

STANDARD OF CARE IN CONTRACTS: “REASONABLE SKILL AND CARE” OR “FITNESS FOR PURPOSE”?

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Standard of Care in Contracts

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“Fit for Purpose”: What does it really mean?

**Electoral administration
'no longer fit for
purpose'**

**Liverpool are fit for
purpose**

**Building regulations – why they're no
longer fit for purpose**

**32 million people think Britain's
homes are not “fit for purpose”**

**Is Today's Office
Fit for Purpose?**

Water Framework Directive declared 'fit for purpose'

**Is UK banking fit for
purpose?**

**UK rail franchising
system 'not fit for
purpose', say MPs**



Open Surgery: Not Fit for Purpose

Are national parks fit for purpose?

Fit for Purpose: Legal Meaning

- Despite its common every day usage, “Fit for Purpose” has a strict legal meaning
- Defines a particular **standard of care** that should be applied when someone is providing goods, works or services
- “Standard of care” defines the level of quality of work that is expected of a person undertaking works or services
- When “Fitness for Purpose” is used in a contract, courts will apply the legal meaning, so as geotechnical professionals engaged in professional services or contracting, we need to understand that meaning

Standard of Care

Fitness For Purpose	Reasonable Skill and Care
<p>Provision of Goods/Construction of Works</p> 	<p>Provision of Services</p> 
<p>The works/goods do what they say they will or what is ordinarily expected of goods/works of that type</p>	<p>Services performed to the standard reasonably expected of a person skilled and experienced in the relevant field</p>
<p>Absolute performance to a meet a required standard</p>	<p>Non-negligent performance</p>

Standard of Care: Common Law Position

Business to Business Contracts: Sale of Goods Act 1979:

Section 14: Implied Terms about Quality or Fitness of Goods

14(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied meet the standard that a reasonable person would regard as satisfactory, including **being fit for all the purposes for which goods of the kind in question are commonly supplied**

14(3) Where the buyer makes known to the seller that the goods will be used for a particular purpose the contract is to be treated as including a term that the goods are **reasonably fit for that purpose** whether or not that is a purpose for which such goods are commonly supplied

Standard of Care: Common Law Position

Business to Business Contracts: Supply of Goods and Services Act 1982:

Section 12: Implied term about care and skill

In a contract for the supply of a services where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.

HOWEVER NOTE:

Section 16: Exclusion of Implied Terms

Where such a liability would arise, **it may be negated or varied by express agreement** between the Parties

Why Does this Matter to Professionals?

- Professionals providing advice, reports and service should only be expected to provide their services using **reasonable skill and care**
- Case law has determined that the level reasonable skill and care expected of any professional is that of a suitably skilled and experienced professional holding themselves out as qualified to do that type of work
- If the professional's work falls below the reasonable level of skill and care expected of a professional; then this is professional **negligence**
- A professional will be found to be **negligent** if the standard of work falls below the expected level of skill and care- and can be liable for the consequences
- Professionals generally have Professional Indemnity (PI) Insurance in place. PI will respond where the professional has been found to be negligent

Standard of Care

- The law will imply the standard for goods or services as appropriate, **unless the contract says otherwise**
- If the contract contains a higher standard of care, **that will apply**
- If a professional services contract contains a “fit for purpose” provision, then the common law provision will **NOT** overwrite it
- Wording may not be “Fit for purpose”; any absolute obligations will be interpreted as such:
 - “the consultant warrants that the Works will comply with the Specifications..”
 - “the consultant guarantees that when complete, the Works will satisfy any performance criteria...”
 - “the consultant ensure the Works will achieve a design life of 10 years...”
- Generally better that the contract sets out the appropriate over-arching standard of care to override these provisions

Consequences of signing up to FFP?

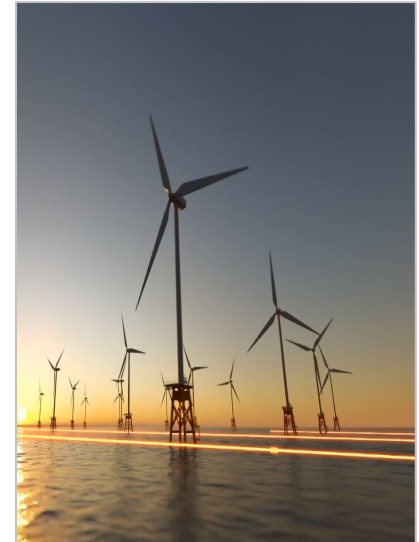
- Can be costly if a professional inadvertently accept a fitness for purpose obligation; may be liable if the outputs do not meet the specified standards, **even if there has been no negligence**
- PI Insurance will only respond where the professional has been negligent
- PI will not respond to a claim where the professional has failed to meet FFP obligations unless there has been negligence - effectively exposed to uninsured risk

Example:

- A professional has used all proper reasonable skill and care in its design, there has been no negligence, but the structure fails resulting in a direct loss- is the professional liable?

MT Højgaard A/S v E.On Climate & Renewables UK, Robin Rigg East Ltd & Anor [2017]

- MT Højgaard A/S (the Contractor) carried out design, fabrication and installation of the foundations for 60 wind turbine generators for the Robin Rigg offshore Wind Farm for E.ON Climate and Renewables UK (the Employer)
- The Contractor completed the Works. But later the Works were defective, due to an error in the international standard DNV-OS-J101 for the design of offshore wind turbines (J101)
- A dispute arose about whether the contractor was responsible for the defects and liable for the cost of the required remedial work, estimated at **EUR 26.25 million**



MT Højgaard A/S v E.On Climate & Renewables UK, Robin Rigg East Ltd & Anor [2017]

Contract Terms and Conditions

Contractor to design the Works:

- with **due care and diligence** expected of appropriately qualified and experienced designers
- in a **professional manner**... in accordance with... Good Industry Practice
- so that the Works when completed by the Contractor shall be wholly in accordance with this Agreement and shall **satisfy any performance specifications in this Agreement**

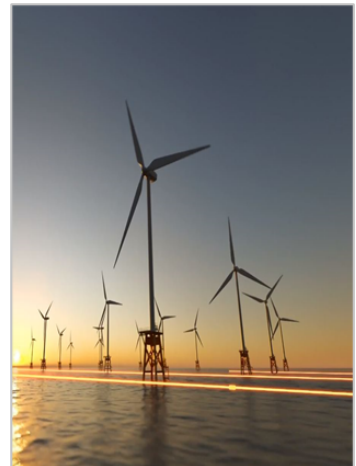
Employer's Requirements:

- The Contractor shall prepare its detailed design in accordance with **international standard DNV-OS-J101** for the design of offshore wind turbines (J101)
- 3.2.2.2: The design of the foundations shall **ensure a lifetime of 20 years** in every aspect

MT Højgaard A/S v E.On Climate & Renewables UK, Robin Rigg East Ltd & Anor [2017]

The Supreme Court held that:

- Employer's Requirements did in fact represent a requirement to achieve a 20-year design life (from Section 3.2.2.2) which the Contractor had failed to achieve and was therefore liable.
- The court should “give full effect” to these technical requirements in the Contract. It did not matter that the contract was formed of documents of “multiple authorship” and contained “much loose wording”
- given that the Employer's Requirements including the particular technical schedule had been given contractual force by the parties, it was to be taken at face value



Lessons for Consultants and Specialists:

- The standard of care expected of professionals is “reasonable skill and care” **but** this can be overridden by contract drafting
- Innocent-looking wording may imply an absolute or fit for purpose obligation, leading to uninsurable risk- **beware!**
- Whether a reasonable skill & care obligation prevails depends on the contract drafting and the order of precedence of the contract documents
- Where contracts are compiled from numerous documents drafted by different specialists, ensure an overall check is undertaken
- Always include an **over-arching** “reasonable skill and care” provision in services contracts

Other Protections:

- **Liability Caps**
 - A robustly worded negotiated liability cap will be upheld by the courts
 - Beware carve-outs from liability caps
 - Link with insurance
- **Exclusion of Consequential Losses**
 - Need to be robustly worded to include loss of profit etc
- **Net contribution clauses?**

Standard of Care: Key Conclusions

- The issue will be avoided if the T&Cs sit above the Scope in the precedence of documents and should contain phrasing like:

“Notwithstanding anything to the contrary contained in or implied by this Contract, the Contractor’s obligations shall be limited to performing the Services using the level of reasonable skill and care usually expected of an appropriately skilled and qualified contractor experienced in undertaking works similar to the Works.”

- Any other obligations in the contract should always be made “subject to” this clause
- Use this wording in parallel with other limitation protections

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