liable for the defect, due to breach of a fitness for purpose obligation under the Contract.
- The defect in the turbine foundations arose due to an inaccuracy in an internationally recognised design standard, DNV-OS-J101 ("**J101**"), which Højgaard was required to comply with under the terms of the Contract.

Højgaard denied liability for the defect. It maintained that it was not in breach of the Contract due to the fact that it had complied with J101, and exercised reasonable skill and care (as required by the Contract).

However, in addition to the standard of care provision, and the requirement to comply with J101, the Contract contained an obligation requiring the works to be fit for purpose in accordance with the criteria specified in the "*Employer's Requirements*". The Employer's Requirements contained a technical document which noted that the turbine foundations should have a service life of twenty years. E.ON therefore contended that Højgaard had warranted that the works would be fit for purpose, and that the "*purpose*" included the works having a service life of twenty years.

In the Supreme Court

The Supreme Court upheld E.ON's argument, and held that the Contract imposed a fitness for purpose obligation as regards the service life of the foundations.

First, the court found that with clear words, it was possible to have a “*double obligation*” to comply with particular specifications and standards and to achieve a specific outcome. As such, Højgaard could (and did) warrant that it would exercise reasonable skill and care in its performance of the works and that it would design the turbine foundations in accordance with J101, so that they would have a service life of twenty years.

Secondly, the court showed little sympathy for Højgaard's argument that, due to the service life warranty's location (i.e. “tucked away” in the technical documents) it was not intended to have contractual effect. The court emphasised that a badly drafted contract would not negate the duty of the court to interpret the contract using the established principles of interpretation.

The court therefore interpreted the Contract based on the natural meaning of the words used in it, in the factual setting. It found that the fact that the definition of “*Fit for Purpose*” specifically referred to capturing requirements set out in the “*Employer's Requirements*” made it clear that the parties intended the technical stipulations to attach themselves to the fitness for purpose obligation.

Further recent case law

Last month, the English Technology and Construction Court in *125 OBS (Nominees1) v Lend Lease Construction (Europe) Ltd* [2017] EWHC 25 (TCC) considered similar issues to those in the Højgaard case. In the TCC case:

- Dominion Corporate Trustees Limited and Dominion Trust Limited (“**Dominion**”) employed Lend Lease Construction (Europe) Limited (“**Lend Lease**”) in early 2006 to redevelop the prestigious 125 Old Broad Street, for use as high-end offices. In November 2006, Dominion novated its contract with Lend Lease to 125 OBS (Nominees1) (“**OBS**”).
- In the four years following completion of the works, seventeen of the curtain wall glass panes were found to be defective. OBS claimed that Lend Lease was liable for the cost of remedial works.
- As per E.ON's position in the Højgaard case, OBS claimed that a fitness for purpose warranty in the contract attached itself to a provision in the technical documents, which required the works to have a service life of at least thirty years.
- Lend Lease rejected liability on the basis that the service life warranty was incompatible with the standard of reasonable skill and care required by the terms of the contract.

The TCC disagreed with Lend Lease's assertion that the provisions were incompatible, and agreed with OBS that a service life warranty had been provided via the fitness for purpose obligation. The TCC also held that Lend Lease was in breach of the fitness for purpose warranty, and therefore liable for the remedial costs.

Comment

The cases above remind us that fitness for purpose warranties need to be treated with care, and the parameters and implications of such obligations deserve due consideration by all parties. Consistency and clarity across the legal and technical documents is the ideal. However, in practice this will rarely be achieved in all respects. Complex construction contracts, by their very nature, will always require input from numerous parties, and it is perhaps unrealistic to expect all documents to fit neatly together.

A practical solution is to ensure that a hierarchy of documents provision is discussed and documented clearly in the contract. This way, the parties will have a chance to consider the way the various contract documents interact, and which documents should take priority in the event of any discrepancy or conflict. A complementary measure may be for the contract to state clearly in its main provisions that, notwithstanding any other provision of the contract, the contractor is required to perform its works using reasonable skill and care or, as the case may be, to ensure that the works when constructed will be fit for their particular purpose.

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