A case concerning the Fitness for Purpose and the use of Reasonable Skill and Care in a construction contract

Facts

MW High Tech Projects (“MW”) was appointed main contractor under a fixed price contract for the design and construction of a waste to energy plant in Horsham. MW appointed Haase Environmental Consulting (“HEC”) to provide design services under a letter of intent, in respect of which HEC completed a basic design. MW based its own tender to the employer on HEC’s basic design, which was incorporated into the Engineer-Procure-Construct (EPC) delivery plan.

The parties subsequently entered into a formal contract. Under the terms of the contract, HEC was obliged to use “all the reasonable skill, care and diligence to be expected of properly qualified and competent design professional experienced in the design of works similar in size, scope nature and complexity to the Process Technology” (clause 5.9.1). The appointment also required HEC to design the EPC works in accordance with the EPC output specification and the EPC delivery plan “...subject to the Consultant’s overriding obligations to exercise reasonable skill and care as more particularly provided in Clause 5.9.1” (clause 11.4).

A dispute arose between the parties in relation to HEC’s design, which was developed beyond the parameters of its basic design. This lead to MW incurring significantly increased costs which could not be recovered under the fixed price main contract.

MW brought a claim against HEC for the additional costs incurred from HEC on the basis that in making such significant changes to its original design, HEC had breached its obligation to design in accordance with the specified design requirements. MW argued that under the appointment there were two separate duties: (a) to use reasonable skill and care in carrying out the services under the appointment; and (b) to design the work in accordance with the EPC Output Specification or EPC delivery plan. According to MW, the latter requirement was a strict obligation and failure to comply, even if could not be shown that HEC had not been negligent, was a breach. HEC on the other hand argued that it was not in breach so long as it had used reasonable skill and care in carrying out its design.
Judgment

Coulson J determined that “the starting point” of HEC’s obligations was to exercise reasonable skill and care in accordance with clause 5.9.1; the court considered this to be an appropriate starting point on the basis that all other obligations under the contract were made either expressly or impliedly subject to it,

“...the obligations at clause 11.3 to design, commission and test in accordance with, for example, the EPC Output Specification and the EPC Delivery Plan are made "subject to the terms of this Appointment". That would of course include clause 5.9.1. Furthermore, clause 11.4 makes express the qualification that, although the obligations to comply with, for example, the EPC Output Specification and the EPC Delivery Plan are independent, they are all "subject to the consultant's overriding obligation to exercise reasonable skill and care as more particularly provided in clause 5.9.1."

The Court determined that the effect of this was “straightforward”; if any other obligation on the part of HEC would mean that he would be acting in breach of his obligation to exercise reasonable skill and care in accordance with clause 5.9.1, then that other obligation is overridden by the obligation to exercise reasonable skill and care. For example, if compliance with a particular part of the EPC Delivery Plan would make HEC's design negligent, then they would not be obliged to comply with that part of the EPC Delivery Plan. Coulson J emphasised that “In the hierarchy of the principal obligations, the obligation to exercise reasonable skill and care is paramount”.

The next question for the Court to determine was the extent, if at all, to which the obligation to exercise reasonable skill and care was affected by what appear to be other clear obligations on the part of HEC, such as the obligation to design, commission and test in accordance with the EPC Output Specification and the EPC Delivery Plan.

Coulson J stated that there was a “clear and unequivocal” obligation to comply with the EPC Output Specification and the ECP Delivery Plan and “Those repeated obligations cannot simply be ignored; they have to be construed as part of the contractual obligations owed by HEC to MW”. He went on to determine that as a matter of proper contractual construction, the obligation to comply with the EPC Output Specification and the ECP Delivery Plan could
be read as an independent obligation alongside the over-riding obligation to take reasonable
skill and care:

“HEC were obliged to design in accordance with reasonable skill and care: they
were also obliged to comply with the EPC Delivery Plan and the EPC Output
Specification. I have already said (paragraph 46 above) that if complying with
some part of the EPC Output Specification or EPC Delivery Plan would thereby
render HEC negligent, then they were not obliged to comply with that part of
the EPC Output Specification or EPC Delivery Plan. But if they could comply
with the EPC Output Specification and the EPC Delivery Plan and produce a
design which was not negligent, then they were obliged to take reasonable
skill and care to do so. That is what the words of the Appointment say.”