Highway Authority - Condition of Road Concealed

Municipality of Huon v Driessen & Sons Pty Ltd, Supreme Court of Tasmania, Full Court, 19 March 1991, (1991) Aust Torts Reports ¶81-093.

An employee of Driessen & Sons Pty Ltd ("Driessen") was driving a semi-trailer along a narrow gravel road which had been constructed by the "cut and fill" method and for which the Municipality of Huon was responsible as highway authority. The employee moved over to allow a car to pass and the prime mover rolled down a hill when the road gave away. The edge of the road which collapsed had been covered in gravel and had the appearance of being solid. Driessen sued for damages alleging negligence and that works had been improperly carried out.

Under s.21(4) of Local Government (Highways) Act ("the Act") the Municipality, as the authority charged with the duty of maintaining the road, was expressed "not [to be] liable for any injury or loss arising from the condition of the highway unless that condition results from the improper carrying out of highway works that are carried out by, or at the direction of the corporation".

The evidence established that the loss suffered was caused by the collapse of the edge of the road which appeared to be more substantial than was actually the case. It was also established that the misleading appearance of the road was caused or contributed to by work done by the Municipality of Huon.

The trial judge found that the Municipality was negligent in the way it maintained the road sufficient to demonstrate for the purposes of s.21(4) of the Act that the way in which works had been carried out was "improper". The trial judge also concluded that the Municipality had actual knowledge of the dangerous condition prior to the accident.

In the appeal, it was found that the trial judge had erred as there was insufficient evidence to sustain the finding that the Municipality "knew of the existence of the 'soft edges'" before the accident. Wright J. said that there were three questions for determination, due to the provisions of s.21(4) of the Act. These were:

1. whether the accident arose from the condition of the road;
2. if so, whether that condition resulted from the carrying out of maintenance work by or at the direction of the Municipality;
3. if so, whether that maintenance work was carried out properly.

The Court held:

1. The accident arose from the condition of the road, that condition being the unstable clay shoulder and its camourflaging layer of gravel which misled the driver into thinking that the shoulder was safe. Driessen's loss arose from the condition of the road which resulted from the carrying out of the maintenance work by the Municipality.
2. It was not established by the evidence that the clay shoulder was not already camourflaged when the Municipality first assumed responsibility for the road, but it was established that by applying gravel and grading the Municipality maintained the condition of camourflage.
3. There was no evidence from which it could be concluded that the Municipality knew or ought to have known of the trap.
4. In the absence of evidence that the Municipality knew or ought to have known of the existence of the danger and in the light of evidence that the maintenance work was otherwise properly carried out, the finding of liability under the Act against the Municipality could not be sustained.

- John Tyrril

Joint Venture - Buy Out Provision - Penalty

CRA Limited and Anor v NZ Goldfields Investments & Anor [1989] VR 870

This case dealt with the interpretation of a clause in a joint venture agreement and whether or not that clause amounted to a penalty.

The clause dealt with the dissolution of the joint venture in the event of one party being in default. If the default continued for a period of 60 days after the giving of notice then the non-defaulting party was entitled to buy out the defaulting party's interest in the joint venture at the fair market value of that interest less 5%. It was submitted that the deduction of the 5% amounted to the exaction of a penalty.

The court did not accept the submission. The court formed the view that the relevant clause was not intended "... to compensate the non-defaulting party or punish the defaulting party ... It is (was) primarily directed ... to dealing with and accommodating a default in a fashion most conveniently suited to overcoming it in the interest of the progress of the joint venture project ...".

The court recognised that at the time the clause would be applied a default would have been in existence for in excess of 60 days. It was also accepted that the non-defaulting party would have incurred loss as a result of the default continuing for this period of time.

- Phillip Greenham, Partner, Minter Ellison, Solicitors, Melbourne. Reprinted with permission from the Building Disputes Practitioners Society's Newsletter.