Fitness for Purpose Højgaard and FIDIC's Yellow Books

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Introduction

MT Højgaard AS v E.ON Climate and Renewables UK Robin Rigg East Ltd & Anor[1] is an important English case because it considered a fitness for purpose obligation in a design and build contract. In FIDIC's Yellow Book contracts (1999 and 2017) there are also fitness for purpose obligations. This article examines the Supreme Court's analysis of a fitness for purpose obligation in the *Højgaard* case and whether it would be applied to FIDIC's Yellow Book contracts.

The *Højgaard* case concerned the foundation structures of two offshore wind farms that Højgaard had designed and installed. These foundations failed shortly after completion of the project and the remedial costs were €26.25 million. The contract incorporated E.ON's "Technical Requirements" which referred to an international design standard - J101. This standard contained an error which meant that the strength of the foundation structures would be substantially over-estimated. The Technical Requirements also required that the foundations be designed to have a design lifetime of twenty years and contained a requirement (Clause 8.1(x)) that the contractor carry out the works so that they were "*fit for its purpose*". This was defined in a way that it included adherence to the Technical Requirements and thus J101. These obligations were also stated to be minimum requirements.

At first instance the High Court found that the contractor was liable for the defects, as the contract required that the foundations would be designed to have a lifetime of twenty years, which they did not. The Court of Appeal overturned the decision and found that there was an inconsistency in the contract between the fitness for purpose obligation (and the design lifetime of 20 years) and Clause J101. As Højgaard had designed the foundations in accordance with J101, the Court of Appeal decided that there was:

> "too slender a thread upon which to hang a finding that MTH gave a warranty of 20 years life for the foundations."[2]

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The matter went before the Supreme Court[3], where Lord Neuberger found that when interpreting a contract with an inherent inconsistency the normal principles of contract interpretation would be applied.[4]

Lord Neuberger stated that while each contract will turn on its own facts, where the contract contains a term that imposes a prescribed criteria then the courts would give effect to that prescribed criteria even if the customer has specified or approved the design. Looking at the contract as a whole, Lord Neuberger decided that a clause imposing an obligation to build the foundations with a 20 year design life was not too slender a thread to impose liability and held the contractor liable for the repair costs.

The Supreme Court's decision restates the normal principles of Contract interpretation and sets out the principles on which a contractor takes on liability for errors in a design. However, as Lord Neuberger stated, "*each case must turn on its own facts*".

Principles of Contract Interpretation

Where there is an ambiguity or inconsistency in the contract, then normal principles of contract interpretation will apply. These principles were stated

[1] [2017] UKSC 59 (3 August 2017).
[2] [2015] EWCA Civ 407.
[3] [2017] UKSC 59 (3 August 2017).
[4] *Ibid* at [37] and [48].

in *Wood v Capita Insurance Services Ltd*[5] where it was held that the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This did not require that a literalist exercise be undertaken which focused solely on the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its views to that objective meaning.[6]

In *Rainy Sky SA v Kookmin Bank*[7] the court stated that where there are rival meanings, the court can give weight to:

- the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense;
- the quality of drafting of the Clause;
- the possibility that one side may have agreed to something which with hindsight did not serve its interest; and
- the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

The Contractor's Liability for Errors in the Design

The Supreme Court then examined the applicable principles of law where a contractor accepts a contract for construction works. Where a contractor takes on works it gives a warranty that it is capable of building the works as designed. Where the contractor encounters difficulties in executing the works in accordance with any design requirements of the employer then this warranty may expose the contractor to a liability if it fails to carry out and complete the works.

Lord Neuberger in the Højgaard case referred to *Thorn v The Mayor and Commonalty of London*[8] where the court held that a contractor who bids on the basis of a specification only has himself to blame if he does not check the practicability of building to the specification and the specification turns out to be defective.

Similarly, *in Tharsis Sulphur & Copper Co v M'Elroy*[9], where a contractor takes on work but wishes to change the specification because the construction of the works is proving difficult, the contractor will not be entitled to an additional payment. In the *Tharsis* case Lord Blackburn noted that this was not a case of impossibility, which may have given the contractor a release from performance under Scottish law. Lord Neuberger then referred to Lord Wright's speech in *Cammell Laird and Co Ltd v The Manganese Bronze and Brass Co Ltd*[10]:

> "[i]t has been laid down that where a manufacturer or builder undertakes to produce a finished result according to a design or plan, he may still be bound by his bargain even though he can show an unanticipated difficulty or even impossibility in achieving the result desired with the plans or specification."

Lord Neuberger concluded, based on the wording of the contract, that where two clauses imposed differing or inconsistent standards or requirements, the correct analysis was that the more rigorous of the two standards should be applied; the less rigorous standard should be construed as a minimum requirement.[11]

Lord Neuberger's approach can be contrasted with the case of *Turriff Ltd v Welsh National Water Development Authority*.[12] The case concerned a contract under the fourth edition of the ICE Conditions. The contractor was required to construct joints between rectangular pre-cast concrete segments of a sewer to an exacting one sixteen of an inch tolerance. In summary, Clause 13 required that the contractor construct the works in strict accordance with the contract except where legally or physically impossible. Counsel for the contractor argued that the word "*impossible*" in Clause 13 of the ICE contract should not mean "*absolutely impossible*". HHJ Stabb QC agreed, and held that impossibility was to be interpreted in a practical or commercial sense. He stated:

> "It was not, plainly, absolutely impossible to manufacture the units to the required dimensions and tolerance, but in the ordinary competitive commercial sense, which the parties plainly

[5] [2017] 2 WLR 1095.
[6] *Ibid* at para 10.
[7] [2011] 1 WLR 2900 at para 11.
[8] (1876) 1 App Cas 120.
[9] [1878] UKHL 777 (4 June 1878).
[10] [1934] AC 402, 425.
[11] [2017] UKSC 59 at [45].
[12] [1994] Const LY 122.

> intended, I am satisfied that it was quite impossible…"

Further, in the *Turriff* case, the judge placed great significance on the fact that there had been extensive pre-contract studies by the employer on the pre-cast units. HHJ Stabb QC found this to be part of the contractual matrix and therefore relevant to the interpretation of the contract.

The main difference between the *Højgaard case* and the *Turriff* case is that in *Højgaard* the Contractor was responsible for the design of the foundations and gave warranties as to fitness for purpose and for the design life. Further, in the various cases referred to by Lord Neuberger, the contractor had given warranties or guaranties as to the finished works; for example, guarantees that the works would achieve some particular output or requirement. In a standard form of building contract with no contractor's design obligations the contractor usually warrants that the works will be built in accordance with architect's or engineer's design and in a proper and workmanlike manner.

Therefore, before any contractor takes on a "*fitness for purpose*" obligation it should be aware of all that it entails. Contractors who therefore propose value engineering solutions, for example under Sub-Clause 13.2 of FIDIC's Red Book, should note that they take on a fitness for purpose obligation for the design that they are proposing (see Sub-Clause 4.1(c)).

There are some similarities but also a number of differences between the contract in the *Højgaard* case and the FIDIC Yellow Books. In terms of similarities both contracts contain a fitness for purpose obligation. However, in the *Højgaard* case, the stated requirements of the employer were expressed as being a minimum. Further, there was an express design life of 20 years. Such terms are not found in an un-amended FIDIC Yellow Book unless they are added as Particular Conditions. Most importantly, however, in FIDIC's Yellow Book there are express terms dealing with errors, faults, or defects in the Employer's Requirements.

Sub-Clause 5.1 of the FIDIC Yellow Book 2017 contains an obligation on the Contractor to review the Employer's Requirements on receiving a Notice to commence and:

> "If the Contractor discovers any error, fault or other defect in the Employer's Requirements, Sub-Clause 1.9 [*Errors in the Employer's Requirements*] shall apply…"

Sub-Clause 1.9 provides that the Contractor should give a Notice to the Engineer of the error, fault, or defect within the time stated in the Contract (or 42 days from the Commencement Date if no date is stated). The Engineer is then required under Sub-Clause 3.7 [*Agreement or Determination*] to determine:

a) whether there is in fact an error, fault or defect in the Employer's Requirements;

b) whether or not (taking account of cost and time) an experienced contractor exercising due care would have discovered the error fault or other defect when examining the Site and the Employer's Requirements before submitting the Tender; and

c) what measures the Contractor should take (if any) to rectify the fault, error or defect.

Sub-Clause 1.9 then proceeds to state that if an experienced contractor would not have discovered the error, fault or other defect when examining the Site and the Employer's Requirements before submitting the Tender then it will be entitled to a Variation and, subject to giving Notice, additional time and Cost Plus Profit. In the event that the error, fault or defect is found at a later time, the Engineer must also ask whether this error, fault or defect should have been found earlier when the Contractor scrutinised the Employer's Requirements under Sub-Clause 5.1.

Conclusion

On the assumption that no Contractor would have discovered an error in the calculations of an international standard, such as J101, it follows that if the contract in the Højgaard case had been on an un-amended FIDIC Yellow Book then a different conclusion may have been reached by the court. The contractor would not have been liable for the error in the Employer's Requirements and may have been entitled to additional time and Cost Plus Profit. The FIDIC forms of contract are intended to apportion risk fairly as between the Parties. Under the FIDIC Yellow Book forms the drafters have adopted a fairer and more equitable approach to apportionment to that applied by the English common law courts.

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