

## Offshore Energy Law

# 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 " $\delta$ ", which was given a specific value. Only later a review showed that the value given for  $\delta$  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.

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