

Legal Briefing

Ted Lowery looks at a case that examined conflicting evidence over the causes of a piling rig collapse

MG Construction Ltd v AGD Equipment [2020] ScotCS CSOH
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Opinion of Lord Ericht

Before Mrs Justice O'Farrell DBE

In the Outer House, Court of Sessions

Opinion delivered 14 July 2020

The facts

During July 2014 MGC purchased a piling rig from AGD consisting of an impact hammer and a piece of equipment known as the "leader" which acted as a guide for the hammer and maintained verticality during piling.

In May 2015 MGC's foreman noticed a paintwork blemish on part of the leader assembly known as the "ram box" and asked one of MGC's fitters, Mr Jack, to carry out an inspection. Mr Jack produced a report dated 12 May which stated, "*Noticed small crack in paintwork on side shift ram box section. Applied weld to crack for visual check*".

On 17 May 2015 during works at a site in Portobello, Edinburgh, the ram box broke in two and the piling rig collapsed. It was apparent that the ram box had sheared along the line of a pre-existing circumferential crack that had been repaired by welding and painted over: the welding had been poorly executed but expertly concealed. AGD agreed to replace the rig but without any admission of liability. MGC retained but subsequently lost the smaller section of the broken ram box.

MGC contended that the weld must have been made prior to purchase in July 2014 so that the piling rig was not of satisfactory quality, contrary to section 14 of the Sale of Goods Act 1979. MGC commenced proceedings seeking damages including lost profits and settlement monies paid to the main contractor. In reply AGD denied that there had been any welding prior to purchase and suggested an alternative scenario whereby

misuse of the rig had caused metal fatigue that MGC had sought to remedy by carrying out welding repairs shortly before the failure on 17 May 2015. AGD further submitted that having chosen not to suspend piling operations following Mr Jack's inspection on 12 May, MGC had failed to mitigate its loss and/or broken the chain of causation.

MGC presented factual evidence from its personnel that there had never been any recorded misuse of plant in 28 years, that equipment was regularly inspected and that any damage to the piling rig would have been reported. MGC also relied upon expert opinion evidence from paint technicians and a metallurgist whose collective view was that unless the entire unit had been repainted after delivery, the ram box had been purchased with the weld in place. MGC's factual witness did not include Mr Jack who was apparently working offshore in South Africa and had declined to assist

AGD's factual witnesses included representatives of the piling rig manufacturer who confirmed factory quality control procedures and their own managing director who said that in his experience, using the leader to straighten up embedded piles was common practice and would have weakened the ram box.

The issue

Had MGC proved its case that the weld had been made before purchase in July 2014, and if so had MGC failed to mitigate and/or broken the chain of causation?

The decision

The judge stressed that the onus was not on AGD to demonstrate the plausibility of their alternative scenario, rather that in order to succeed, MGC was required to prove its case on the balance of probabilities.

The judge noted the absence of any direct evidence as to when the weld was carried out. He characterised MGC's failure to call Mr Jack or to apparently take any steps to obtain evidence from Mr Jack by alternative means, for example video link or by deposition, as creating a "fundamental difficulty" for the claim.

The judge considered that the expert evidence was inconclusive where the experts had not been able to examine the smaller

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section of the broken ram box. The judge concluded that the evidence on both sides was largely circumstantial and as such was insufficiently persuasive. Accordingly he dismissed the claim on the grounds that MGC had failed to discharge the burden of proof.

Commentary

The parties agreed that the failure of the ram box was caused by the poor quality of the weld but the dispute concerned when the weld had been undertaken. Whilst the volume of evidence presented was considerable, MGC's case was undermined by its failure to make available Mr Jack and the missing section of the ram box.

The judge observed that no tribunal would choose to determine disputes solely by reference to burden of proof arguments if it could legitimately avoid having to do so but he reluctantly concluded that MGC's claim was one of those unusual cases where owing to the unsatisfactory state of the evidence, this approach was the only just course to take.

Ted Lowery
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