Construction

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WIND FARM DESIGN RISK: LANDMARK COURT DECISION

In April 2014 the English courts issued a judgment in the case *Højgaard v. E.ON* concerning the contractor's responsibility for the construction and design of the monopiles and transition pieces on the Robin Rigg wind farm. Despite the fact that Højgaard had followed the DNV standard it was found liable for design failures. Højgaard appealed the "first instance" court judgment of Mr Justice Edwards-Stuart, a move which has now been vindicated by the Court of Appeal, which has reversed the original finding.

The Court of Appeal decision will be of particular interest to those involved in the offshore wind industry. However, the principles involved will be of considerable relevance to the construction industry generally because the case looks at how you should interpret a contract which contains contradictory and overlapping technical specifications and performance requirements.

The case arose because the grouted connections between the monopiles and the transition pieces constructed by Højgaard on the Robin Rigg field began to fail after completion of the project. The design which Højgaard used was based on the internationally recognised standard published by DNV which was called J101. This was relied on throughout the industry and when it transpired (as a result of the Robin Rigg failures) that there was an error in the standard, this then surprised many in the industry.

There was therefore no basis on which Højgaard could be said to have failed to produce the design using "reasonable care" as a result of having relied on J101 to produce its design. After all, it was perfectly good practice for Højgaard to have followed the industry standard. Therefore, if E.ON was going to be able to successfully sue Højgaard it would need to establish that Højgaard had guaranteed the performance of the works.

As is quite common with offshore wind contracts, the agreement referred to a 20 year design life and E.ON sought to rely on this provision in the court proceedings. E.ON's case, therefore, was that it did not matter that Højgaard had carefully prepared the design using best industry knowledge and practice because it had nonetheless guaranteed the foundations for 20 years and was liable for their failure.

Basis of original decision

The proper interpretation of the contract was always going to be controversial as it contained contradictory obligations.

On the one hand, the contract defined the standard which the contractor was required to build in accordance with, including DNV J101. But, in addition, the contract stated that the works had to achieve certain standards, including the 20 year design life. If the contractor built in accordance with the specification then the works would not achieve the performance standard.

There is no reason why a contract cannot define a product that the seller is required to deliver whilst also promising that the product will achieve impossible performance requirements. For example, a car dealer may agree to sell the old car on its forecourt whilst also promising that it will achieve a top speed of 200mph. The car dealer will be in breach of contract and will be liable in damages for breach of contract.

The original court decision came to a similar conclusion. As is typically the case with large civil engineering projects the contract documentation was very extensive. In addition to the Contract Conditions there was a vast array of technical schedules, including the Employer's Requirements and the Contractor's Proposals. The Conditions set out the contractor's general construction obligations at clause 8.1:

"The Contractor shall, in accordance with this Agreement, design, manufacture, test, deliver and install and complete the Works:

(i) with due care and diligence...

(iv) in a professional manner...in accordance with...Good Industry Practice

(x) so that each item of...the Works... shall be fit for its purpose as determined in accordance with the Specification using Good Industry Practice

(xv) so that the design of the Works... shall satisfy any performance specifications or requirements"

The court will normally try to give effect to the clear and unambiguous meaning of words in a contract. But one party may show that the factual background is such that a particular slant should be placed on certain clauses.

MAX WIELICZKO, PARTNER

The Employer's Requirements contained the following key provisions:

"3.2.2.2. The design of the foundations shall ensure a lifetime of 20 years"

"3b.5.1. The design of the structures... shall ensure a lifetime of 20 years"

The court decision in April 2014 decided that the reference to a 20 year lifetime at clauses 3.2.2.2 and 3b.5.1 placed the risk of failure on the contractor.

Court of Appeal analysis

The Court of Appeal interpreted the contractual provisions differently to the first instance decision of Mr Justice Edwards-Stuart. In particular, it found that the references to a 20 year design life in clauses 3.2.2.2 and 3b.5.1 could not be interpreted to mean that Højgaard warranted that the facility would last 20 years. The court found that these provisions were inconsistent with the other technical requirements in the contract and therefore could either effectively be ignored, or treated as imposing an obligation to undertake design work with the aim of providing a 20 year facility, but without imposing any absolute warranty to this effect.

It should be remembered that the courts are often called upon to interpret contradictory provisions in contracts. There are a number of clearly recognised principles that the courts will follow in undertaking this process of contract interpretation. The aim of the process is to determine the "common intention" of the parties. This must be undertaken in an objective manner. This means that the subjective view of one party as to what the wording in a contract meant is irrelevant. Instead, the court is seeking to determine the objective meaning of the contract based on the wording of the document. Having said this, the court will take account of the factual background and circumstances surrounding contract formation.



Clearly, there will be a tension between some of these principles. The court will normally try to give effect to the clear and unambiguous meaning of words in a contract. But one party may show that the factual background is such that a particular slant should be placed on certain clauses.

The Court of Appeal took the view that the provisions in clauses 3.2.2.2 and 3b.5.1 had to be read in the context of the contract requirement that Højgaard had to build in accordance with DNV J101. As the court noted, J101 was at the top of the hierarchy of documents and it was *"intended to lead to offshore structures with a design life of 20 years"* but that is not the same as a warranty to achieve that design life.

One of the difficulties for E.ON in trying to persuade the Court of Appeal of its case was the sheer length of the documentation. The provision referring to a 20 year design life was one of many obligations, buried deep within the technical specifications. The court sought to consider this obligation in the context of the weight of other requirements. It emphasised, for example, that clause 8.1 of the Contract Conditions did not contain the free standing 20 year design life obligation. Some may find this a surprising point to make since clause 8.1 did state that the contractor had to achieve the performance requirements in the contract and the Employer's Requirements did specify a 20 year life. Indeed, it is typically the case that the Contract Conditions will contain the high level obligations such as an obligation to achieve the design criteria in the Employer's Requirements and for the technical engineering standards to only appear in the appendices.

The Court of Appeal nevertheless emphasised the importance of considering the overall context of the obligations in the contract and in not placing too much emphasis on individual provisions which did not fit the general tenor of the agreement. It stated:

"A reasonable person in the position of E.ON and Højgaard would know that the normal standard required in the construction of offshore wind farms was compliance with J101 and that such compliance was expected, but not absolutely guaranteed, to produce a life of 20 years. ...it does not make sense to regard them as overriding all other provisions of the contract and converting it to one with a guarantee of 20 years life..."

It is essential that parties focus their minds on what the key features of the deal are and to clearly articulate this. In this case, the court were of the view that if a 20 year design life had been a key part of the deal then this requirement would have been given much more prominence in the documentation.

MICHAEL SERGEANT, PARTNER

The Court of Appeal went on to give the following conclusion:

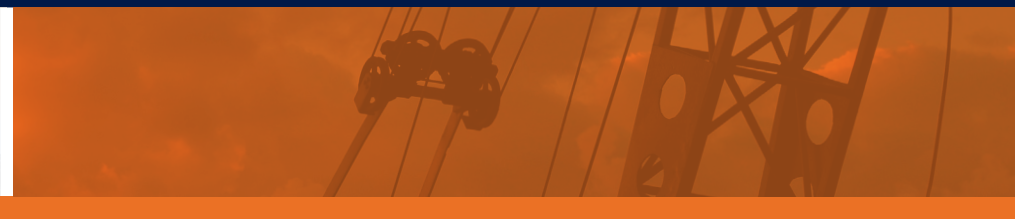
"...paragraphs 3.2.2.2 and 3b.5.1 are inconsistent with the remainder of the Employer's Requirements and J101. They are too slender a thread upon which to hang a finding that Højgaard gave a warranty of 20 years life for the foundations."

Lessons for the industry

This case illustrates just how difficult it is to predict with any certainty how the courts will interpret contradictory provisions in a contract. In the course of 12 months, the parties in this case have received two entirely different assessments from the English courts. This was not, after all, a situation where the Court of Appeal was of the view that the first instance court got the law wrong. This was simply a situation of both courts applying the same principles of interpretation but coming to different conclusions.

The case does illustrate the importance of parties ensuring that their contracts contain clear provisions. There is often a tendency at the contract drafting stage for the parties (in particular the employer) to throw all possibly relevant documents into the contract appendices. Equally, the clauses placing obligations on the contractor get longer and longer and there is a risk that it gets to the point that one cannot see the wood for the trees. It is essential that parties focus their minds on what the key features of the deal are and to clearly articulate this. In this case, the court were of the view that if a 20 year design life had been a key part of the deal then this requirement would have been given much more prominence in the documentation. As a contract drafting lesson: less can often be more.

The full case judgment can be found here: http://www.bailii.org/ew/cases/EWCA/Civ/2015/407.html.



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Our lawyers have advised and acted for developers, main contractors, turbine suppliers, specialist cabling contractors, OSV owners and charterers, and professional consultants.

We are involved at each stage of the procurement process, from advising on procurement strategies, and project structures to engineering, construction and operation and maintenance.

We also deal with regulatory and public procurement issues, as well as dispute work arising out of the industry.

In one capacity or another we have now advised a variety of different participants in approximately 60-70% of the UK's offshore wind farm projects constructed or under construction.

We are well structured to service clients in the offshore wind industry. We focus on utilising our sector specific expertise to work efficiently and effectively whilst employing the right team for the job.

Our construction team is supported by lawyers from other areas of expertise including those specialising in finance, casualty/incident response, insurance, health and safety, environmental, shipping and logistics.

In addition, our Partners and Senior Associates are regular speakers at wind power conferences and host seminars for senior management and other industry professionals. We run an annual conference on legal issues arising out of the offshore wind industry which takes place in December/January each year.

We are also the authors of the leading text on variations, Construction Contract Variations.

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