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Court of Appeal ruling on one-step sealed façades

In January this year, the Court of Appeal ruled in the widely-covered "Myresjöhus" case (Göta Court of Appeal's judgment of January 18, 2013 in case No T 99-12) on the question of whether façades that have been sealed in a one-step process constitute a defect and, if so, who is liable? The matter concerns a great number of property owners, who brought legal action against Myresjöhus Aktiebolag ("Myresjöhus"). Unlike the District Court, the Court of Appeal rejected all the property owners' claims.

To give a brief summary of the background to the dispute, it should be mentioned that the "original" property owners, upon whose lawsuits this article will focus, acquired the properties in question before building on the land was commenced. The property owners entered into a standard contract to build (ABS 95) with Myresjöhus for the erection of houses on their properties. The houses were constructed during the period 1999-2003 and employed a construction method whereby façades were sealed in a single step.

The property owners lodged several claims in the case. As grounds for their complaint, the property owners alleged that Myresjöhus, in using a construction process with one-step sealed façades, had neither fulfilled its undertakings in a workman-like manner, nor taken due care in protecting the interests of the property owners. Thus they had acted negligently. This constituted a material fault, for which Myresjöhus would be liable. Moreover, as an alternative ground, it was alleged, *inter alia*, that the workmanship was deficient.

The District Court held that one-step façades constitute a fault, in a construction law sense, since they do not comprise adequate and secure damp protection. According to the District Court, Myresjöhus was responsible for the fault, whilst concluding that the construction sector, at the time in question, was unaware that this construction method was flawed. The construction sector should have conducted tests and controls before employing the construction method in question, since it would then have been possible to discover the defects.

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In its ruling, the Court of Appeal focused on the article published in the journal, *Bygg & Teknik* in January 2007, in which the SP Technical Research Institute of Sweden ("SP") warned, for the first time, of the risk inherent to this method of façade construction. Later the same year, a seminar was held at which SP reported on its experiences from two investigative reports from 2009 and 2011. According to the Court of Appeal, the assessment of what should be deemed to be workmanlike – as was also stated by the District Court – should be made in consideration of the circumstances at hand during the years 1999 to 2003, when the houses were erected, and not on the grounds of what has later to become known about the risks attendant upon these façades. The Court of Appeal concluded that the construction sector became aware of the risks early in 2007. The construction was thus to be regarded as workmanlike up until the beginning of 2007. The Court of Appeal held moreover that there was no question of strict liability for the construction companies and that overall, Myresjöhus had acted in a workmanlike manner and that the company could not be held liable for negligence.

The reasoning and the divergent rulings in the District Court and the Court of Appeal demonstrate the dilemma associated with the problems of one-step sealed facades, at least in those cases in the grey area between where the shortcomings were considered to be publicly known and before that. Is it reasonable that a consumer, who consults an expert with a view to obtaining a façade capable of functioning, should bear the costs of remedying the defects? Perhaps the fact that the Consumer Ombudsman is now supporting the property owners with legal advice, in order for them to be able to take the matter to the Supreme Court, suggests that the answer is; probably not. On the other hand it is not reasonable that a construction company should be responsible for faults in the construction if these did not deviate from what was considered as a workmanlike standard at the time the construction method was employed, a fact which the Court of Appeal addressed at the end of the day.

The Myresjöhus case gives rise to questions regarding the role played by the mandatory, statutory insurance covering liability for construction faults. Under section 2 of the relevant act, such insurance must cover reasonable costs for remedying faults in the building's construction; in materials used in the construction; or in the execution of the work, and reasonable costs for remedying damage on the building caused by the fault.

The problems in this case should serve as a typical example of why we have such a statutory requirement in Sweden. The background to the act is that the legislator wanted to address the issues of damp and "sick houses". It was thought that the faults would be remedied quickly and regardless of whether anyone could be held

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liable. However, due to the exemption in the act regarding so-called development faults, the insurance companies can largely avoid having to pay compensation. The insurance only covers the remedying of faults which deviate from a workmanlike standard at the time the work was carried out. The Courts of Appeal's finding that the construction must be deemed as workmanlike until the beginning of 2007 has thus led to many people not being able to use their insurance.

In November 2011, the government decided to appoint a special investigator with the task of examining certain construction issues in order to facilitate new construction in Sweden. In September 2012, the investigator was also given the task of examining the need to provide consumers with financial protection in those cases, during the statutory ten-year guarantee period under the Consumer Services Act and the Land Code, respectively, when faults or damage arise as a consequence of a defect in a house and the consumer cannot obtain redress under the guarantee. The committee report will re-address the need for statutory third party protection and the investigator has been given the task of providing a proposal as to how such protection can be formed. In doing so, the investigator is to assume that the act on construction fault insurance etc. will be repealed.

The report period has been extended to 30 April this year, and we are eagerly awaiting the outcome.

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