

Lessons Learned: Robin Rigg Part 1 (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. The windfarm first generated power for test purposes on 9 September 2009. The wind farm was completed on 20 April 2010. Whilst the wind farm is now producing power successfully, the project suffered from significant problems that gave rise to extensive litigation.

The purpose of this two-part article is to consider what lessons may be learned for those companies active in offshore wind and offshore projects generally?

Unsuitability of Contractor's vessel

E.ON contracted with MT Højgaard in December 2006 to design, manufacture, deliver, install and commission the foundations for 60 wind turbine generators and 2 substations for the Robin Rigg Wind Farm. The contract specified that MT Højgaard was to provide a jack-up barge called the LISA to undertake the installation work. After the execution of the contract, and while the works were in progress, the LISA proved to be inadequate for the tasks that she was meant to carry out. Work progressed much more slowly than had been budgeted for and in various locations at the worksite, the LISA was acknowledged to be unable to undertake the works.

In response, 3 Variation Orders ("VOs") were issued on behalf of E.ON requiring the substitution of a different vessel - the Resolution - to do the installation work which, under the terms of the contract, was previously to have been done using the LISA. The Resolution was a superior and more effective vessel. A central feature of the changed arrangements pursuant to the VOs was that, where originally MT Højgaard had been responsible for hiring the LISA and providing it for the project at its cost, the Resolution was hired direct by E.ON which then provided it on a free-issue basis to MT Højgaard.

A dispute arose concerning the financial implications of the revised arrangements brought about by the VOs. The differences in approach were calculated to be worth EURO 44m (against the background of a total contract value of EURO 101m).

MT Højgaard asserted that what should be omitted was the component of the original Contract Price included for the provision of the LISA (making allowance for the fact that she had carried out 2 of the 62 foundations).

In contrast, E.ON contended that the deduction should be the product of applying a rate (or, alternatively, a cost) to the amount of time it alleges that the LISA would have taken to carry out the contract works if it had in fact done so.

The Judge at first instance and the Court of Appeal found in favour of MT Højgaard.

Analysis

The main contractor will typically bear the burden of additional costs if the vessel(s) it provides for the project are not suitable. The main contractor's losses are likely to be exacerbated if the vessel is chartered in; it may be difficult to ensure the contracts are back to back and/or obtain a warranty from the Owner that the vessel is fit for purpose. Typically, if

the main contractor does not own the installation vessel, then it will be chartered in on a day rate and only be required to meet the specification. The suitability of the vessel therefore needs to be carefully managed by the main contractor from a technical perspective.

In the Robin Rigg case, E.ON stepped in to help solve the problems caused by the unsuitability of the LISA. This appears to have expedited completion of the project but not without considerable additional expense to E.ON. MT Højgaard, the party in breach for supplying the unsuitable vessel, appears to have done comparatively well out of the revised arrangements brought about by E.ON; it was relieved of the impossible task of completing the project using the LISA and provided with a superior vessel to complete the works.

E.ON were not obliged to step into the project as they did. Prior to stepping in with the VOs E.ON appear to have had the option to:

- (a) step back and await the delay and claim liquidated damages (which were capped at 20% of total contract value);
- (b) terminate the contract with MT Højgaard (a failure to remedy the situation with the unsuitable LISA was likely a repudiatory breach by MT Højgaard) and claim damages;
- (c) using (a) and (b) above, apply pressure to MT Højgaard to remedy its own breach and itself charter in an additional or substitute vessel; or
- (d) negotiate with MT Højgaard so that E.ON obtained an indemnity to cover some or all of the additional costs of hiring in the Resolution.

VOs are commonly issued but, as this case highlights, the implications of issuing negative VOs need to be carefully considered in each case. This is particularly important in the case of negative VOs if the Contractor has under-priced the relevant work and/or is already in default of its performance obligations.

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He has advised on offshore oil and gas projects and conducted litigation and arbitration around the world. Projects Simon has acted on include, Kwame Nkrumah FPSO (Ghana), Benguela-Belize CPT (Angola), BP Thunder Horse (GoM), BP Mad Dog (GoM), BP Mad Dog 2 (GoM), Agbami FPSO (Nigeria), Usan FPSO (Nigeria), Senje Berge FPSO (Nigeria), Akpo FPSO (Nigeria), Coral FLNG (Mozambique), Pazflor FPSO (Angola), Frade FPSO (Brazil), Ichthys FPSO (Australia) and Balder FPSO (North Sea).

Simon successfully acted for the underwriters in the marine insurance case the "*B Atlantic*" before the UK Supreme Court in May 2018 and was awarded the Solicitor of the Year Award (Private Practice) by the Law Society in October 2018.

Simon is co-author of the leading text on law and practice relating to design and construction of vessels for offshore oil & gas: *Offshore Construction Law and Practice*, published by Informa Law for Routledge.

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