JONES DAY

COMMENTARY

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IN SHORT

The Situation: A recent ruling in *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Limited* by the UK Supreme Court gives guidance on construction contracts where the contractor undertakes both to deliver a certain outcome and to follow a specific design that is inconsistent with that outcome.

The Result: While the Court noted that each case must turn on its own facts, in this instance the contractor was obliged to meet the performance criteria and bore the risk that they could not be achieved by the specified design.

The Impact: The decision reaffirms that if a contractor undertakes to deliver a certain outcome, the contractor will be liable for failing to do so even if required to follow a specific design that is inconsistent with that outcome.

E.ON engaged MT Højgaard ("MTH") to design and construct foundations for the Robin Rigg offshore wind farm in Scotland. The contract required MTH to exercise reasonable skill and diligence in carrying out the works. The contract also incorporated a schedule of Technical Requirements, which (i) required MTH to comply with the "J101" industry standard, issued by Det Norske Veritas, and (ii) required that the works would be fit for purpose (or be designed to be fit for purpose) for 20 years.

Following completion, failures were discovered in the works. It was clear that MTH had exercised reasonable skill and diligence. However, due to errors in the J101 standard, the works would not be fit for purpose for a 20-year lifespan.

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The Issue

This case raises an issue that will be familiar to many contractors: The contract prescribed a design to be followed (in this case, a formula within the J101 standard), but the imposed performance criteria were impossible to achieve by following that design (namely, a 20-year lifespan).

MTH argued that the 20-year fitness for purpose obligation was not binding as it appeared only in the Technical Requirements, and such an onerous provision ought to have been more prominent in order to be effective (for example, by appearing in the general conditions of contract).

The Outcome

Applying well-established principles of contractual interpretation, the Court said that there was no inconsistency between the requirements to use the specified design and to achieve a 20-year lifespan. The Court also said that the design requirements were a minimum standard which the contractor was required to exceed if necessary to achieve the specified lifespan.

According to the Court, the fact that an employer had agreed on or approved a design does not normally detract from a contractor's obligation to meet prescribed criteria. The Court reasoned that the contractor would normally be expected to take the risk of an agreed design as being unable to meet the criteria. That said, the Court emphasised that the contractor's obligations will always turn on the terms of the contract.

The Court also rejected the argument that the Technical Requirements were "too slender a thread" to support such a serious obligation as the 20-year design or performance life. The Court said that the terms of the contract clearly required a lifespan of 20 years and there was no reason to think this was an improbable or unbusinesslike bargain.

This ruling shows that courts in the United Kingdom are likely to uphold nothing short of strict performance of contractual terms: the 20 year "fitness for purpose" term reigned supreme, despite that (i) the root cause of the failure was an error in a prevalent industry standard, rather than some other design flaw by the Contractor; (ii) it was E.ON who had specified the standard be used and accepted the tender on the basis of the design provided; and (iii) an international body had certified the works.

This reflects the approach taken by the courts in United Kingdom and Canada which, as the Court noted,

are "generally inclined to give full effect to the requirement that the item as produced complies with the prescribed criteria". This would apply equally to Australian courts, in line with the approach to contractual interpretation under Australian law.

While not mentioned in this ruling, in other cases, contractors and consultants have been found to owe employers a "duty to warn" where the employer has prescribed an unsuitable design. Australian, UK and Canadian courts have all found that such a "duty to warn" may exist in certain circumstances. Where the employer has approved or agreed to a design or work method, contractors and consultants should be mindful of a potential "duty to warn" as another possible ground of liability, and seek specialist advice where necessary.

THREE KEY TAKEAWAYS

1. Where contractors agree to a fitness for purpose obligation, following industry best practice and using reasonable skill and care will not always be enough to avoid liability.
2. "Technical" schedules or annexures to a contract may have significant and wide-ranging implications. They should not be agreed in isolation from the "conditions" of the contract, and the two should be consistent to the extent possible.
3. Contractors should be cautious in adopting a design (or elements of a design) agreed to or approved by a principal. If the contract includes fitness for purpose or performance requirements, the contractor may need to revise or further develop the design to meet them.

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