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Industry Briefing

Design and construct liability
in remediation and other works

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Design and construct liability in remediation and other works

This briefing is aimed primarily at those in the brownfield remediation and development industry who are responsible for, or affected by a responsibility to, design and construct the relevant remediation works.

However, it is of equal application to other areas of the construction and civil engineering industry: the lessons from recent high-profile court rulings are potentially applicable across the board to developers, professional designers, contractors, end users and funders and other investors.

Vincent Brown
E: vincent@vincentbrownlaw.com
T: + 44 (0)7740 877 627

Designing for Complexity

Design responsibility in any contract for construction works or remediation or other civil engineering works is always a difficult matter, especially where what is to be designed and built has a measure of complexity to it or is not necessarily easily defined in terms of what it should look like and/or how it should perform. Remediation of a contaminated site on a brownfield development comes into this category, especially if (as is often the case) regulators are insisting in the remediation planning conditions on specific results being achieved.

The law tends to enforce what people put in their contracts about who is responsible for what, and specifically, in cases of dispute, the courts will interpret what they think was meant by the parties. Of course, this usually begs a very complex question, especially where there are words in the contract capable overall of conveying different outcomes.

Two relatively recent cases, one a Supreme Court ruling, reinforce the need for extreme care in how design and construct responsibilities are expressed, especially where reliance is placed on traditional standard forms of construction or civil engineering contract, with or without lawyers' standard amendments. The two cases intertwined with each other in terms of timescale, but one of the cases went all the way to the Supreme Court (with different outcomes as between the Court of Appeal and the Supreme Court) whereas the other case was decided at High Court level in the Technology and Construction Court.

In both cases, the contractors lost, heavily.

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Højgaard v E.On Climate and Renewables UK

Supreme Court, 3 August 2017

In this case, Højgaard had agreed to carry out design, fabrication and installation of the foundations for 60 wind turbine generators for an offshore wind farm. It was accepted that the contractor had designed and built the foundations in accordance with the applicable international standard, and in a competent manner, but an error *in the international standard itself* resulted in defects requiring remedial work costing over €20m.

The contract included fairly standard but quite expansive obligations on the contractor. These were, typically, quite lengthy and involved references to supporting and external technical documents, but in essence the relevant obligations comprised:

- on the one hand, relatively standard wording about exercising the due care and diligence expected of appropriately qualified and experienced designer, engineer and constructor, in a professional manner, and in accordance with good industry practice; but also….
- on the other hand, a mixed bag of other clauses and references which conveyed additional more specific obligations, including:
  1. that the works as a whole would be fit for their purpose as determined in accordance with the specification;
  2. that the design of the works, and the works when completed, would satisfy any performance specifications or requirements of the employer;
  3. that the employer's specified technical requirements were the *minimum* requirements, and that it was the contractor's responsibility to identify any areas where the works needed to be designed to any additional or more rigorous requirements or parameters;
  4. that the contractor's detailed design be prepared in accordance with the relevant international standard, and
  5. that the contractor would ensure that the foundations would have a service life of 20 years.

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Højgaard v E.On Climate and Renewables UK

Compliance with Design Criteria not enough?

As noted already, the defective works stemmed from an error in the international standard, rather than the contractor's lack of skill or workmanship. No matter, the contractor still lost, but not before it won in the Court of Appeal. The Court of Appeal view was that the contractor was not under some 'fitness for purpose' obligation and had discharged its duty to exercise reasonable skill and care by complying with the relevant international standard. This all seemed perfectly reasonable at the time of the ruling and many considered this to be the correct result.

However, in a unanimous decision, the Supreme Court overturned this, and allowed the employer's appeal. The Supreme Court ruled that, *on the natural meaning of the words in the contract*, the contractor either had warranted that the foundations would have a lifetime of 20 years or had agreed that the design of the foundations would be such as to give them such a lifetime. The Court ruled that, even if the employer has specified or approved the design, it is the contractor who is taking the risk that, by working to the design, it may be incapable of meeting the criteria.

The case was thus having to deal with the common contractual situation where a contract says different things that cannot be reconciled – for example, requiring the contractor to provide something in accordance with a specified design, but at the same time requiring that something to satisfy specified performance criteria which are not necessarily achieved by complying with the design.

The Supreme Court ruled that, although each case will turn on its own facts [and its words], it is clear that the courts' approach is to require the contractor to be *"bound by his bargain even though he can show an unanticipated difficulty or even impossibility in achieving the result desired"*.

In this case, the technical specification in the contract stated that the requirement to comply with the International Standard was a minimum requirement, and that the onus was on the contractor to identify any areas where the works needed to be designed to additional or more rigorous requirements or parameters.

Thus, the Court held that, where you have two inconsistent provisions or standards, rather than concluding that they are inconsistent, the correct analysis is that the more rigorous or demanding of the two standards or requirements must prevail. The less rigorous provision will be treated as a minimum requirement.

The Court also ruled that, if there is an inconsistency between a design requirement and the required criteria, the contract had made it clear that, even if the contractor complied with the design, it would be liable for the failure to comply with the required criteria because the contractor had a duty to identify the need to improve on the design.

A tough decision indeed, but rationalised by the Court according to what the parties had written down in their contract.

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The case went all the way to the Supreme Court, with the fortunes of the parties fluctuating on the way.

OBS v Lend Lease Construction (Europe) Ltd

Technology and Construction Court, 14 July 2017

This was a decision of the Technology and Construction Court (TCC), which, interestingly was handed down after the contractor had won his case in the Court of Appeal in the *Højgaard v E.On* case, but BEFORE the contractor in that case then lost out in the Supreme Court. In other words, when the TCC was sitting in OBS, it had before it a Court of Appeal ruling in favour of *Højgaard* in which a contractor had escaped 'fitness for purpose' responsibility and had been exonerated because it had exercised reasonable skill and care by complying with the relevant product standard.

The facts of the *OBS v. Lend Lease* case were a little different. It concerned a 26-storey tower which was clad with toughened glass panels weighing 300 tonnes, which had been completed but which had experienced significant breakages. The damage was so serious that scaffold tunnels had to be erected around the building to protect pedestrians from falling glass. Ultimately, the building had to be re-glazed, the employer having rejected the contractor's suggestion that the glass panels could be left in place and a protective canopy added to catch any falling glass.

The design and build contract incorporated the terms of the JCT Standard Form of Building Contract with Contractor's Design, 1998 Edition with both standard and bespoke amendments. Key provisions included an obligation on the contractor to carry out and complete the works:

- in accordance with the employer's requirements and the contractor's proposals,
- with materials and goods of good quality, appropriate for their purpose, and
- to the employer's reasonable satisfaction.

There was also an interesting contractual "technical clarification", stating that *"third party risks rest with the client after Practical Completion"*.

In addition, the contract was varied to provide that glass used in the building's outer panes must be heat soaked in accordance with the BS Standard.

In its July 2017 judgment, the TCC ruled that the contractor *was liable* for the defective glass panes. This was only partly based on the fact that at least 35% of the glass had not been heat soaked (which breached an express contractual requirement) anyway. However, the Court also ruled that, even if the contractor had complied with its obligation to heat soak, it was still subject to wider express contractual requirements – which were that all materials and goods must be:

- of good quality;
- appropriate for their purpose,
- to the employer's reasonable satisfaction and
- in accordance with the employer's requirements and contractor's proposals.

The Court said that the "technical clarification" did not mean that the employer accepted all risk of breakage after completion.

It was bad enough for the contractor to be found liable: the damages awarded were heavy – £8.7m for the re-glazing and just over £6m to cover losses associated with the remedial works, which included sums paid to third parties, including tenants and local businesses, in settlement of proposed claims for loss caused by the falling glass, the scaffolding and the remedial works. In addition, there was an award of damages for the employer's additional financial charges and associated costs. The court considered that any substantial builder such as the contractor would know that a developer's financing arrangements would probably be for finite periods, would require renegotiation after a certain time and that renegotiation may result in higher rates of interest: "This is absolutely basic for commercial contracting parties in this line of business" noted the Court. Accordingly, the court found that the Employer's loss under this heading was foreseeable and not too remote.

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Lessons to be drawn?

Probably obvious. If ever there was a salutary tale for design and build contractors, then these cases provide it, and in broad terms, the cases reinforce the need for very careful drafting, which draws a clear distinction between those obligations that are absolute and those that are subject to reasonable skill and care.

// Every case is different: therefore, it is risky even to draw general principles on what to do in each case, because general principles can easily be trumped by the specific expectations and requirements.

Bespoke drafting

However, it seems to me that the lessons go beyond that, and should cause developers, contractors, professional designers, and other involved in the process, to reflect very carefully on the individual risks that are inherent in the design and construct process: what are the things that could go wrong? Who is bearing the risk of these? Even when you decide that, it is essential that the words used put the matter beyond doubt: after all, it did not assist the contractor in the *OBS v Lend Lease* case that the contract stated that "third party risks rest with the client after Practical Completion" (albeit with the benefit of hindsight, a vague and potentially ambiguous statement).

Every case is different: therefore, it is risky even to draw general principles on what to do in each case, because general principles can easily be trumped by the specific expectations and requirements in each case, and the drafting of these contracts has to respond to these case-specific circumstances. Nonetheless, these cases show that we should at least be looking at the following:

Drafting for design responsibility

1 understand and measure with precision what it is that is to be designed and constructed/ produced in each case;

2 identify any specific agreed standards and/or performance criteria that are to be met;

3 draw a clear line of responsibility between contractor risk and employer risk should the end result not meet those expectations;

4 ask yourself whether there is concrete consistency between the various components that make up the 'design and construct' package in the contract – does it all hang together and make sense?

5 this necessarily involves comparing the legal wording in the contract with what is stated in the technical supporting documents and/or any external standard that is referred to;

6 consider whether the standard form contract is appropriate in the circumstances: are there any provisions in that standard form (or the received wisdom amendments supplied by the lawyers) that risk the sort of ambiguities we saw in the *Højgaard* and *OBS* cases?

To find out more, get in touch

Vincent Brown
E: vincent@vincentbrownlaw.com
T: + 44 (0)7740 877 627

Vincent Brown Law

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