

CONTRACTOR'S DESIGN LIABILITY - PRIMARY ROLE OF OUTPUT OBJECTIVE

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Legal Briefings

On 3rd August 2017, the UK Supreme Court unanimously allowed the appeal in the case of E.ON v MT Hojgaard. The facts of the case and the decision of the Court of Appeal are set out in our earlier e-bulletin [here](#). In allowing the appeal, the Supreme Court found that the contractor, having agreed to an output objective, could not say that the employer's approval or specification of a design precluded achievement of the objective so as to exonerate it from liability or limit its liability to a duty only to exercise reasonable skill and care. The court said

"Where a contract contains terms which require an item (i) which is to be produced in accordance with a prescribed design, and (ii) which, when provided, will comply with prescribed criteria, and literal conformity with the prescribed design will inevitably result in the product falling short of one or more of the prescribed criteria, it by no means follows that the two terms are mutually inconsistent.... in many contracts, the proper analysis may well be that the contractor has to improve on any aspects of the prescribed design which would otherwise lead to the product falling short of the prescribed criteria, and in other contracts, the correct view could be that the requirements of the prescribed criteria only apply to aspects of the design which are not prescribed.

While each case must turn on its own facts, the message from decisions and observations of judges in the United Kingdom and Canada is that the courts are generally inclined to give full effect to the requirement that the item as produced complies with the prescribed criteria, on the basis that, even if the customer or employer has specified or approved the design, it is the contractor who can be expected to take the risk if he agreed to work to a design which would render the item incapable of meeting the criteria to which he has agreed"

The court also rejected the contractor's contention that the Technical Requirements (TR) of the contract (where the design life requirements were to be found) was too slender a thread to base the contractor's wider duty as referred to above. It said

"[The contractor] argues that it is surprising that such an onerous obligation is found only in a part of a paragraph of the TR, essentially a technical document, rather than spelled out in the Contract. Given that it is clear from the terms of the Contract that the provisions of the TR are intended to be of contractual effect, I am not impressed with that point."

Of course each contract must be interpreted according to its individual terms but this decision indicates that the courts will generally take a purposive approach to inconsistent contractual terms and to the interpretation of a contractor's design duties.

[**Read our related briefing from the Middle East team here >**](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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