

# Defining fitness for purpose

**STUART JORDAN\* stresses that ‘fitness for purpose’ means exactly that – and is a guarantee by the contractor that the completed works will suit the purpose intended for them.**

**I**N THE past few months, we have looked at some important developments in the concept of ‘fitness for purpose’ and related terms such as ‘design life’ and ‘performance specifications’.

‘Fitness for purpose’ is a guarantee by the contractor that the completed works will be fit for the purpose which the employer intends for them. Most engineering, procurement and construction (EPC) contracts, whether published standards (such as Fidic *Yellow* and *Silver* books) or bespoke ones, will include a ‘fitness for purpose’ obligation.

The decision of the UK Supreme Court in *MT Højgaard versus E.On Climate and Renewables* examined the difficulties which arise in EPC contracting where there is an apparent clash between a technical requirement and a performance requirement.

Of equal importance to those drafting and using EPC contracts is another court decision which has looked at the concept of ‘fitness for purpose’. This is also an English law decision but, again, examines EPC issues which apply equally in this region.

The new decision is in *Fluor Limited versus Shanghai Zhenhua Heavy Industries (SZ)*. Fluor was the EPC contractor appointed by Greater Gabbard Offshore Wind (GGL) to make and install foundations – mostly monopiles and transition pieces – for 140 wind turbines. The EPC required two types of ultrasonic scanning of welds to identify different types of weld flaws: a ‘D’ pattern scan was required when the weld was flush, and an ‘E’ pattern when it was not.

Fluor subcontracted the fabrication to SZ and imposed the same testing regime except for agreeing not to require a ‘D’ scan if a weld had already undergone an ‘E’ scan before grinding it flush. Unfortunately, because of this, certain types of flaws (transverse cracks), which would have been picked up by the ‘D’ scan, were

not identified during production but were found later when welds were re-scanned by GGL.

As a result, some monopiles were rejected and GGL required retesting of all welds and repairs where needed. Fluor (and SZ) believed that these requirements were unnecessary and should not be at Fluor’s cost when the goods in fact were (by objective assessment) ‘fit for purpose’. Fluor went to arbitration with GGL.

Following the arbitration however, Fluor sought to recover from SZ the cost of the retesting and repairs, on the basis that the goods did not meet the purchase order requirement of ‘fitness for purpose’.

SZ contended that the goods, on an objective assessment, met their fitness requirements and would perform their function for the required life of 25 years. They said that this is the sole test of fitness: the purchaser’s view of it is irrelevant. Fluor did not attempt to deny that the goods met the objective test but said they failed another condition: that the goods had to be in such condition that a reasonable purchaser – knowing what Fluor knew about the weld test data – could still go ahead and install them without further testing and repair.

The judge (Justice Edwards Stuart in the Technology and Construction Court) went back to basics. Since these goods have only one purpose, he was able to borrow a formulation of “merchantable quality” from an Australian court decision which stated: “The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their

apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms.”

So – because a reasonable purchaser, knowing what Fluor knew about flaws, could not have simply installed the foundations without imposing “special terms” (doing more testing and repairs), these goods were not ‘fit for purpose’, regardless of their actual ability to perform their function.

This is especially important as it addresses two common contractor arguments:

- The works passed production testing, so that is the end of it; and
- The employer must prove lack of fitness by commissioning the works and seeing if they fail.

The reality is that production testing is, conventionally, a quality control tool and concludes nothing in terms of meeting specification. Also, employers cannot afford to commission plant when there is data pointing to doubts about its quality. The consequences of a failure may go beyond money. On these bases alone, this is a decision which reflects the common intentions in agreeing ‘fitness for purpose’ provisions. They give assurance to employers that the thing they are buying will work.

Courts keep upholding ‘fitness for purpose’ in strong terms - reminding us that these provisions mean what they say. ■



**Jordan ... addressing key contractor issues.**

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