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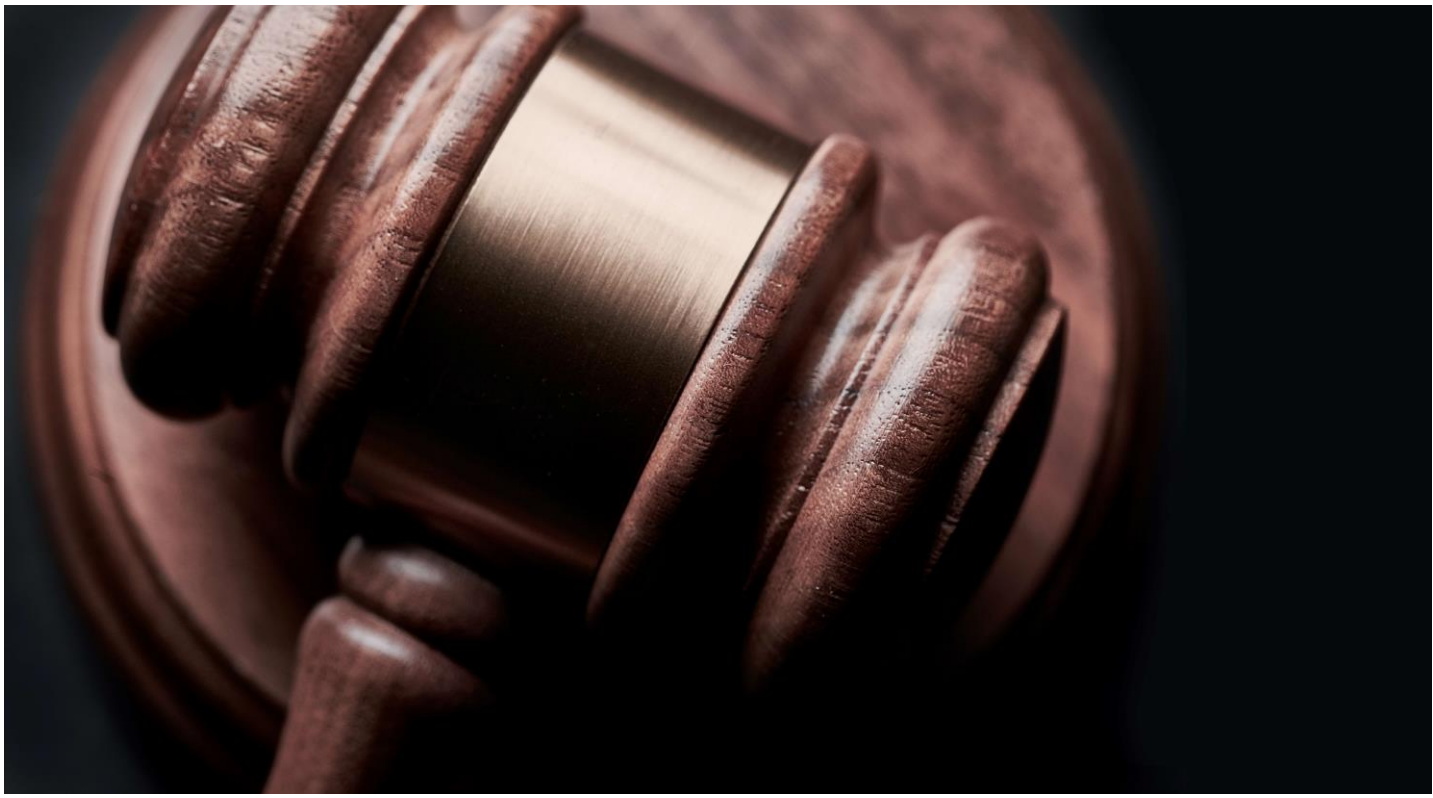

NEW DECISION FROM THE EASTERN HIGH COURT REGARDING MGO BOARDS

1 October 2021

Introduction

In recent years, consultants, contractors, and suppliers have been involved in several disputes regarding the use of MgO boards in construction projects.

In June 2021, the latest decision on the subject was concluded by the Eastern High Court.

Background

Magnesium oxide boards ("MgO boards") have been used as windbreaks in facades in several buildings and were introduced to the Danish market in 2010. In subsequent years, the MgO boards were the most used in the market for wind barrier boards. The MgO boards have, however, as a consequence of the Danish climate proved to be unsuitable, as the climate in Denmark causes the MgO boards to accumulate moisture, which has made the MgO boards unusable in construction projects.

Consequently, the use of the MgO boards has resulted in extensive damages to several of the buildings, where the MgO boards have been used. This has led to several disputes in Denmark regarding the responsibility for the damages, which the use of MgO boards have caused, including in relation to recourse claims between the contractors, developers, and suppliers.

In Danish construction law, the starting principle is that the contractor bears the risk of the construction being in accordance with applicable professional standards; but the contractor will not become liable, if the product was deemed to be unsuitable at the time where the specific material was used for the building project, i.e., if the material according to the professional standards was considered to be legitimate to use. In such case, the developer will bear the risk of the product being used in the building project. This is characterized as "construction time knowledge" (in Danish *"byggetidens viden").*

In recent years, several decisions have been made in relation to the use of MgO boards. Based on these decisions, it can be concluded that the assessment of whether a contractor or a consultant is liable towards the developer for costs associated with the replacement of the MgO boards depends on, at which time the construction work was carried out.

This assessment is consistent with the "construction time knowledge" principle, and thus whether the use of MgO boards at the time they were used was in accordance with applicable professional standards. Overall, the following can be concluded from case law so far (with certain exceptions):

1) for the period before 27 December 2013, the contractor (or consultant) is responsible if the contractor (or consultant) recommended using the MgO boards

2) for the period from 27 December 2013 to 5 May 2015, the contractor (or consultant) shall not be liable for the use of MgO boards.

3) for the time after 5 May 2015, the contractor (or consultant) is most likely responsible if the contractor (or consultant) has recommended using the MgO boards.

A newly published decision from The Eastern High Court addresses the question regarding recourse claims between involved parties.

Resume

This recent decision concerned a contractor's recourse claim against the supplier and sub-contractor in connection with the purchase and use of MgO boards. The question was whether the contractor, who was liable towards the developer, could raise a recourse claim against one of the contractor's suppliers, or the importer of the MgO boards to Denmark based on the assumption that they should have been aware of the MgO boards' shortcomings, or regardless of this, were responsible for such.

In the period February 2011 to April 2014, the construction company had used MgO boards as wind barrier boards in part of their buildings. Subsequently, it turned out, as in several other cases, that the MgO boards were unsuitable as windbreaks in the Danish climate, which led to the contractor replacing the MgO boards.

The contractor had to change the MgO boards, and it was agreed between the contractor and the developer that the contractor had to bear the costs associated with the replacement. In other words, the contractor acknowledges being responsible for the use of the MgO boards. Afterwards, the contractor decided to claim recourse firstly from the importer of the MgO boards (who imported these to Denmark), and secondly from the supplier of the MgO boards (who had bought the MgO boards from the importer) on the basis that the respective parties knew – or should have known – that the MgO boards were not compliant with the applicable professional standards for construction purposes in Denmark.

The substantive subject of the case was thus related to the law of contract and tort. There was no contractual agreement in place between the importer and the contractor, and the legal questions therefore related to:

1) Whether the contractor was entitled to claim recourse against the importer based on the principle known as "direct claim" (in Danish: *"direkte krav"*); and

2) Whether the contractor was entitled to subrogate the potential claim, which the supplier potentially had against the importer.

The legal basis for recourse claims against a supplier is regulated in the Danish Sale of Goods Act (in Danish: *"købeloven"*) and its provisions regarding the supply of faulty products/materials. The legal question was first whether the contractor was entitled to raise a

recourse claim against the importer on the basis that the importer was liable for importing and selling faulty MgO boards in Denmark.

The Eastern High Court concluded that there were no circumstances indicating that the importer knew – or should have known - about the faulty MgO boards before they were imported to Denmark. This was despite the fact that the importer prior to importing the MgO boards was aware that the MgO boards were intended to be used in a construction project. Accordingly, the Eastern High Court found that the contractor was not entitled to raise a recourse claim against the importer based on principles of "direct claims". For the same reason, the Eastern High Court concluded that the supplier was not entitled to raise a claim based on the provisions in the Danish Sale of Goods Act, and consequently, it would not, in any case, be relevant for the contractor to subrogate the potential claim against the importer.

In relation to the construction wholesaler (whom the contractor had bought the MgO boards from), the Eastern High Court concluded that the contractor had not submitted a notice of the claim immediately after the contractor became aware of the faulty MgO boards, and the claim was thus not raised in a timely manner. For that sole reason, the Eastern High Court found that the contractor was not entitled to raise a claim against the construction wholesaler, and the contractor's right to pursue a claim for damages was thus lapsed.

Our Comments

In relation to the liability for contractors and consultants regarding the use of MgO boards, the legal position has been determined based on several civil and arbitration cases, as described initially, and in our assessment, this legal position will not – taken the recent case from the Eastern High Court into account - be fundamentally changed in any future disputes regarding the use of MgO boards.

However, the new decision from the Eastern High Court emphasizes that it appears to be difficult for contractors to pursue potential claims against suppliers or other parties, who have been involved in the procurement of the faulty MgO boards. The decision also deals with the legal framework for direct claims and emphasizes that in order to raise a direct claim certain conditions and circumstances must be present.

In addition, the decision establishes the general contractual principle that if a contractor becomes aware of a faulty product, the contractor is immediately obligated to give notice of such fault, after the contractor became – or should have become – aware of the faulty product. If the contractor fails to comply with such principle, the contractor risks losing the right to pursue a claim for damages.

In relation to the importer's knowledge, it can further be concluded that an importer as a general rule should be able to prove the qualities/features that appear from a product sheet, but in this specific case, the installation instructions and product sheets had not been decisive for the contractor’s decision to purchase and use the MgO boards as wind barriers.

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