



NEW SQUARE

LESSONS FROM MT HØJGAARD

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July 2018

The Højgaard Problem

1. MTH will design the works with reasonable skill and care.
2. MTH will design and complete the Works so that they shall be fit for purpose. Fitness for purpose means in accordance with the Technical Requirements. “The design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement” [para 3.2.2.2 of the Technical Requirements].
3. “The design of the foundations shall comply with J101”. J101 requires the shear strength to be calculated by formula x. Formula x contains an error so that shear strength is too low by a factor of 10.

Giving meaning to the contract

1. The Court strives to give meaning to the words the parties choose to use.
2. The starting point is the words in their context.
3. The parties may have imposed a hierarchy (or one may be apparent).
4. Other parts of the contract may point the way.
5. If there is a genuine ambiguity, the courts will prefer the commercial meaning .
6. The court will not shy away from the natural meaning of the words used merely because it produces a harsh result.

“Fitness for purpose” – is it ever a good idea ?

Risks to Both Parties

1. Requires a conscious deviation from the main standard forms (JCT, NEC3/4)
2. What benefit does it bring for “run of the mill” projects ?
3. Commercial risk – increased cost; increased designer risk; may backfire on employer (liability cap)
4. Insurance – will any insurance company stand behind the designer ?
5. Imprecision – what is “the purpose” ? what is “fitness” in that context ?
6. If you are going to go down this route, use a performance spec

Improving construction contracts (1)

1. Do you need a bespoke contract, or can you work with one of the standard forms ?
2. If you can manage with the standard forms, do you need to carve out any exceptions ?
3. How does the contract assign responsibility for design risk and in particular the risk of errors in the outline design ?
4. How does the contract assign responsibility for ground conditions / other aspects of the physical environment ?
5. Does the contract proceed on the basis of a shared assumption ?
If so, who bears the risk of it being wrong ?

Improving construction contracts (2)

For contracts with annexures regulating design (e.g. lengthy specifications referring to design standards):

(a) are they strictly necessary ?

(b) are they clear ? (do you know what they mean ?)

(c) are they consistent ?

(e) is there a hierarchy ?

(f) are some parts of the works treated differently to others ?

(g) if there are absolute performance standards, are they explicit ?

(h) is appropriate language used when describing standards (eg “designed to achieve” rather than “will ensure”)

References

MT Hojgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Limited and another [2017] UKSC 59

SSE Generation Ltd v Hochtief Solutions AG and Anor [2018] CSIH

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