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Offshore Wind Contract Conundrum Heads to Supreme Court

The English Supreme Court is due to hear an appeal on the long-running dispute in connection with the Robin Rigg Offshore Wind Farm. The decision promises to be significant for the offshore wind industry, its financiers, insurers, and service providers.

At issue is whether E.ON (the employer) or Højgaard (the contractor) must bear the approximate €26 million cost of remedying failed grouted connections between monopiles and transition pieces at Robin Rigg.

Where Does the Fault Lie?

The failures arose because E.ON and Højgaard agreed that the design of the foundations should be based on the J101 international standard, produced by the independent classification and certification agency DNV in 2004 for the then fledgling industry. Although J101 had been demonstrated as viable by use in the Danish Horns Rev 1 Offshore Wind Farm, as well as in tests conducted by the University of Aalborg, those tests assumed that the grouted connection between the monopile and transition piece had sufficient axial load capacity to bear the weight of the tower and turbines above it.

In 2009, DNV announced that the equations used in J101 had substantially over-estimated the axial load capacity of the grouted connections. In 2010, the connections at Robin Rigg began to fail and the transition pieces started to slip down the monopiles.

E.ON argued (on a number of grounds) that, even if J101 had been correct, Højgaard had not complied with it. However, one of those grounds was rejected by the High Court and was not appealed, while two others were accepted by the Court of Appeal but with the result that E.ON was held to have suffered no loss and could only recover nominal damages. Ultimately, the central issue for determination was distilled as follows: Had Højgaard warranted only that it would comply with J101, or, had it taken on the risk that J101 might be wrong by warranting a specific outcome, which was that the foundations would achieve a service life of 20 years or more?

The allocation of risk for an error in underlying design standards, which the High Court found was neither the fault of E.ON nor Højgaard, was bound to produce a harsh result. In the meantime, that result could significantly affect the terms of future deals, the risk assessment of existing deals, as well as insurance premiums and finance packages available in the offshore wind sector.

The Fine Print

As is typical in offshore wind contracts, the contract between E.ON and Højgaard was detailed and lengthy. It comprised nine parts, ranked in order of precedence. Some parts required Højgaard to follow J101, other parts required it to design the foundations for a minimum design life of 20 years, whilst others still required it to design the foundations to ensure a service life of 20 years. The obligation to ensure a service life of 20 years was set out in the technical requirements, which were relatively low in the order of precedence.

The High Court saw the technical requirements as additional to, but not inconsistent with, Højgaard's obligations in the other parts of the contract. It therefore found in favor of E.ON, holding that Højgaard was required to provide foundations with a service life of 20 years, which it had failed to do and would have failed to do even if it had followed J101 to the letter.

The Court of Appeal, however, took a different view. It held that a contract could impose a double obligation upon a contractor, such as to comply with a certain design specification and also to achieve a specific end result (for example, a service life of 20 years), if that contract was drafted sufficiently clearly. However, the E.ON and Højgaard contract did not fall into that category and was therefore considered to be internally inconsistent.

The Court of Appeal resolved the inconsistency by checking the rival interpretations of the contract and investigating their commercial consequences. This led the court to conclude that it should not be "led astray" by the inconsistency. The primary terms of the contract were directed towards only providing a design life of 20 years, not to a service life, which had been tucked away in the technical requirements section. If Højgaard had really contracted for an absolute warranty of quality, one would expect to see it front and center in the parties' contract.

For the Court to Decide

This issue is now live before the Supreme Court, which initially declined to hear the case, before giving E.ON permission to bring its appeal. It is not clear why the Supreme Court had a change of heart but, since the law concerning contractual interpretation has received judicial attention since the Court of Appeal's judgment, the Supreme Court may take the opportunity to set out detailed rules as to how apparent inconsistencies in complex construction contracts are to be approached, which could have ramifications for the UK construction industry as a whole.

The upcoming judgment therefore merits close scrutiny. The Supreme Court's decision may give parties entering into construction contracts, as well as their financiers and insurers, cause to think again about the terms of their deals. ■

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