

## Construction Law Update

### TCC Considers Design Obligations, Implied Terms of Fitness for Purpose and Causation

In the recent case of *DBE Energy Ltd v Biogas Products Ltd*, the Court considered a claim by DBE Energy Limited (“DBE”) for breach of contract and negligence against Biogas Products Limited (“Biogas”) in relation to the design, manufacture and supply of components to be incorporated into an anaerobic digestion facility in Surrey, England (the “AD Facility”).

#### Background

The parties entered into two contracts, one for the supply of tank heaters and one for the supply of pasteuriser tanks (the “Contracts”). The Contracts were subject to DBE’s standard terms and conditions along with implied terms as to satisfactory quality and fitness for purpose pursuant to the Sale of Goods Act 1979 and Supply of Goods and Services Act 1982.

The components supplied by Biogas suffered catastrophic defects, including the buckling and bursting of the pasteuriser tanks, causing DBE significant loss which it sought to recover in these proceedings. Biogas responded by denying liability and making a counterclaim. Key issues for the Court included: the extent of Biogas’ design obligations under the Contracts (the same was not set out in the contract documents); whether Biogas had exercised reasonable skill and care; whether the components supplied were fit for purpose; and whether Biogas had acted negligently or in breach of the Contracts.

#### What was the extent of Biogas’ design obligations?

Witness evidence was given at trial regarding pre-contract discussions. It was alleged that Biogas had not understood that DBE required it to provide design in addition to component parts and Biogas sought to rely on the fact that no quotations or purchase orders had passed between DBE and Biogas for such design. This allegation was dismissed by the Court by virtue of contemporaneous documents from the period indicating an offer was made to carry out design by

Biogas and Biogas was subsequently paid for the same. Other relevant evidence included email correspondence and Biogas’ invoices for the “*Provision of Engineering Design Services*” which included time spent “[*outlining*] design sketches and calculations” and on the “*hot water system design*”. It was held that Biogas and DBE agreed that Biogas would become involved in design relating to the AD Facility and that, even if the same had only related to the tank heaters and pasteurising tanks, it would inevitably involve incorporation with the design of the hot water system to which the components would be connected.

#### Did Biogas exercise reasonable skill and care?

Biogas was subject to implied standards and an express standard of “*utmost skill, care and diligence*.” In order to undertake its design obligations in accordance with such standards, the Court held that Biogas was obliged to: (a) ensure that the elements of design it was responsible for could be safely integrated with the overall design of the AD Facility, including the operating pressures of the hot water system; and (b) comply with all applicable legislation and regulations. Biogas were held to have done neither.

#### Were the tank heaters and pasteuriser tanks provided by Biogas fit for purpose?

Biogas’ implied fitness for purpose obligation was held to incorporate not only the components effective operation in their own right, but also their safe integration with the hot water system to which they were connected. It was held that neither components had been designed to withstand the operating pressures of the water pumps of the hot water system and, as such, neither the tank heaters nor pasteuriser tanks were fit for purpose.

#### Had Biogas acted negligently or in breach of the Contracts and did the same cause the catastrophic defects to occur?

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Given the Court's previous findings, it was held that Biogas was both negligent and in breach of the Contracts in the design, fabrication and supply of the pasteuriser tanks and tank heaters. Further, it was held that it was Biogas' negligence and breach which caused the pasteuriser tanks to fail (in short, had the pasteuriser tanks been designed to withstand the pressures they were to be subjected to by the hot water system, the same would not have failed). The Court was not satisfied, however, as to the circumstances in which the tank heaters failed and, as such, was unable to conclude the same was caused by Biogas' negligence.

### The Court's Award

DBE was awarded damages of around £224,300 flowing from the failure of the pasteuriser tanks, a detailed analysis of which is included in the Court's judgment. Biogas' counterclaim, based upon allegedly unpaid invoices due and owing, was dismissed.

### Analysis

The first key point to take away from this case is the importance of being clear as to a party's obligations under a contract. The outcome of this case rested heavily on the extent of Biogas' design obligations, which were not detailed in the Contracts. DBE were fortunate that, in this instance, the Court was willing and able to infer the existence and scope of Biogas' obligation from contemporaneous evidence, however, this will not be possible in every case. The second key point is the importance of proving causation. In this case, despite finding that the tank heaters designed and supplied by Biogas were not fit for purpose, the Court was unable to come to a conclusion (based upon the evidence provided) that the same caused their eventual failure, meaning DBE lost out on recovering its losses flowing from the same. Finally, contractors undertaking design must remember that exercising reasonable skill and care diligence in relation to design obligations includes ensuring that the elements of design the contractor is responsible for can be safely integrated with the overall design.

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