

Legal Briefing

Was there sufficient evidence before the court to support the claimant's hypotheses as to the causes of failure?

Dundee City Council, Angus Council and Perth and Kinross Council carrying on business together under the name and style of "Tayside Contracts" v D. Geddes (Contractors) Ltd [2017] ScotCS CSOH 108

Opinion of Lord Doherty

In the Outer House, Court of Session

Opinion delivered 18 August 2017

The facts

During April 2010 Tayside entered into a series of contracts with Geddes for the purchase of some 8,764 tonnes of 6mm and 10mm aggregate chippings from Geddes' Waulkmill Quarry. The chippings were purchased for the purpose of surface dressing works to various roads in Scotland. Surface dressing involves using a roller to embed the chippings into a bitumen binder that has been sprayed onto the road surface with the aim of waterproofing the road and restoring skid resistance. During summer 2010 Tayside used the chippings to carry out surface dressing works for local authorities in Dundee, Angus, Perth and Kinross and Falkirk.

By spring 2011 widespread instances of loose chippings had occurred and it was clear that the bulk of the surface dressing works had failed with the chippings having failed to properly embed and/or adhere to the bitumen binder.

During 2014 Tayside commenced proceedings against Geddes alleging breach of an implied term that the chippings would be of satisfactory quality. Tayside contended that breaches of the implied term had occurred due to the mineralogical characteristics of stone from the Waulkmill Quarry that had prevented the chippings from adhering to the bitumen binder when used in road dressing. First, Tayside claimed that "dusting up" had occurred i.e. that the chippings were susceptible to the absorption of moisture whilst being stockpiled, causing surface fragmentation and leaving a fine layer of dust on the surfaces. Second, Tayside alleged that once embedded the chippings had remained susceptible to "stripping" from the bitumen binder, particularly in the presence of water.

Tayside made a further submission that if neither "dusting up" or "stripping" could be proved then the surrounding circumstances demonstrated that the endemic failure of the road dressing works could only have been caused by some unidentified characteristic of the chippings. Tayside submitted that where similar failures had not occurred before or since and where the same problems affected the roads across four local authorities despite different design and construction teams being used, the only possible common factor that could explain the failures was that there was something wrong with the chippings.

The issue

Had there been a breach of the implied term as to quality in consequence of either "dusting up" or "stripping" or on the grounds that with all other possible causes eliminated, the chippings must have in some way been defective?

The decision

Where it was common ground that the chippings had been produced to meet demand and were not stockpiled for any period of time and where the mineralogical expert evidence was that the Waulkmill Quarry stone was not susceptible to surface disintegration, the judge rejected Tayside's case on "dusting up".

Regarding the second case the judge found that the expert evidence presented by Tayside was not sufficiently persuasive to justify a conclusion that the chippings from Waulkmill Quarry were susceptible to stripping from the bitumen binder.

The limited evidence available led the judge to apply the burden of proof to Tayside's further submission. Having considered other road dressing failures and a number of alternative explanatory theories put forward by Geddes' experts, the judge decided that it was not possible to conclude that all other potential causes had been eliminated. Therefore it could not be said that it was more likely than not that the chippings were in some unspecified way defective.

Commentary

That Tayside's case appeared a little speculative was due in part to the dearth of contemporaneous evidence. Tayside had apparently not recorded the nature and extent of the failures and was only able to present one photograph from 2011. The physical evidence was limited to two sections of road dressing taken from a single site and Tayside had not retained any samples of the chippings purchased in 2010. The judge found that where all of the relevant facts were not

Legal Briefing

known, the elimination process underpinning Tayside's further submission was inappropriate.

It is unusual for a claimant to allege that an unidentified defect must have caused the problem on grounds that all other possible causes can be eliminated. Such a claim will only have a chance of success if the factual background unambiguously points towards one conclusion. As was the case here, if the circumstantial evidence is sporadic, it will be rather easier for the defendant to defeat the claim by raising alternative theories that may be no more than plausible.

Ted Lowery
September 2017