

# LIMITATIONS ON LIABILITY

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**London, 30 November 2016**

# AGENDA

1. Introduction
2. Recent Case: *MT Højgaard v E.On Climate and Renewables*
3. NEC 3 provisions
4. Conclusion and top tips



# Introduction

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MT Højgaard A/S v E.ON Climate  
and Renewables UK Robin Rigg  
East Limited and another

# Overview

- In 2006 E.ON engaged MTH to design, fabricate and install 60 wind turbine foundations for the Robin Rigg offshore wind farm in the Solway Firth
- Installation commenced December 2007, works completed February 2009
- In April 2010, error in the J101 standard incorporated into contract led to remediation works costing €26.25 million
  - **Who should bear the cost?**

# Contractual terms

## Clause 8.1 included that MTH shall complete Works:

- with **due care and diligence**
- in a professional manner in accordance with ... **Good Industry Practice**
- so that the Works, when completed, comply with **the requirements of this Agreement**; and
- so that each item of Plant and the Works as a whole shall be free from defective workmanship and materials and **fit for its purpose** as determined **in accordance with the Specification**

## Incorporated Technical Requirements (“TR”) were contradictory:

- Foundation structural design “*shall ensure a lifetime of 20 years in every respect without planned replacement*” (paras 3.2.2.2 and 3b.5.1)
- Other provisions directed to **design life of 20 years**

## First instance | TCC

- **MTH was responsible for cost of the remedial work:**
  - TR required MTH to achieve a result, i.e. foundations with service life of 20 years
  - This was additional to, but not inconsistent with, MTH's other less onerous obligations such as compliance with J101
  - MTH was in breach of Clause 8.1 read in conjunction with TR, because the foundations did not have a service life of 20 years
- MTH not in breach of a number of other specific contract requirements relating to test data and experimental verification
- MTH appealed to Court of Appeal on first point and E.ON cross-appealed on second point

## Court of Appeal | Legal principles

- Court recognised it must decide which party should pay the bill where there had been no negligence or want of professional skill on either side: MTH complied with J101 which contained error
- Not unknown for construction contracts to require the contractor to both: (a) comply with particular specifications and standards; and (b) achieve a particular result – potential double standard
- Was agreement negotiated between E.ON and MTH a contract of this character?
- ‘Reasonable person’ test – to construe contract court must postulate a reasonable person having all the knowledge available to the parties

## Court of Appeal | Decision

- TR did **not** give rise to a warranty that foundation design would ensure a lifetime of 20 years
  - TR came fourth in the contractual order of preference. Clause 8.1, which took priority, did not contain any warranty – just the exercise of *reasonable skill and care*, as well as compliance with J101
  - Reasonable person would know required standard was compliance with J101, with such compliance not guaranteed to produce life of 20 years
  - Court allowed E.ON cross-appeal, but held no loss suffered



# NEC 3 provisions

## Options X15 & X18 | Limitation of liability (1)

- X15.1** The Contractor is **not liable for Defects** in the works due to his design so far as he proves he **used reasonable skill and care** to ensure the design complied with the Works Information.
- X18.1** The Contractor's liability to the Employer for the Employer's **indirect or consequential loss** is limited to the amount stated in the Contract Data.
- X18.2** For any one event, the liability of the Contractor to the Employer **for loss of or damage to the Employer's property** is limited to the amount stated in the Contract Data.
- X18.3** The Contractor's liability to the Employer for **Defects due to his design which are not listed on the Defects Certificate** is limited to the amount stated in the Contract Data.

## Option X18 | Limitation of liability (2)

**X18.4** The Contractor's total liability to the Employer for all matters arising under or in connection with this contract, other than the excluded matters, is limited to the amount stated in the Contract Data and applies in contract, tort or delict and otherwise to the extent allowed under the law of the contract

The excluded matters are amounts payable to the Contractor as stated in this contract for

- loss of or damage to the Employer's property,
- delay damages if Option X7 applies and
- low performance damages if Option X17 applies

**X18.5** The Contractor is not liable to the Employer for a matter unless it is notified to the Contractor before the end of liability date.

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# Conclusion and top tips

# Summary

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MTH case likely to be comfort to construction professionals – suggests reasonable skill and care standard will only be replaced by a clearly prioritised absolute obligation if the contract clearly requires it

2

After initially rejecting E.ON's application to appeal, Supreme Court changed its mind and case is listed to be heard next year – watch this space

## Top tips



Clearly distinguish between absolute obligations to produce a specific result and those subject to reasonable skill and care standard



To ensure enforceability of desired provisions make sure wording of contract as a whole is consistent (even if using standard form)



Ensure priority of contractual documents is clear

# QUESTIONS



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