

Judicial Communications Office

20 December 2018

COURT OF APPEAL DECISION ON LIABILITY

Summary of Judgment

The Court of Appeal today dismissed an appeal by the supplier of a glue who had been found in breach of a contract with the maker of kitchen cupboard doors. The High Court had found that the supplier failed to take into account the effect of the presence of wax in the MDF doors which caused the PVC laminate to start to peel off. The Court of Appeal upheld the earlier decision and found the glue supplier to be liable.

Background

BA Kitchen Components Ltd (“respondent”) is a manufacturer of kitchen cupboard doors based in Cookstown. Jowat (UK) Ltd (“the appellant”) is a supplier of adhesives based in Staffordshire. The respondent claimed against the appellant for damages for breach of contract, negligence, breach of statutory duty, misrepresentation and negligent misstatement in relation to the supply of adhesives to the respondent for use in the manufacture of kitchen doors. The respondent’s product is an MDF door covered by a PVC wrap stuck on by the appellant’s glue. The respondent started to use the glue in May 2003 but started receiving a number of complaints from October 2005 in that the PVC was detaching from the MDF. The respondent stopped using the appellant’s glue in May 2007. The issue in the case was the liability between the parties.

The respondent’s claim was that the appellant, with knowledge of the respondent’s manufacturing process, supplied an adhesive that was unsuitable and not fit for purpose and further was unsuitable and unfit for use with MDF or with the MDF used by the plaintiff. The appellant pleaded that the adhesive was suitable for use and fit for purpose if applied correctly and in sufficient quantities and that any delamination was a result of the respondent’s failure to manufacture the doors properly or make proper use of the adhesive and in particular to apply sufficient adhesive.

The Expert Evidence

The experts engaged by the respondent and the appellant differed in their views as to the cause of the delamination. The respondent’s expert considered the principal cause was the migration of a layer of copolymer from the adhesive. The appellant’s expert considered the principal cause was the weakening effect of wax diffusing from the MDF on the glue. The expert also commented that there were many aspects of the respondent’s manufacturing process that could contribute to a subsequent adhesion failure including the application of insufficient glue, failure to apply a smooth, even film of glue, and failure to reach and maintain the desired activation temperature of the glue for long enough.

In view of the divergence of views between the parties’ experts it was agreed that a further expert would be appointed to assist the court. This expert reviewed all the materials presented to him in relation to the cause(s) of the failure of the doors, evaluated the conclusions of the other two experts in light of this review and produced his own report for the guidance of the court. His view was that “neither of the experts have paid sufficient attention to identifying the locus of failure and to the interaction of the adhesive with the MDF surfaces ...” . He concluded that the MDF interface was

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the locus of failure. His view was that failure took place at the MDF surface as the adhesive was not able to penetrate sufficiently far into it to form a sufficiently robust layer of fibre reinforced resin composite to withstand the delamination forces. He commented that gradually over time water and wax (diffusing from the MDF) would find their way back into the interface and by lubricating the fibres would cause these to be teased out of the surface with consequent failure of the laminate.

The Judge's Decision

The trial judge said the court must be satisfied that the respondent has discharged the burden of establishing that the appellant was in breach of a duty to the respondent and that the breach of duty caused the damage to the respondent, that is that the delamination of the respondent's doors resulted from the use of the adhesive supplied by the appellant. The standard of proof imposed on the plaintiff is the balance of probabilities. Definitive testing with the MDF and the PVC and the adhesive as used in the manufacturing process between May 2003 and May 2007 was not possible and records of the quality control of the production process were not available. The trial judge held that the court must proceed on the evidence available.

The trial judge was satisfied on the balance of probabilities that the independent expert's hypothesis contained the explanation for the problem. The probable cause of delamination of the kitchen doors was that over time water and wax migrated to the MDF interface and lubricated the fibres and caused them to be teased out of the surface with resulting failure of the laminate. He said he was satisfied that the appellant failed to appreciate the significance of the wax content of the MDF and its overall effect on the adhesive. The trial judge commented that it was the appellant's representatives who approached the respondent to promote their glue as suitable for use in their existing process, subject to compliance with the appellant's specifications. He said he was satisfied that the appellant did not take any or adequate account of the presence of wax in the MDF. No issue was raised about the use of the particular MDF used by the respondent and no adjustment of the process was stated by the appellant to be necessary.

The trial judge concluded that it was an implied term of the contract between the respondent and the appellant that the adhesive supplied would be suitable for use by the respondent with the MDF and PVC used by the company and with the equipment that it had installed, subject to the appellant's specifications. He held that the appellant was in breach of contract in failing to have any or adequate regard to the effect of the presence of wax in the MDF and that the failure to take account of the presence of wax in the MDF was the cause of the delamination of the doors. He held that the appellant's breach was the cause of the damage to the respondent and found for the respondent on liability.

The Appeal

The appellant's Notice of Appeal may be summarised into two main points:

- That the court did not have evidence to draw the conclusions which formed the ratio of the trial judge's decision on liability; and/or
- That the court fell into an error of law by failing to properly explain the issues which were critical to the trial judge's decision in a way which allows the reader to understand why he reached the decision which he did.

The Law

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The legal principles relied upon by the appellant are that the common law has long recognised that courts should give adequate reasons for their decisions in order that a party can adequately exercise any appeal rights, so that justice is not only done but is seen to be done and as a bulwark against arbitrariness. The application of these principles has been explained as follows: “If the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision It is possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision.”

Discussion

The appellant’s skeleton argument contended that Court of Appeal must:

- Review the judgment in the context of the material evidence and the submissions at trial;
- Assess whether it is apparent why the trial judge reached the conclusions which he did; and
- If the Court concludes the reasons given by the trial judge for his decision are apparent, then it must still be satisfied that those reasons are a valid basis for the judgment.

According to the appellant therefore, the function of the Court of Appeal was to review the judgment “in the context of the material evidence and the submissions at trial”. The materiality of the evidence was to be assessed by reference to the agreed issues in the case, namely that “the appellant, with knowledge of the respondent’s manufacturing process, supplied an adhesive that was not fit for purpose and further was unsuitable and unfit for use with MDF, or with the MDF used by the respondent or with MDF containing paraffin based hydrophobing elements”.

The Court of Appeal firstly identified the ratio of the trial judge’s judgment. It said the first part of this was set out in paragraph [54] of the judgment which was introduced with the following explanatory preamble:

“[54] On the basis of the available evidence the Court is satisfied on the balance of probabilities that Dr Dahm’s hypothesis contains the explanation for the problem. The probable cause of delamination of the kitchen doors was that over time water and wax migrated to the MDF interface and lubricated the fibres and caused them to be teased out of the surface with resulting failure of the laminate.”

Having selected this as the most persuasive of the three proposed mechanisms through which delamination of the doors was 'achieved', the judge then said he was satisfied that the appellant “failed to appreciate the significance of the wax content of the MDF and its overall effect on the adhesive.” The Court of Appeal said this is the operational part of the ratio and the element about which the judge expressed himself to be satisfied by the available evidence. The appellant objected that this was not a sufficient explanation for it to understand the judge’s reasoning and complained that the judge gave “undue weight” to the hypothesis of the independent expert “which was not supported by testing or any independent verification”. The appellant complained that the trial judge erred by failing to make or record any finding of fact as to the likely wax content within the MDF.

The Court commented:

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“All these objections stem from the misconception that the trial judge had to decide which expert hypothesis was “the best one” and then set out his reasons for that finding. In our view any question along the lines “which expert got it right and why?” is an unprofitable question and irrelevant to the real exercise in hand. It is unprofitable because it is incapable of a definitive answer since at least two factors in the equation were not available to any of the experts at the time of their investigations. As the trial judge correctly states in paragraph [53] of his judgment “Definitive testing with the MDF and the PVC and the adhesive as used in the manufacturing process between May 2003 and May 2007 has not been possible. ... The court must proceed on the evidence available”.

The first question for the Court to answer in order to determine liability was “who is at fault for the delamination of the doors?” The trial judge decided that the core fault, the error which could potentially ground liability in the case, was the appellant’s “failure to appreciate the significance of the wax content”. The “event” or action most likely to have caused the problem was found to be that the appellant failed to understand that the fact that MDF has a wax content is a significant fact because the presence of wax impacted the effectiveness of its product. The Court of Appeal commented:

“This court understands this finding perfectly well. Much of the expert evidence in the case focussed on the mechanism of failure and the question “how did the adhesive come to fail?” Each expert produced a different theory in relation to this “how” question, but underlying the differences there was a measure of consensus between them all on the fact that the presence of wax from the MDF was important. This is because, as all the experts accepted, wax has well known adhesive-weakening properties and its presence will have an impact on the overall effectiveness of an adhesive. The question of “how” this impact happens is not legally relevant to the outcome of the case. All that matters for the purpose of the proceedings is the fact that the appellant failed to appreciate that the wax content was significant *at all*. The trial judge, correctly on the basis of all the evidence, has concluded that the breach of duty in the case is the appellant’s “failure to appreciate the significance of the wax content”. On all the evidence that we have reviewed it would have been surprising had the trial judge reached any other conclusion.”

The next question for the trial judge was whether or not the breach of duty caused the damage to the respondent, that is did the delamination of the respondent’s doors result from the use of the adhesive supplied by the appellant. The trial judge approached this issue in two steps. First, he considered whether the level of delamination that occurred amounted to “damage”. He established that failure of the doors was at a rate of 6%. Having established that there was a high failure rate which was temporally associated with use of the appellant’s product the trial judge then returned to the question of damage and stated that the evidence established that the rate of delamination with the appellant’s adhesive at 6% was “inordinate and unacceptable”. The Court of Appeal considered this made it clear that the trial judge was satisfied on the evidence received that a failure rate of 6% constituted “damage” for the purposes of this case.

Finally, the trial judge had to consider if it was the appellant’s adhesive, and not some other factor, that had caused this damage. It had been suggested in the course of the case that the real cause of the failures might have been some defect in the manufacturing processes used by the respondent, or some problem with another component used in the manufacture of the doors. On this point the trial

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judge stated that the appellant's representatives approached the respondent to promote their "one part" glue as suitable for use by the respondent. It was represented that it was suitable for use in their existing process, subject to compliance with the appellant's specifications. The process involved the respondent's machinery, including the spraying equipment, newly installed, of which the appellant was complimentary. The process also involved the use of MDF and PVC, which the appellant represented could be adequately bonded with the glue. The appellant's specifications included the grammage, temperature and pressure to be applied during the process. The trial judge said he was satisfied that the appellant did not take any or adequate account of the presence of wax in the MDF. The respondent and the appellant undertook trials of the adhesive on the respondent's MDF and PVC before it was accepted and no issue was raised about the use of MDF or the particular MDF used by the respondent. Variation of grammage or temperature or pressure was not stated by the appellant to be necessary because of the use of the MDF. The trial judge concluded:

"It was an implied term of the contract between the respondent and the appellant that the adhesive supplied would be suitable for use by the respondent with the MDF and PVC used by the respondent and with the equipment installed by the respondent, subject to the appellant's specifications. The appellant was in breach of the contract in failing to have any or adequate regard to the effect of the presence of wax in the MDF. The failure to take account of the presence of wax in the MDF was the cause of the delamination of the doors. The appellant's breach was the cause of the damage to the respondent".

The Court of Appeal was entirely satisfied that the trial judge had addressed all the legally relevant issues arising in this case and that he answered the right questions with reference to all the evidence that was presented to him. It was satisfied that it was entirely open to him to evaluate the evidence in the way that he did and found his explanation of his decisions and the reasons for them entirely clear and cogent: "His judgment benefits from a total absence of prolixity and displays an impressive clarity which is difficult to achieve in cases involving such large amounts of expert evidence".

Conclusion

The Court of Appeal concluded that, on foot of its review of the case, the appellant's appeal was misconceived because it misunderstood the ratio of the case. The Court was satisfied that the trial judge's decision was safe and appropriate and dismissed the appeal.

NOTES TO EDITORS

This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

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