MT HØJGAARD A/S (Respondent) v E.ON CLIMATE & RENEWABLES UK ROBIN RIGG EAST LIMITED and Another (APPELLANTS) – [2017] UKSC 59

At the beginning of August the Supreme Court handed down its judgment in MT HØJGAARD A/S (‘MTH’) v E.ON – reversing the decision of the Court of Appeal and reinstating the first instance order of Edwards-Stuart J.

The case having arisen out of a claim brought by E.ON for the €26.25 million costs of remedial works required to be undertaken on the foundations of two off-shore wind farms built at Robbin Rigg and in the Solway Firth that had been designed and installed by MTH.

The parties entered into the contract for the works via a tender process that required (within the Technical Requirements document) that the design must meet certain minimum requirements, including compliance with an independently certified international standard referred to as J101. The Technical Requirements were then incorporated by reference into the final contract for the works. However, the J101 document contained a crucial error in the value ascribed to a particular factor (it was tenfold out) that meant the foundations designed in accordance with it were much weaker than required and consequently those foundations began to fail within months of being installed – despite paragraph 3.2.2.2 of the Technical Requirements providing that “The design of the foundations shall ensure a lifetime of twenty years in every aspect without planned replacement.”

The Court questioned whether para 3.2.2.2 gave rise to a contractual warranty that the foundations would last for twenty years or should be read as an undertaking to provide a design that could objectively be expected to have a lifetime of twenty years. Whilst the Court determined that the question did not need to be answered within the appeal as the design failed on either basis – leaving MTH liable for the costs of the remedial works.

The court took the firm view that the Technical Requirements were a minimum and could be departed from where necessary: the risk of completing works to an employer’s defective design requirements (including, in this case, the faulty standard J101) fell on the contractor. If more rigorous design requirements were needed to comply with the 20-year lifespan for the foundations then the responsibility for meeting that requirement was that of MTH.

And finally, the court was not satisfied that the terms of para 3.2.2.2 were too thin a thread to hang a liability on it neither being improbable or business-like to bind MTH to the natural meaning of the words of the Technical Requirements.

Dr Tim Sampson / 1st Sep 2017
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