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Panel 1: Energy from Waste

Keating Chambers Energy Masterclass
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Common issues in EFW Projects



- **Bespoke** contracts
- **New** and/or quickly **evolving technology**
- Often third-party funded
- **Subsidy deadlines** can drive timely completion
- Pressure of revenue generation/financial model
- More **susceptible to supply chain risk**
- Criticality of **feedstocks/inputs**
- Complex performance obligations/warranties/test procedures
- **Long term operation** periods

Agenda for today



- **John Steel** - performance obligations and long term operation periods
- **Mercy Milgo** - supply chain risk and collateral warranties

Performance obligations and long term operational periods - John Steel



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- Obligations that are intended to ensure that the works meet a particular standard or particular output.
- Mandatory: must be complied with.
- Beyond Reasonable Skill & Care.

Sample Clause – Absolute Obligation?



“The design life of the RDF Plant is 20 years, which shall be achieved without major engineering input beyond that which would normally be expected for an RDF facility of like size and scale during the course of the design life.”

This is contained in a secondary ‘technical specification’.

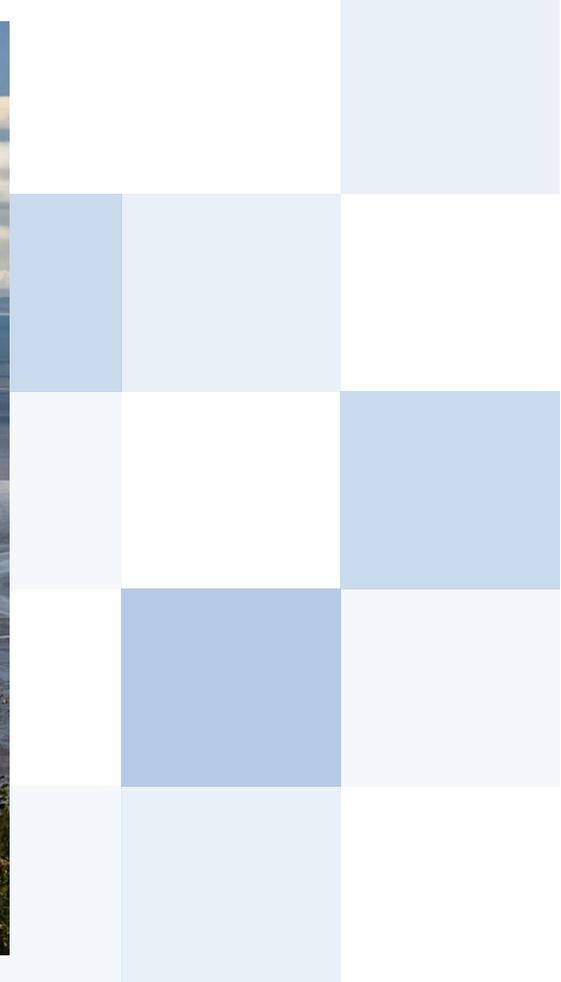
There is an obligation to provide the Works with reasonable skill and care.

Three Questions re: sample clause



1. Qualified by reasonable skill and care obligation?
2. Nature of the absolute obligation?
3. At what date is the question of compliance/
breach judged?

MT Højgaard [2017] UKSC 59



Para 3.2.2.2(ii) of the Technical Requirements

“The design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement. The choice of structure, materials, corrosion protection system operation and inspection programme shall be made accordingly”

Lord Neuberger's Distinction



“30. It appears to me that there is a powerful case for saying that, rather than warranting that the foundations would have a lifetime of 20 years, para 3.2.2.2(ii) amounted to an agreement that the design of the foundations was such that they would have a lifetime of 20 years.

A. Warranty that the foundations would have a lifetime of 20 years;

B. Requirement to design the foundations to have a 20 year lifetime.

“The former meaning has been taken as correct by the parties and by the courts below, but, for the reasons given in paras 28 to 31 above, I am currently inclined to favour the latter meaning.” (obiter)

Sample Clause – Warranty or Design to 20 years?



“The design life of the RDF Plant is 20 years, which shall be achieved without major engineering input beyond that which would normally be expected for an RDF facility of like size and scale during the course of the design life.”

- A. Warranty that the RDF Plant would have a lifetime of 20 years?
- b. Requirement to design the RDF Plant to have a 20 year lifetime?

Toucan Energy Holdings Ltd v Wirsol Energy Ltd [2021] EWHC 895 (Comm)



“... the Contractor **warrants that it has designed the Works to have a minimum design operational life of 25 years** under the operational conditions set out in the Employer’s ...”

AND

“The Works **shall be designed for a minimum operating life of a period of at least 25 years**, taking full account of proximity to coastal environment and ground type (PH). ...”

*“Lord Neuberger [...] stated that the clause on its proper construction was a contractual obligation that the design of the foundations was such that they would have a lifetime of 20 years, as opposed to being a warranty that they would last 20 years without replacement (§ 30). In other words, the question related to the **quality of the design**, as opposed to whether the foundations in fact lasted 20 years. It follows that the question is to be answered as at the date of design.”*

Design obligation assessed as at the date of the design



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Where Does This Leave Us?



1. Lord Neuberger's Distinction as a guide for all contract lawyers in EFW.
2. Scope for the distinction beyond design life?
3. Experts – guidance on the law.

Supply Chain Risk and Collateral Warranties



EFW – Supply chain risk - Contractor's failure to procure collateral warranties from principal sub-contractors



When it all goes wrong – a common ground relied on by Employers/Purchasers when terminating for Contractor Default

The Collateral Warranties obligation



*“The Contractor shall **within twenty (20) Business Days of the entry into a Principal Sub-Contract**, obtain a Principal Sub-Contractor Collateral Warranty from the Principal Sub-Contractors*”

*Paragraph x of Schedule 1 required the Contractor to procure collateral warranties from “**the Principal Subcontractors identified within Appendix Y**”.*

The termination provisions – the Contractor Default Warning Notice



*The Purchaser shall be entitled to terminate the Contractor's employment under this Contract by notice in writing to the Contractor if a **Contractor Default** has occurred...*

***Contractor Default:** persistent breach of the Contract, which may include minor but repetitive and/or on-going breaches, and in any case which has become material.*

- The Contractor failed to deliver a Principal Sub-Contractor Collateral Warranty under Clause 1 of the Contract:
- By virtue of the passage of time and the need for repeated requests for compliance, this failure had become persistent and material. The failure to provide the missing warranty therefore constituted a Contractor Default.

- By the Contractor's Default Warning Notice, the Employer gave the Contractor 21 days' notice to remedy this persistent breach by providing the outstanding collateral warranties. The Contractor failed to do so.
- Accordingly, the Employer was entitled to terminate the Contractor's employment on this ground, which it did.

(1) **Affirmation:** The Employer affirmed the EPC Contract in respect of any breach relied upon under this ground, which occurred “*once and for all*” when the Contractor had not obtained collateral warranty sub-contractors by the 21st Business Day. The Employer could not rely on those matters to sustain a Contractor Default Warning Notice years later

Contractor's case: grounds in defence (2)



(2) **Estoppel:** The parties established a conventional understanding or common expectation that the Contractor was not required to supply collateral warranties from the three sub-contractors.

(3) **Commercial Equivalent:** Any breach by the Contractor of Clause 1 was not material within the meaning of a Contractor Default because the Contractor had offered to provide the commercial equivalent of collateral warranties, but the Employer/Purchaser declined the offer.

1) Affirmation – Was the Contractor’s breach a continuing or a once-for-all breach?



“If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant.”

Larking v Great Western (Nepean) Gravel Ltd (1940) 64 CLR 221

2) Estoppel by convention – Tribunal’s application of *Tinkler* requirements (1)



- i. It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them (further, “*something must be shown to have ‘crossed the line’ sufficient to manifest an assent to the assumption*” as regards this requirement).
- ii. The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

2) Estoppel by convention – Tribunal's application of *Tinkler* requirements (2)



- iii. The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.
- iv. That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
- v. Some detriment must thereby have been suffered by the person alleging the estoppel or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

3) Contractor's offer in the absence of warranties (1)



- The Contractor had previously offered to “*step into*” the warranty and accept the obligations of the Principal Subcontractor; i.e. assuming design responsibility for that element of the Plant.
- The Employer did not accept this offer.

3) Contractor's offer in the absence of warranties (2)



- The Contractor argued that since it had always been solvent (an assertion not challenged by the Employer) and therefore in a position to satisfy the requirements of the warranty it was willing to provide, its “step in” offer was the commercial equivalent to providing collateral warranties directly from the Principal Sub-Contractors.
- Tribunal said No! One of the key advantages of a collateral warranty is that it is given by a different entity.

Thank You For Listening