



## **Horbury Building Systems Ltd v Hampden Insurance NV (2004)**

### **Correct decision: wrong policy?**

#### **Introduction**

The Horbury case was much publicised shortly after the decision was laid down in April 2004, under the banner that an Insurer was not liable to indemnify an Insured sub-contractor in respect of loss of profit arising from the closure of an entire cinema complex where a ceiling had collapsed in a single auditorium; emphasising that the policy only covered liability for the physical consequences of the damage in the auditorium and the economic losses caused by that physical damage.

My attention was particularly drawn, as coincidental to the judgement, I was considering an almost identical case for the Contractors All Risks and Public Liability Insurers of a main contractor. Quick off the mark, as you would expect, the instructing Insurer wondered whether there was any parallel to our case, hence a thorough review was undertaken:

#### **The Horbury Case**

The Horbury case, which was originally decided by Mr Ian Glick QC, sitting as Deputy High Court Judge in September 2003, was considered in the Supreme Court of Judicature Court of Appeal (Civil Division) on Appeal from the Queens Bench Commercial Court by Lord Justices Peter Gibson, Mance and Keene.

Leaving aside other issues, the case was interesting insofar as the Courts had been asked to determine whether liability for certain losses would fall within the terms of a policy without knowing on what legal basis the Insured would be liable for those losses, as at the time of the Appeal Hearing, no Proceedings had begun against the Claimant by either the main contractors or their employers. Far less had the extent of the basis of liability of the Claimant been established, or the detailed factual basis of any such liability been found or agreed.



Lord Justice Mance made particular comment in that regard, confirming that the right to indemnity under a liability insurance only arises in law as and when the Insured's third party liability has been ascertained and quantified by judgement, award or agreement (Post Office –v- Norwich Union (1967) and Bradley –v- Eagle Star (1989)). However, the Court had jurisdiction to grant declaration as to the extent to which valid and acceptable cover exists under such a policy in Proceedings brought by the Insured against the Insurer before the Insured's third party liability had been determined (Brice –v- Wackerbarth (1974); Du Pont –v- Agnew (1987) and Thormann –v- New Hampshire (1988)).

Fortunately, the assumed facts presented by each party left a relatively clear cut choice between two different analysis of the scope of the insurance of indemnity, so that despite the misgivings of the Lord Justices involved, it was concluded to be right to hear the Appeal on its merits.

### **The Facts of the Case**

The proceedings initially arose out of the collapse of a ceiling in a cinema complex in Manchester. The complex had been built for AMC and was to be operated by them. As eventually constructed, it contained 16 cinema auditoria. The Main Contractors for the building work were Galliford Northern. The Claimant (Horbury) was sub-contracted to Galliford to provide partition walls and ceilings to all auditoria, public areas and back of house areas at the complex. The ceilings in the cinema auditoria were to be suspended ones, comprising a system of hangers attached to the main roof structure.

The complex opened on 19<sup>th</sup> December 2001. However, during the early hours of 21<sup>st</sup> December 2001, when the complex was empty, the ceiling of auditorium 6 collapsed. The reason for the collapse was not at first known. AMC immediately closed the whole complex, and it stayed closed until 25<sup>th</sup> January 2002.

It was common ground between the parties to the proceedings that the damage caused by the collapse of the ceiling did not physically prevent the use of the rest of the complex.



Access to the rest of the complex was not obstructed nor did the collapse of the ceiling in auditorium 6 cause physical damage elsewhere in the complex.

Solicitors acting for AMC placed Galliford on notice, indicating its intention to claim for loss of revenue, the cost of physical repair, and additional marketing and advertising costs. The loss of revenue specified related to the whole complex. Galliford had previously placed Horbury on notice. Horbury had notified their Insurers (the Defendant), and ultimately issued a Claim Form because the Defendant had indicated that he did not accept that the policy covered the extent of the losses set out by AMC/Galliford.

The cinema operators had obtained the licence from the local authority under the Cinemas Act 1985, with the licence requiring them to maintain the premises, fittings and apparatus etc in good order and condition at all times, subject to the proviso that the Cinematographic (Safety) Regulations 1955 (as amended) would allow a licence to be suspended if any part of the building became unsafe.

It was accepted that some of Horbury's work had been carried out without the degree of skill one would expect, and not in conformity with the contract, in that, the wrong washers had been incorporated within the suspended ceiling hangers in 5 of the auditoria, including that in which the collapse had occurred. The effect of the use of the wrong washers was that individual hangers disconnected. Each disconnection removed or significantly reduced the support which that hanger had provided to the suspended ceilings; increased the load on the adjacent hangers and removed or significantly reduced the support which that hanger had provided for duct work.

It was generally accepted, that had remedial measures not have been taken, then it was probable that some or all of the ceilings in the affected auditoria would have collapsed in due course, either in part or overall.

AMC's closure of the complex was voluntary, as they gave the local authority assurances that the complex would not be re-opened until such time as the problem had been fully investigated and a programme for remedial works implemented. The local authority considered the situation so dangerous that they would not allow their staff onto the



premises until they were satisfied with the temporary protective measures that were required.

### **The Policy**

Whilst reference is made of the All Risks policy issued by the Defendant, it was in effect a policy of liability insurance which; amongst other things, was to indemnify the Claimant for its liability in respect of damage to property caused by products after they had ceased to be in the Insured's custody and/or control. "Products" were defined to include goods sold, supplied, erected, repaired, altered, treated or installed, or work carried out by the Insured.

In deciding the case, two particular exclusions were considered, the first of which dealt with Contractual Liability, which excluded liability assumed by agreement unless such liability would have attached in the absence of such agreement. Also considered was an exclusion relative to Damage to Products Serviced or Treated, which removed from the indemnity provided the cost of recalling, removing, replacing, repairing, anything sold, supplied, constructed, erected, installed etc by the Insured caused by a defect therein or the unsuitability thereof for its intended purpose.

### **The Decision**

The original Judge concluded that through the correct application of the policy, the Claimants could seek an indemnity for their liability for damages in respect of the physical damage done by the collapse of the ceiling in Cinema 6, for example to seats, carpets and decorations, and for the "economic consequences of that physical damage", such as loss of profits caused by the closure of Cinema 6 itself. He did not accept the damages for profits lost as a result of the closure of the rest of the complex where damages "in respect of" the damage to material property which had occurred.

This decision was upheld at appeal, with Lord Justice Keene in particular questions the basis or extent of the Claimant's liability to either AMC or Galliford by observing that a contractor should not be liable in tort to the buyer or occupier of a building if a defect is



discovered before any personal injury or physical damage is caused by the defect. His view was that the cost of repairing the defect was pure economic loss and therefore not recoverable in tort (D & F States –v- Church Commissioners (1989) and Murphy –v- Brentwood District Council (1991)). He pointed out that it is only if the defect itself causes damage to other property that damages may be recovered by an action in tort, along with economic loss flowing from the physical damage.

## **DISCUSSION**

Based upon the assumed facts considered by the Courts, and the disclosed nature of the Defendants policy, it is clear that both Courts came to the correct decision, in that the Defendants policy could only provide a limited indemnity. Indeed, in my similar case, this was exactly the position that sub-contractors, in several tiers, found themselves in! What insurance protection Galliford received is unknown, but it is clear that the Construction insurance market can, and often do, grant indemnity whereby, in these circumstances, the covers would be of far greater benefit to the Insured party.

### **Nature of the Contractor’s Liability**

The transcript of the handed down judgement in the Horbury case does not consider the contractual relationships between the parties, although, it is perhaps reasonable to assume that AMC engaged Galliford subject to one of the JCT Forms of Building Contract, and that in all probability, Horbury were engaged as sub-contractors subject to one of the JCT Sub-Contract Forms, or a Galliford specific order which would to a large degree mirror the obligations and duties imposed under the main contract.

On this assumption, Galliford would have had obligations to provide proper standards of workmanship and materials etc, and if they had a design obligation, warranted to use reasonable skill or care. It will be recalled that the collapse in auditoria 6 occurred only two days after the cinema was opened, and therefore, it is reasonable to assume that Galliford would have ongoing obligations under the Maintenance and Defects Clause of the main contract. Finally, by virtue of the general indemnity clause (Clause 20.2) they would be obliged to indemnify AMC for both their, and their sub-contractor’s negligence.



There can therefore be no defence to Galliford's primary liability for both damage and defect rectification, with consequential losses flowing therefrom. In that respect, despite Lord Justice Keene's comments, it will be appreciated that AMC's claim would rise in contract, as opposed to tort, so that, arguments of pure economic loss could be discounted. It is for this reason that I will not dwell upon the standard exclusion for Contractual Liability. Similarly, Galliford's claim against Horbury would be under contract, so that, if it were accepted that Horbury were at fault, perhaps through either a workmanship or materials error, then Galliford should have every expectation of passing down that liability to Horbury.

### **The Alternative Outcome**

I will deliberately avoid utilising the wording that applied to my particular case, but, utilising a relatively standard construction policy, the case can be re-examined. Firstly, let us consider a standard public liability cover which will deal with sums the Insured may become legally liable to pay in respect of amongst other things, accidental loss of or damage to property. Leaving aside other issues, it would be entirely reasonable to expect the policy to exclude the cost of making good faulty or defective design, workmanship or materials in the permanent works, even if the exclusion is limited to the parts immediately affected and does not apply to loss or damage in consequence thereof. A major part of the claim would undoubtedly have been the cost of repairing the damaged ceiling, and undertaking defect rectification. With the foregoing exclusion in mind, where could an Insured find an indemnity?

In the Horbury case, as indicated above, it is clear that any "damage" was discovered or came to light, during the maintenance and defects period of the main contract, i.e., subsequent to the issue of a Certificate of Practical Completion (as evidenced by the opening of the cinema). Contractors All Risks covers will normally exclude damage to the original works subsequent to the issue of a Certificate of Practical Completion, although by virtue of the Defects Liability Clause the indemnity is extended beyond that date, particularly in circumstances such as this where damage occurs within the maintenance and defects period from a cause during the earlier construction period



(defective workmanship/materials). The Contractors All Risks policy could therefore be of assistance.

One has to question the extent of indemnifiable “damage”. A standard cover would exclude the cost necessary to repair, replace or rectify the works which were in a defective condition due to a defect in design, plan, specification, materials or workmanship. Damage to other parts of the works which are not in themselves defective, where the damage is consequent upon the said defect, would however still fall within the cover.

In the Horbury case, we are concerned with defective washers to the suspended ceiling system and in particular the hangers. The degree to which the ceiling was in itself defective, and which elements could be considered as consequential or subsequent damage could be debated, although, it might be reasonable to assume that Galliford’s contract extended to seats, carpets, decorations and other fixtures including screens which may have been damaged. In those circumstances, the Contractors All Risks cover would have been more specific, so that it would be appropriate to provide an insured party with an indemnity thereunder.

Beyond that however, most main contractors, although not sub-contractors, receive an enhanced indemnity for defects, whereby the costs necessary to repair, replace or rectify any permanent and/or temporary works, which were in a defect condition due to defects in design, plans, specification, materials or workmanship, if damaged, would fall within the indemnity provided subject to an increased excess, (usually a minimum of £100,000). The nature of the enhanced defects cover (DE5) is such that only improvements to the defected element will be excluded.

If therefore indemnifiable “damage” to all elements in auditorium 6 exceeded the excess, the enhanced cover may be of assistance. More particularly however, one would have to ask the question whether the cover could extend to the other four auditoria where defects existed. The existence of a defect in any part of the works does not in itself mean that either “damage” or “loss” within the terms of the operative clause of any policy has occurred.



It will be recalled that the effect of the wrong washers was that the individual hangers disconnected. If, it were found that disconnection had taken place in the auditoria where no collapse had occurred, does that constitute indemnifiable “damage”. It may be the commencement of the likely collapse mechanism, but, in the ordinary sense of the word, would disconnection be considered to be a physical change in condition, which impaired the usefulness of the hanger. If movement had taken place, there would have been physical change, and certainly, as the collapsed mechanism had commenced, the hangers would no longer be fit for the purpose.

Consequently, if disconnection/damage was evident in all of the affected auditoria, an insured party could take full advantage of the enhanced indemnity under the DE5 Exclusion, and seek the full cost of rectifying all affected areas, subject to excess, with only any additional cost in using the correct washer excluded as an improvement. Excess application, and the possibility of multiple excesses, would have to be closely considered in the context of the true nature of the defect!

In principle therefore, a Contractors All Risks cover could consider all material damage elements of AMC’s ultimate claim, although, as consequential losses would be specifically excluded, a home must be found for their claim for financial loss. Let us assume that there is no separate Financial Loss cover, and question therefore whether the Public Liability policy could assist.

Beyond all sums which the Insured may become legally liable to pay as damages in respect of death or bodily injury or loss of or damage to material property, it is often the case that the indemnity will extend in respect of loss of or interference with amenities due to or alleged to be due to the operations of the Insured. The question to be considered therefore is whether or not there has been any loss of amenities or the like. “Amenities” will not normally be defined within any policy document, and consequently, its ordinary and natural meaning or any dictionary definition can assist. An amenity is often described as a pleasant or useful feature. “Useful” suggests serviceable, producing or able to produce good results. The five auditoria where defects/damage existed would



have had their usefulness impaired and if that loss of amenity occurred during the policy period, then, the policy could assist.

The standard exclusion relevant to claims for making good faulty or inefficient workmanship etc would still apply, although, it can be the case that as an exception to such an exclusion, the policy will extend to the cover for the Insured's legal liability for accidental loss of amenities resulting from faulty or inefficient workmanship etc.

Certainly, AMC's decision to close the affected auditoria pending rectification work is valid, and therefore, it is likely that ultimately Horbury would have a liability, so that if they had operated on this basis, an indemnity in relation to consequential losses flowing from the temporary closure of those auditoria could arise.

The policy is of course one of indemnity, and, the wording I am suggesting considers merely accidental loss of amenities. Is the loss of amenity therefore accidental in nature? It is often the case that interference with any property of third parties, in circumstances which are reasonably foreseeable as being inevitable; having regarded the nature of the works undertaken, is excluded. Whilst some debate could take place, my own view is that it would be unreasonable to assume that an Insured party would enter into a contract with an expectation of failure, and as one can only assume that the use of incorrect washers in certain auditoria was merely a mistake, it would suggest a fortuity and therefore the loss of amenity is accidental.

What about the temporary closure of the other auditoria, where, it was found that there was neither defect nor damage? The wordings I have considered, in relation to loss of amenities, have no individual policy requirement for damage to have occurred. An argument could be mounted therefore that consequential losses resultant from the temporary closure of other auditoria to check for defects would also fall within the indemnity. I would however caution that not enough detail regarding AMC's claim in that regard is known to be definitive. This latter area, I would suspect, would be subject of considerable debate and argument.



## **CONCLUSION**

I have stated that in my view the decisions in the Horbury case were correct based upon the facts placed before various Courts. I have merely re-examined the case in the context of alternative covers that could be obtained in the construction insurance market, and to a degree, have utilised an amalgam of policies I have seen to create the argument.

The purpose is not to suggest that Horbury had improper insurance, but merely to highlight the fact that construction losses, as all claims, should be dealt with strictly on their individual merits with reference to specific contract and policy wordings. Generalities rarely exist!

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