

DESIGN LIABILITY FITNESS FOR PURPOSE OR REASONABLE SKILL AND CARE

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Design duties (Part 1)

- Key distinction
 - Reasonable skill and care
 - Fitness for purpose/compliance with specific performance criteria
- Relevant to
 - Insurance
 - Proof
 - Pass on claim to designer
 - Contributory negligence

Design duties (Part 2)

- ***MT Hojgaard a/s v Eon Renewables & UK Robin Rigg***
 - Design, fabrication and installation of the foundations for wind turbine generators
 - Independent agency produced design standard (J101)
 - J101 contained an error
 - Everyone unaware of error
 - Design carried out in accordance with J101
 - Following installation, problems arose because design in accordance with J101
 - Defendant held Claimant responsible for the failure of the connections

Design duties (Part 3)

- What was the Claimant's duty in relation to design?
 - Reasonable skill and care
 - Strict?
- Who took the risk that J101 contained an error?

Design duties (Part 4)

- Part C List of Definitions

“Fit for Purpose means fitness for purpose in accordance with, and as may properly be inferred from, the Employer’s Requirements

Good Industry Practice means in relation to any particular undertaking or task ... those standards, practices and methods and procedures ... to be performed with the exercise of skill, diligence, prudence and foresight that can ordinarily be expected from a fully skilled contractor who is engaged in a similar type of undertaking or task in similar circumstances consistent with recognised international standards

Design duties (Part 5)

- Clause 8.1 General obligations

The Contractor shall, in accordance with this Agreement, design, manufacture, test, deliver and install and complete the Works:

(i) with due care and diligence expected of appropriately qualified and experienced designers, engineers and constructors (as the case may be).

...

(iv) in a professional manner ... in accordance with ... Good Industry Practice

...

(viii) so that the Works, when completed, comply with the requirements of the Agreement.

...

(x) so that each item of Plant and the Works as a whole shall be fit for its purpose as determined in accordance with the Specification using Good Industry Practice.

...

(xv) so that the design of the Works and the Works when completed by the Contractor shall be wholly in accordance with this Agreement and shall satisfy any performance specifications or requirements of the Employer as set out in this Agreement, and

Design duties (Part 6)

- Part I of the Employer's Requirements

1.6 Key functional requirements

...The Works elements shall be designed for a minimum site specific 'design life' of twenty (20) years without major retrofits or refurbishments; all elements shall be designed to operate safely and reliably in the environmental conditions that exist on the site for at least this lifetime. ...

Design duties (Part 7)

- Section 3.1

“It is stressed that the requirements contained in this section and the environmental conditions given are the MINIMUM requirements of the Employer to be taken into account in the design. It shall be the responsibility of the Contractor to identify any areas where the Works need to be designed to any additional or more rigorous requirements or parameters.”

...The Contractor shall undertake the detailed engineering design of all structures, fixtures and fittings required to comply with the requirements of this Agreement and the Conditions of Contract. The Contractor shall assume full responsibility for design and installation of the structures.”

Design duties (Part 8)

- Section 3.2.2.2

The design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement.

Design duties (Part 9)

- 3.2.3.2 Document Hierarchy

Subject to current legislation, the Contractors design shall be in accordance with international and national rules, circulars, EU directives executive orders and standards applying to the Site. Unless otherwise specified in the Contract, the following hierarchy of standards shall apply (1 highest and 8 lowest):...

- 1. ...
- 2. [J101] ...

Design duties (Part 10)

- Section 3b

3b.5.1 Scope

The design of the structures addressed by this Design Basis shall ensure a lifetime of 20 years in every aspect without planned replacement.

Design duties (Part 11)

- ***Steel Company of Canada*** – approving Hudson

Where a contractor expressly undertakes to carry out work which will perform a particular function in accordance with plans and specifications and it turns out that work designed and constructed in accordance with those plans and specifications will not perform that function, then generally the express obligation to achieve the function overrides the obligation to comply with the plans.

Design duties (Part 12)

- ***Great Vancouver Water District***

The general rule is that defects caused by an owner's specification are not the responsibility of the contractor, unless the contractor expressly guarantees that the construction would be fit for purpose or a warranty can be implied by the owner's actual reliance on the contractor's skill and judgment.

- Clause 4.4.4 :

The Supply Contractor warrants and guarantees that the Goods are free from all defects arising at any time from faulty design in any part of the Goods.

Design duties (Part 13)

- Mr Justice Edwards-Stuart :
 - Not unusual in construction and engineering contracts for there to be both fitness for purpose type obligations and reasonable skill and care obligations
 - Not mutually incompatible
 - The key clauses
 - 3.1: assumed full responsibility for the design
 - 3.2.2.2: service life of 20 years

Design duties (Part 14)

- The Court of Appeal
- Re Sigma:

“In complex documents of the kind in issue there are bound to be ambiguities, infelicities and inconsistencies. An over-literal interpretation of one provision without regard to the whole may distort or frustrate the commercial purpose.”

Design duties (Part 15)

- Distinction between:
 - obligation to ensure a lifetime of 20 years
 - obligation to provide structure with a “design life” of 20 years
- “Design life”: probably but not inevitably will function for 20 years
- Contract contained both types of provision

Design duties (Part 16)

- Clause 5.3: contract conditions take precedence over other contractual documents
- Clause 8.1 of contract conditions: sets out contractor's obligations.
- No express absolute warranty of quality in clause 8.1

Design duties (Part 17)

- Obligations in clause 8.1 expressly or by implication indicated only reasonable skill and care and were inconsistent with strict obligation
- No free-standing warranty or guarantee so distinguish *Steel Company of Canada* and *Vancouver Water District*
- Applying Re Sigma – no guarantee of 20 year life

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