



Welcome to the February 2016 edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

**This issue considers fitness for purpose obligations under NEC3, fitness for purpose obligations generally in light of the recent decision of the Court of Appeal and the practice points arising.**

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## Where are we on fitness for purpose under NEC3?

A recent survey of nearly 1,000 construction businesses by the RIBA has found that the market share of the NEC3 form is increasing in comparison with the JCT form, whose popularity has started to wane.<sup>1</sup>

In view of the growing importance and use of the NEC3 form, this 56th issue of *Insight* will consider (i) fitness for purpose obligations under NEC3; (ii) fitness for purpose obligations generally in light of the recent decision of the Court of Appeal in *MT Højgaard a/s v E.ON Climate and Renewables UK Robin Rigg East Limited* [2015] EWCA Civ 407; and (iii) the practice points arising in relation to (i) and (ii).

### Nature of the fitness for purpose obligation

A fitness for purpose obligation imposes an obligation on the contractor or designer that the works or design will be fit for the purpose for which they were intended, and liability is strict which means that liability will arise regardless of any negligence on the contractor's or designer's part.

Strict liability creates considerable difficulties in the insurance context as most professional indemnity policies exclude claims for a breach of any fitness for purpose obligation. As a general rule, unless negligence is alleged (in practice, there is often no need to allege negligence in circumstances where liability is strict), policies are unlikely to respond to an alleged breach of any duty of fitness for purpose which may render the defence of any fitness for purpose obligation uninsured. On a worst case scenario, the inclusion of fitness for purpose obligations in contracts or appointments may render the entire policy null and void, which may have the very draconian consequence of leaving the contractor or designer with no professional indemnity cover whatsoever.

Prior to considering the treatment of fitness for purpose obligations under the NEC3 form, it is instructive to consider how fitness for purpose is dealt with at common law so as to place contractual fitness for purpose clauses in context.

### The position at common law

The contractor's role is to supply goods (i.e. completed works) and this is governed by the Sale of Goods Act 1979 (as amended by the Sale and Supply of Goods Act 1994) ("the Sale of Goods Act").

In the absence of any express terms to the contrary, where goods and materials are supplied, the standard of care imposed by the Sale of Goods Act is one of satisfactory quality, and where a purpose is made known to the employer for the supply of goods or materials, reasonable fitness for that

intended purpose.<sup>2</sup> In the construction context, the position under the Sale of Goods Act is confirmed by the decision in *Young v Marten v McManus Childs*<sup>3</sup> which confirms that a warranty will be implied into a building contract that any goods and materials supplied by a contractor will be reasonably fit for the purpose for which they were supplied.

Where construction works or design are supplied (again, absent any express terms to the contrary), if the purpose for which the works or design are to be carried out is made known to the contractor, the work is of a kind that the contractor or designer holds itself out to perform and the employer relies on the contractor's skill and judgment, then a warranty will be implied that the works or design will be reasonably fit for their intended purpose when completed.<sup>4</sup>

The consultant's design, on the other hand, is part of a contract for services governed by the Supply of Goods and Services Act 1982 which implies a duty to take reasonable care and skill.

### Treatment of fitness for purpose under NEC3

The existence of an absolute implied term of fitness for purpose is very onerous, particularly in light of the likely absence of insurance cover noted above. As a result, most standard forms contain express provisions which absolve the contractor from any implied fitness for purpose obligation that might otherwise exist. Usually, these express terms limit the contractor's liability for design to the standard required of the appropriate professional designer,<sup>5</sup> which imposes an express obligation of reasonable care and skill that operates to trump the onerous implied fitness for purpose obligation.

### The ECC

At first glance, NEC3 appears to be silent on the standard of care in relation to design as fitness for purpose is not covered by any of the core clauses, but a more in-depth review reveals the contractor may be saddled with an express fitness for purpose



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obligation under Clause 21.1, which mirrors the approach adopted at common law and under statute to fitness for purpose.

Clause 21.1 provides that:

*"The Contractor Provides the Works in accordance with the Works Information."*

In other words, the Works must comply with any purpose specified in the Works Information and, in turn, the Works Information should define the extent of the contractor's design obligations and state the purpose of the design work. It is often the case that the employer will include an obligation of fitness for purpose within the Works Information but this will not provide a panacea in the event that other parts of the Works Information are inconsistent with an obligation of fitness for purpose: much therefore will depend upon the precise wording of the Works Information.

In the absence of any absolute obligation in the Works Information that the design is to be fit for purpose, the contractor will probably still be saddled with the implied term that the completed work will be reasonably fit for the purpose for which it was made known to the contractor, unless, that is, secondary Option X15 has been selected. Secondary Option X15 provides that the contractor will not be liable for defects in the design if it can prove that it has used reasonable care and skill to ensure the design complies with the Works Information. This brings NEC3 into line with the reasonable care and skill approach to fitness for purpose favoured by most other standard forms which, importantly, is insurable.

## The PSC

In a similar vein to the ECC, the PSC reflects the position at common law with regard to fitness for purpose by

imposing a duty on the consultant to take reasonable care and skill.

Clause 21.2 provides:

*"The Consultant's obligation is to use the skill and care normally used by professionals providing services similar to the services."*

This appears to impose an obligation to act with reasonable care and skill which is judged objectively against the normal standards of the consultant's profession. It should be noted, however, that many employers will seek to amend Clause 21.1 to refer to the reasonable care and skill that should be exercised by consultants experienced in preparing designs for projects similar to the employer's current project.

The PSC equivalent of the ECC Works Information is the Scope, and the Consultant is to provide the Services in accordance with the Scope under Clause 21.1 of the PSC. It is important to note that, unlike the ECC, if the Scope specifies that designs must be fit for purpose, this will not necessarily automatically impose a fitness for purpose obligation in respect of the design. This is because the obligation under Clause 21.2 is to take reasonable care and skill to produce designs that are fit for purpose which is no higher than a duty to take reasonable skill and care generally. That said, some employers will wish to amend Clause 21.2 such that the services must be provided with whatever skill and care are necessary to make the designs fit for purpose, in which case the primary obligation would be fitness for purpose, not the production of design work.

**Identifying fitness for purpose obligations: *MT Højgaard a/s v E.ON Climate and Renewables UK Robin Rigg East Limited* [2015] EWCA Civ 407**

Difficulties can arise in circumstances where the standard of care is inconsistent having regard to the contract documents and/or where the standard of care is defined having regard to specifications prepared by different organisations, as

demonstrated by the recent decision of the Court of Appeal in *MT Højgaard a/s v E.ON Climate and Renewables UK Robin Rigg East Limited* [2015] EWCA Civ 407.

In that case, E.ON engaged MTH to design, fabricate and install 62 monopile foundations at the Robin Rigg offshore wind farm in 2006. The contract included a clause that the works as a whole would be "fit for its purpose as determined in accordance with the Specification using Good Industry Practice". A Specification or Technical Requirements Document ("TR") was attached to the contract which stated that the design of the foundations "shall ensure a lifetime of 20 years", and there was further reference to a requirement for the foundations to have a minimum service life of 20 years. Finally, the TR stated that MTH should undertake the design of the foundations using the international DNV-OS-J101 ("the DNV Standard").

The design and installation of the foundations had been substantially completed by early 2009, and in September 2009, DNV notified the offshore wind industry that the DNV Standard contained an error. The axial capacity of the grouted connection had been overestimated, as a result of which the grouted connection was not sufficiently strong and this had an adverse effect on the design life of the foundations.

E.ON argued (i) there was a fitness for purpose obligation as MTH had warranted the foundations would have a service life of 20 years, and (ii) MTH was in breach of contract and/or negligent in its design.

At first instance, Mr Justice Edwards-Stuart concluded that the cause of the problem with the grouted connections was the error in the DNV Standard and not any breach on MTH's part, but he found MTH was still liable in contract as it had provided a warranty that the foundation structures would have a service life of 20 years. MTH appealed to the Court of Appeal on the issue of the warranty, amongst other matters.



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In the Court of Appeal, Lord Justice Jackson reviewed the relevant authorities on fitness for purpose and pointed out that it is not unknown for construction contracts to require the contractor to comply with particular specifications and standards to achieve a particular result, and emphasised that such contracts may impose a double obligation upon the contractor if they are worded with sufficient clarity. In circumstances where there is a double obligation, the contractor must, as a minimum, comply with the relevant specifications and standards, and it must also take such other steps as are necessary to ensure it achieves the specified result.

Lord Justice Jackson commented that whether such a double obligation was imposed in the instant case was a matter of contractual interpretation. Reading the contract as a whole and taking into account the factual matrix, his Lordship found there was no warranty for a 20-year service life which amounted to a fitness for purpose obligation. E.ON's claim therefore failed on the facts.

### Practice points

- As a general rule, whether you are a contractor or a consultant, if you wish to preserve your protection under professional indemnity policies, fitness for purpose obligations are best avoided.
- Read the contract and any contract amendments very carefully before signing; be clear as to whether you are accepting a potential fitness for purpose obligation or not, particularly if the contract drafting is diffuse. Following the decision of the Court of Appeal in *MT Højgaard a/s v E.ON Climate and Renewables UK Robin Rigg East Limited*, any fitness for purpose obligation

must be worded in very clear terms if it is to be enforceable.

- If you have design responsibility under NEC3 ECC, ensure Option X15 is selected to limit your design liability to a standard of reasonable care and skill so as to avoid any implied fitness for purpose obligation that might otherwise arise.
- When contracting under the NEC3 PSC, resist any attempt by the employer to amend Clause 21.2 to elevate the standard of care to that of a consultant experienced in preparing design for projects similar to the employer's project, as this may also amount to a fitness for purpose obligation.
- Remember that if you contract with the employer under the NEC3 ECC without Option X15 and retain a designer under an unamended PSC, the standard of care obligations will not be back to back and you will owe a greater obligation to the employer than the designer will owe to you. To avoid inconsistent obligations, either include Option X15, or amend the PSC to ensure design responsibilities flow consistently down the contractual chain.

### Conclusion

Absolute fitness for purpose obligations relating to design should always be approached with caution and either diluted or avoided for the simple reason that they are uninsurable. If fitness for purpose obligations have to be accepted for commercial reasons, then contractors should seek to mitigate their effects by pricing them into the deal.

### Footnotes

1. A survey of nearly 1,000 UK construction businesses published in January 2016 by the RIBA found that the NEC3 contract is used most often by 30% of the construction industry, up from 22% in the last survey in 2012, whilst JCT contracts are used most often by 39% of the industry, down from 48% in 2012. Further information about the survey can be found at <https://www.neccontract.com/About-NEC/News-Media/NEC3-is-favourite-contract-suite-for-UK-clients>.
2. See section 14 of the Sale of Goods Act 1979 (as amended).
3. [1969] 1 AC 454, HL.
4. See *Greaves & Co (Contractors) Limited v Baynham Meikle* [1975] 1 WLR 1095.
5. The test to be applied is known as the Bolam test which establishes that where special skill and competence are involved, the test for negligence is not that of the man on the Clapham omnibus, as he does not possess this special skill. Neither is it necessary for the professional consultant to possess the highest skill: it is sufficient if he exercises the ordinary skill of an ordinarily competent man exercising that particular art (see *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 583).

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston. [lkington@fenwickelliott.com](mailto:lkington@fenwickelliott.com). Tel +44 (0) 207 421 1986

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