



## LEGAL BRIEFING

### *MT Højgaard A/S -v- E.On Climate and Renewables UK Robin Rigg East Limited and another*

[2015] EWCA Civ 407, Lord Justice Jackson, Lord Justice Patten and Lord Justice Underhill

#### *The Facts*

During 2006 E.On Climate and Renewables UK Robin Rigg East Limited ("E.On") engaged MT Højgaard A/S to design, fabricate and install sixty wind turbine foundations for the Robin Rigg offshore wind farm in the Solway Firth.

Clause 8.1(x) of the Contract required 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."*

The Technical Requirements provided that the design should meet the international standard for the design of offshore wind turbines (DNV-OS-J101) and that, *"The design of the foundations shall ensure a lifetime of 20 years in every respect..."*.

MT Højgaard was also required to demonstrate, with test data, that various parts of its design were appropriate and, if this test data was not available, to carry out experimental verification of those parts of the design.

Installation of the wind turbine foundations commenced in December 2007 and the works were completed in February 2009. In summer 2009 defects were discovered at a Dutch offshore wind farm which had a similar design to that at Robin Rigg. These defects arose from a significant error in the DNV-OS-J101 and in April 2010 it was found that the wind turbines at Robin Rigg were suffering from the same defects. Substantial remedial works were required at Robin Rigg and the parties agreed to the sum of €26.25m for the remedials.

At first instance in the Technology & Construction Court Mr Justice Edwards-Stuart found that MT Højgaard had exercised reasonable skill and care and complied with the DNV-OS-J101 but that the Contract and Technical Requirements included a warranty that the foundations would have a service life of 20 years. E.On was therefore entitled to the cost of the remedial works. Mr Justice Edwards-Stuart also found that MT Højgaard was not in breach of the test data and experimental verification requirements.

MT Højgaard appealed. E.On cross-appealed the finding that MT Højgaard was not in breach of the test data and experimental verification requirements.

#### *The Issues*

Did the Contract include an absolute warranty requiring MT Højgaard to achieve a *"service life"* for the wind farm foundations of 20 years rather than a *"design life"* of 20 years?

#### *The Decision*

In reversing the first instance decision, the Court of Appeal held that on a proper construction the Contract did not include a warranty for 20 years of service life. The Court of Appeal made a very clear distinction between *"design life"* and *"service life"* saying that if a structure had a design life of 20 years, then that did not mean inevitably it would function for 20 years, although it probably should.

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With regard to the wording in the Technical Requirements that “*The design of the foundations shall ensure a lifetime of 20 years*”, the Court of Appeal said that, at first sight, such a provision, if incorporated into the Contract, would be a warranty requiring the foundations to function for 20 years. However, the Court of Appeal highlighted that the Technical Requirements contained many references to the requirement for the foundations to have a “*design life*” of 20 years. In addition, the DNV-OS-J101 standard was intended to be used for offshore structures with a design life of 20 years.

The Court of Appeal also held that the provisions of the Contract did not contain any free standing warranty or guarantee. The wording in Clause 8.1(x) that the works as a whole should be “*fit for its purpose*” were qualified by the phrase “*as determined in accordance with the Specification using Good Industry Practice.*” As defined in the Contract “*Good Industry Practice*” required the exercise of reasonable skill and care as well as compliance with the DNV-OS-J101 standard but did not impose a warranty as to the length of the operational life.

On the cross-appeal, the Court of Appeal found that MT Højgaard was in breach of the test data and experimental verification requirements but concluded that those tests would not have revealed the defects that occurred and therefore the breach did not cause any loss. Hence E.On was only entitled to recover nominal damages of £10.

#### **Commentary**

Uncertainty may arise when a contractor is required to comply with a particular industry standard and at the same time achieve a specific result.

Although the Court of Appeal found that there was no absolute warranty in the Contract, it did acknowledge that if a contract was worded with sufficient clarity, a contractor could be liable for failing to achieve a specific result even if it otherwise complied with the relevant standard.

Where construction contract documents typically include standards and specifications prepared by different organisations it is important to clearly differentiate between obligations that are absolute and those that are subject to reasonable skill and care.

Contractors should always consider the insurance implications if a contract includes an absolute warranty.

Lyndon Smith  
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