

Lessons Learned: Robin Rigg Part 2 (of 2)

Robin Rigg Wind Farm, Scotland's first offshore wind farm, was constructed on behalf of E.ON at Robin Rigg in the Solway Firth, a sandbank midway between the Galloway and Cumbrian coasts. In this part 2 we focus on the litigation arising from the premature failure of the foundation structures.

Premature Failure of the Foundation Structures

The foundation structures failed shortly after completion of the project. A dispute arose concerning who should pay for the remedial costs in the sum of €26.25m, MT Højgaard or E.ON.

This aspect of the dispute went through the entire judicial system in England & Wales. The Courts took different decisions at the different stages but the Supreme Court made the final and conclusive decision in E.ON's favour on 3 August 2017; the remedial costs were to be borne by MT Højgaard.

The investigations into the cause of the premature failures identified an error in the design that was attributable to widely used international standards J101 which had been incorporated into the contract through E.ON's technical standards. J101 provides for certain mathematical formulae to calculate aspects of the foundation structures. One such formula included " δ ", which was given a specific value. Only later a review showed that the value given for δ was wrong by a factor of ten. This error meant that the strength of the foundation structures was being substantially over-estimated in the design and this led to the premature failure of the foundations after the completion of the project.

MT Højgaard contended that it had exercised reasonable skill and care and had complied with all its contractual obligations, and so should have no liability for the cost of the remedial works. By contrast E.ON contended that MT Højgaard had been negligent and also had been responsible for

numerous breaches of contract, and they claimed declarations to the effect that MT Højgaard was liable for the defective foundations.

By the time the case reached the Supreme Court, the central question in the litigation was whether MT Højgaard was in breach of contract for failing to ensure a life for the foundations of 20 years, despite the fact that it used due care and professional skill, adhered to good industry practice, and complied with J101. The Supreme Court found in favour of E.ON holding that the more rigorous or demanding standard prevails, and the less rigorous should be treated as minimum standards.

Analysis

In light of this case many Contractors may be concerned about the extent of their obligations and exposure when agreeing to design and build an offshore facility with a 20 year design life. Many will be familiar with the language but few will expect to be undertaking to be responsible if the facility does not actually last that long. Whilst the Supreme Court's decision is concerning (and an unhelpful precedent for Contractors) it is possible to manage this risk in the following ways:

1. **Including limitation periods for the notification of claims.** Under the contract, the claims against MT Højgaard became time barred after 24 months following completion. Such clauses provide important and robust protection to Contractors. Regrettably for MT Højgaard in this case, the defects in the foundations and deficiency in the design were identified and

notified by E.ON within the 24 month period. If robustly drafted, the limitation period for claims for defects, which are typically found within the warranty clauses, provide Contractors with significant comfort against this potentially very long tail exposure.

2. **Including a clause excluding liability for consequential losses.** The biggest exposure is probably the exposure to a claim for loss of profits if the wind farm is no longer generating energy. An appropriately drafted consequential loss clause would protect against this exposure.

3. **Including an order of precedence clause.** Contractors are often presented with draft contracts with multiple overlapping and potentially conflicting obligations. Some of these will be specific such as to design and build in accordance with the client's technical requirements whilst others may be broader such as to ensure the works are of "*satisfactory quality*" or "*fit for purpose*" or to have a "design life of 20 years". The Supreme Court's reasoning in this case is a cause for concern for Contractors. Even if contractual requirements are in tension or conflict, the approach adopted by the Supreme Court suggests that the Contractor is taking on the burden of meeting each (and the consequences of a failure to do so). The Supreme Court held that the more rigorous or demanding of the standards prevails, and the less rigorous should be treated as minimum standards. (Of course, which standard is the more rigorous may only be assessed in hindsight, once the failure has occurred and the Client has the opportunity to trawl through the contractual and technical requirements to identify any requirement that has been breached. This is in contrast to the position of the Contractor during the design and build process that can simply do its best with the multiple overlapping and potentially inconsistent standards.) A detailed and structured order of precedence clause could be used to rebalance the position because it could confirm which obligation should take precedence when there is a conflict.

4. **Avoiding language that suggests that each requirement is simply a minimum standard.** Such language may mean that there is not a conflict and the order of precedence clause does not apply.

5. **Using reasonable skill and care language to qualify obligations.** Contractors also need to be wary of accepting clauses requiring the facility/work to be of "*satisfactory quality*", "*fit for*

purpose" or to have a specified design life whilst at the same time committing to build in accordance with the client's (potentially conflicting) technical requirements. Where possible, the obligation should be deleted or qualified so that it is an obligation on the Contractor to exercise reasonable skill and care to design and build the facility to be of satisfactory quality, fit for purpose or for the specified design life. By including the "reasonable skill and care" language the strict obligation may be watered down to be an obligation not to act negligently, with the result that the Client will find it more difficult to prove a breach.

6. **Including an overall cap on liability.** This should ensure that the total exposure is limited, provided that there are no inappropriate carve outs.

7. **Insurance.** The Construction All Risks Policy that is purchased for the project would ideally have a "maintenance period" that is consistent with the limitation period referenced in point 1 above. Where this is the case, the physical loss or damage that occurs during this period may be insured under the Construction All Risks Policy. It may also be possible for the Contractor to buy specialist liability insurance policies if additional cover is considered appropriate.

Clients should also have regard to the extent to which the risk of premature failure is insured even after expiry of the maintenance period in the Construction All Risks policy. In case this is of interest, please see our articles titled "FPSO Design Life" and "Insuring Design Risk".

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Simon was awarded the Solicitor of the Year Award (Private Practice) by the Law Society in October 2018.