

Legal Briefing

Ted Lowery considers a judgment concerning defective stone supplied for a residential project

BDW Trading Ltd v Lantoom Ltd [2023] EWHC 183 (TCC)

Before Mrs Justice Jefford DBE

In the Technology and Construction Court

Judgment delivered 3 February 2023

The facts

Lantoom operated a quarry in Cornwall and during 2012 supplied BDW with 500 tonnes of stone for a residential project in Looe. The stone was used as the external leaf of the cavity walls for several houses but following completion, the homeowners reported cracking, spalling and falling away. BDW subsequently undertook rectification works replacing all of the Lantoom stone with stone from another local quarry.

During 2018 BDW commenced proceedings claiming some £5.354 million in damages and by way of an indemnity in respect of its rectification works costs. BDW alleged that the Lantoom stone had been provided pursuant to a BDW purchase order dated 6 February 2012 which included in the specification requirements that the stone should comprise true slate and would be safe for use. Alternatively, BDW claimed that from October 2011 onwards, Lantoom had represented that the stone was suitable for use as external walling and that Lantoom was in breach of terms as to fitness for purpose implied on the basis of the factual matrix and/or pursuant to the Sale of Goods Act.

Lantoom contended that the contract was based upon the conditions of sale appearing on the reverse of their delivery note that a BDW site operative had signed when accepting delivery of the first 25 tonnes of stone, alternatively that a simple contract on neither parties' standard terms had come into being. Lantoom also contended that referring to the stone supplied as slate was not a misrepresentation where in Cornwall, Lantoom's product was commonly referred to as a slate or a slate stone. Lantoom conceded that the stonework had to comply with the description in the February 2012 purchase order but denied any misrepresentation or breach of contract, including on the basis that the cracking, spalling and falling away of the stone was caused by a number of design and/or workmanship errors including insufficient wall depth and the use of sub-standard mortar.

The issue

Was stone supplied by Lantoom fit for the intended purpose?

The decision

The judge concluded that the contract had clearly been formed on the basis of BDW's purchase order dated 6 February 2012: she dismissed Lantoom's reliance upon its own delivery note on the grounds that this did not comprise a counter-offer and could not be said to have been signed by anyone with proper authority from BDW.

The judge found that the stone supplied by Lantoom should have been correctly described as mudstone but noted that there had been no agreement to supply true slate where the term 'slate' had a different meaning in Cornwall. The judge however considered that arguments concerning the nature of the stone were less relevant where the key issue concerned the performance of the stone.

Having found on the facts that Lantoom was aware that the stone was required for external walls of houses, the judge reviewed the history of the defects, the experts' views and various geological analyses and agreed with BDW that the performance of the stone – consistent with a lack of durability including as to water absorption – amounted to persuasive evidence that it was not fit for the intended purpose. Where there was evidence of stone falling off the sides of the houses, the judge also agreed with BDW that the stone supplied was not safe. The judge considered that there was no compelling evidence supporting Lantoom's allegations as to poor workmanship, use of sub-standard mortar mix, or insufficient inner leaf wall depth.

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In summary, the judge found that the stone delivered by Lantoom was not reasonably fit for the purpose of being used for external walling with the result that BDW was entitled to make a claim under the indemnity and/or the warranty within the terms and conditions of its purchase order.

Commentary

The 93 page judgment includes an admirable dissection and analysis of the proliferation of arguments and counter-arguments generated by an agreed list of issues that stretched to 7 pages.

The judge was particularly critical of Lantoom's expert in geology including where this individual's report was difficult to navigate and did not comply with CPR Part 35.10(3) insofar as it failed to include a summary of instructions given. Lantoom's expert had also failed to address the views of his opposite number on the grounds he did not think them relevant, had offered speculative theories without evidence and, both in writing and in the witness box, had expressed trenchant and absolute views which on cross-examination he was unable to justify in a comprehensible manner. This judgment therefore includes some useful guidance for experts on what not to do.

Ted Lowery
March 2023