Neutral Citation Number: [2023] EWHC 2028 (KB)

Case No: Appeal Ref. QA-2022-000086
Claim No. F46YM291

**IN THE HIGH COURT OF JUSTICE**
**LIVERPOOL DISTRICT REGISTRY**

Civil & Family Court,
35 Vernon Street,
Liverpool,
L2 2BX

Date: 4 April 2023
Start Time: **1203** Finish Time: **1309**

**Before**:

**THE HONOURABLE MR. JUSTICE JACOBS**

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**Between:**

**FAHAD ATTA**

**Claimant/Respondent**

**- and -**

**HDI GLOBAL SPECIALTY SE**

**Defendant/Applicant**

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**GREG PLUNKETT** for the **Claimant/Respondent**
**JAMES MALAM** for the **Defendant/Applicant**

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# Approved Judgment

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MR JUSTICE JACOBS

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## MR. JUSTICE JACOBS:

*Introduction*

1. This is an appeal against a decision by Mr. Recorder Berkley KC which was given in a reserved judgment and then supplemented by a short addendum.

2. The background is that the claimant, together with his family, lived in a house at 75 Halifax Road, Nelson. He had bought the house in 2011. It was a two-storey left-hand end-of-terrace house and the house had been occupied by the claimant and his family for a number of years, since April 2012.

3. On about 28th November 2013, pursuant to an agreement between the claimant and a company called Heatwave Energy Solutions Limited, which I will call "Heatwave", cavity wall insulation ("CWI") was installed at the property. By the time of the trial, Heatwave was in liquidation. However, it had been insured by a number of insurers for public liability and product liability risks, which are material to the arguments on the present appeal, as well as employers' liability risks. The first defendant and the appellant in this case, HDI Global Specialty SE ("HDI" or "the appellant"), was the insurer of Heatwave for the period 28th July 2013 until 27th July 2014.

4. The cavity wall CWI product that was used for the cavity wall insulation was called Technitherm. The judge found that for a variety of reasons this work was performed negligently and in breach of contractual and tortious duties of care. The judge set out the reasons for that conclusion in paragraph [33] of his judgment and there was no appeal from that decision. In summary, however, the judge considered that this particular product was not suitable for the house in question and, perhaps more importantly, had been installed in a manner which was negligent.

5. In particular, the insulation had been left with voids within it which meant that the house was more exposed to problems of damp and mould than it would have been if there had been no insulation installed in the first place. I summarise broadly the judge's conclusions in paragraph [33], but they were more detailed than my summary.

6. Since Heatwave was in liquidation, the claim made by the claimant, in respect of the problems encountered as a result of Heatwave's work, was not brought against Heatwave directly. Instead, the claim was brought under the Third Parties (Rights Against Insurers) Act 1930 against a number of insurers. There were three defendants to the original proceedings. Each had insured Heatwave for public liability risks and HDI, as well as the second defendant (Royal and Sun Alliance Insurance PLC), had also insured Heatwave for product liability risks.

7. Each policy ran for a period of twelve months and the only material policy which I need to consider is the policy which expired on 27th July 2014, which had been issued by the appellant.

*The proceedings and judgment below*

8. The judge had a large number of issues to deal. These included whether or not the problems, which had become apparent at the house, were in fact caused by the CWI installed by Heatwave. For example there was an argument that certain problems had

been caused by a failure to repair guttering problems. One of the substantial issues in the case was the nature of the damage, if any, which had been caused to the house and when that damage was caused. The judge heard evidence about this and about its timing from the claimant and his wife, and he also had the benefit of evidence from expert witnesses on each side, whose evidence he found helpful in his assessment of what had happened.

9. In paragraphs 14 to 16 of his judgment he recorded the following:

> "[14] Under cross-examination, by Mr Malam, counsel for the First Defendant, Mrs Kausar confirmed that when the Property was purchased a valuation had been obtained presumably for mortgage purposes. She confirmed there were no concerns with damp or mould when they moved into the Property in April 2012, and that the problems only started some months after the CWI had been installed.
>
> [15] She explained that, some five to sixth months after the installation of CWI, mould damage appeared and progressed around the front door, the bay window at the front of the Property, and on the back and side wall of the sitting room at the rear of the Property; there was crumbling plaster and flaking paint in the kitchen, as well as rotten skirting boards which were damp to the touch; and mould damage and damp on the front and side walls of the master bedroom at the front of the Property (with the majority being behind the wardrobe) and on the back and side wall of the second bedroom at the rear; and mould damage and damp in the third bedroom, which first appeared on the back wall, which was the most affected room in the Property; and mould damage to all the blinds in the affected rooms at the Property…
>
> [16] The Claimant's evidence was consistent with his wife's. He did not see any dampness or mould prior to the decoration which followed the purchase of the Property but the first signs of mould only appeared some 5 to 6 months after the CWI installation. He accepted that the damage had worsened over time…"

10. The judge accepted that evidence from the claimant and his wife. In the course of the argument on appeal, I was shown certain passages in the cross-examination of both the claimant and his wife. The reason for being shown those passages is because of an argument, on behalf of the appellant, that the judge had erred in concluding that all of Heatwave's proven liability to the claimant arose from damage which occurred during HDI's policy period. The appellant, through the submissions of Mr. Malam who appeared below and has made very helpful and carefully considered submissions on this appeal, has drawn attention to the evidence of progression about which he questioned the claimant and his wife: the progression, in broad terms, starting with the presence of mould and then progressing to matters such as crumbling plaster and flaking paintwork.

11. I am not persuaded that I should on this appeal embark on reconsidering, by reference to questions and answers in cross-examination, the facts of this case as found by the judge. It is, however, apparent from the evidence to which I was referred that the claimant's wife had some difficulty in recalling the exact timing of when problems had arisen or progressed. She was seeking to recall, at a trial which took place in 2021, events which had occurred back in 2014 or thereabouts. Both she and her husband were reasonably clear that the initial discovery of the problem with mould was in or around April or May 2014, which was a time which was well within the policy period. Mrs. Kausar could not really recall the timing of the discovery of further problems elsewhere in the property after that, although she referred in her evidence to discovering problems in a period of months after the initial problems had manifested themselves and she had become aware of them.

12. The evidence of the claimant was that the progression of problems beyond those which were first seen was quick. He said it was not too long and he, too, referred in his evidence to matters developing in a matter of months.

13. It was clear on the evidence before the judge that the problems had got worse over time. The problems had never in fact been rectified and the purpose of the claim was to recover damages which would cover the cost of refurbishing the property and removing, as part of that exercise, the CWI which was alleged to be defective.

14. The question of progression was an important matter which was relevant in a number of respects at the trial. It was relevant in the context of the extent of the appellant's liability: the argument of the appellant was that the liability should fall into subsequent policy years or at least that the claimant had not sufficiently proven that any relevant liability was sufficiently related to the damage which had occurred during the policy year covered by its policy, which expired in July 2014.

15. The judge made various findings which are related to that question. The bottom line is that he considered that HDI was liable under the policy for all the costs which were being claimed by the claimant as referable to the damage which had occurred, save for a relatively small discount which he gave. His findings on causation are contained at various points throughout his judgment and his finding in relation to the appellant's liability also had the effect that the claim against the other two insurers failed. The principal reason why the claim against the second defendant failed is that there was no incremental damage in subsequent policy years which made things materially worse in terms of the costs which were going to be required to rectify the problem. The third defendant, which had provided insurance even later, could take advantage of that point as well as reliance on a specific exclusion in its policy wordings.

16. Accordingly, the judge's findings, as to the liability of the appellant for an indemnity in respect of all of the damage, had the knock-on effect of preventing any successful claim against the other two defendants.

17. The judge addressed the issue of when the damage was caused, and its progression, at various points of his judgment. In paragraph [39], he referred to the fact that the Technitherm product had been originally inserted by puncturing the outer leaf of the building and fed in to the cavity. He said that that was not physical damage to the property. In paragraph [40] he said that despite the findings which he made about poor insulation and the unsuitability of the CWI method, he was unable to find that

any actionable physical damage occurred at the time of installation. In saying that, he referred to a leading decision in the Court of Appeal, whose effect is that the incorporation of a defective product does not under English law result in damage to the building. Something else is required if there is to be a tortious liability for damage.

18. In paragraph [48], he said:

> "…I am satisfied, on the balance of probabilities, that his findings of damp, paint flaking and mould growth were evidence of damp passing across the bridges formed by the voids or the subject of condensation caused by the cold spots where the Technitherm had not reached. I also accept Mr Smitheringale's thesis that the pattern from the thermal imaging on the upper storey is consistent with the absence of Technitherm and confirms that the cavity was not adequately filled."

19. At paragraph [52] he refers to the evidence of the experts and concluded that there were significant voids left in the property by the installer Heatwave. He said that those voids allowed for water transmission and significantly increased a) the risks of penetrating dampness as well as b), condensation caused by the development of cold spots and in combination made the property less resistant to dampness than in its pre-installation state.

20. He then went on in paragraph [54] to say:

> "Despite the property not being suitable for Technitherm it was, in the event, the poor installation which caused the particular damage to the Property. That produced the state of affairs I have described and the continued unremedied state of voids and cold spots allowing for the progressive damage to the Property over time".

The judge then referred to the claimant's evidence that the damage in the property had progressed significantly.

21. So pausing there, there is no doubt that the judge considered on the evidence that there had been significant damage to the property itself, and that is a point which he returned to later in his judgment.

22. In paragraph [74] he was dealing with the appellant's policy, to whose terms I will refer to in due course. He said that this was a case where "we are not concerned with future damage". He said that he accepted the claimant's evidence that mould and damp first appeared some months after the installation of the CWI, perhaps late April to late May. He referred to the relevant period of indemnity being provided under the policy as ceasing on 27th July 2014 and said:

> "I am entirely satisfied that significant in the sense of more than nominal physical damage to the Property did occur during

> the operational period of the First Defendant's policy and so the Installer's right of indemnity was potentially engaged".

23. In paragraph [99], in a section of the judgment dealing with the second defendant's liability, he acknowledged the points which had been made by the second defendant that there was no evidence directed to the precise progression and advancement of the damage to the property. However, he went on to say:

> "…even without such evidence I can take notice of the inevitability that the uncontrolled and unremedied state of affairs caused by the Installers' negligence in leaving the Property less resistant to penetrating dampness would have caused some physical damage to have appeared during the operational period of each of the Second Defendant's Policies and for that matter the Third Defendant's Policy. That too is consistent with the general thrust of the evidence of the Claimant and his wife. Such progressive damage that occurred during the operational period of the successive policies, on the basis of my findings, were plainly caused by the negligence of the Installer and not caused or contributed to by other factors."

24. So there he dealt with the position of both the second and third defendant in relation to progressive damage. At paragraph [117] he dealt with the question of calculating the claimant's losses:

> "To be clear for the purposes of this exercise I draw a distinction between the occurrence of damage and the quantification of loss. Absent any damage occurring during the operational period of the Policy, there would have been no right to an indemnity from the relevant insurer. What distinguishes the present case is that I am satisfied, albeit with very little direct evidence, that some more than negligible progression is likely to have occurred during the period of the Second and Third Defendant's indemnity, which potentially would have resulted in a legitimate call upon the relevant Policy by the Installer."

25. He went on to say in paragraph [118], consistent with his earlier decision, that:

> "The state of affairs which created the progression of physical damage to the Property was created by the negligence of the Installer during the operational period of the First Defendant's Policy".

26. In paragraph [119], where he was considering HDI, he said as follows in a significant paragraph of his judgment:

> "I am satisfied that significant, in the sense of more than nominal physical damage occurred during the operational period of the First Defendant's Policy. The damage first became visible to the Claimant and his wife some 5 or 6

> months after the installation and it is highly likely that there had been damage to the fabric of the Property. The Claimant therefore had a good cause of action in tort in respect of which the Installer's liability to pay damages for physical damage which arose within the operational period of the First Defendant's Policy."

27. At paragraph [122] he said that the liability of Heatwave would include the full cost of removing Technitherm from the cavity and he said that that would be "reasonable and necessary since, unless it was removed, further damage would have continued unabated and the Claimant was entitled to have the Property restored to its pre-damaged state". In paragraph [126] he referred to the position of the second defendant and said that despite his finding that there was progressive damage during the period of the second and third defendants' policies, and that in principle the second defendant's policies would respond:

> "…the Claimant has not proved either the extent of any damage occurring during the period of the Second Defendant's Policies or the Third Defendant's Policy or that the extent of the Installer's liability to pay damages increased over time."

28. In paragraph [127], which is again an important part of the judgment, the judge said:

> "I am satisfied that the current cost of remedial works would have represented the damages which would have been awarded against the Installer even from the perspective of that damage which was manifest prior to the expiry of the First Defendant's Policy. Had the Claimant sued the Installer during the operational period of the First Defendant's Policy, he would have recovered substantially the same remedial costs as he is seeking in this Claim. I have not been informed of any differential in terms of the difference between current and historic costs; or that current costs; as opposed to historic costs and interest would produce any different outcome."

29. At paragraphs [128] and [129], he quantified those costs. He relied upon a schedule which had been prepared by Mr. Smitheringale and he referred to aspects of that which totalled £38,835.45. He reduced that on the information before him and doing the best he could to the sum of £34,000, which is said to have taken into account betterment, duplications, unnecessary items and included some allowance for storage or removal costs. He rejected other aspects of the claimant's case, for example for temporary accommodation.

30. It is clear from paragraph [127] that the judge had well in mind the question of the extent of the liability of the installer for damage which occurred during the policy period. The effect of the judge's judgment is that if there had been a claim shortly after the end of the policy period, the full amount of damages which were then claimed in the proceedings would be recoverable. The basis of that, in my view, as Mr. Plunkett said in argument, was that although there was progressive damage thereafter, that did not add in any material financial sense to the liability which Heatwave already had. In other words, Heatwave was already liable for all of the

costs of refurbishment and removal which were necessary in consequence of damage which had manifested itself or which existed at the time when the appellant's policy expired.

31. The judge reserved judgment and, following circulation of the judgment, the appellant sought clarification from the judge on a number of issues. One of the issues related to an argument which Mr. Malam had advanced, and which he again advanced on appeal, concerning the extent of liability for the removal costs. This argument is contained within what was described as ground 6 of the notice of appeal. The judge dealt with that particular argument in some detail and I will refer to what he said in due course.

32. So that is the background to the case. The upshot was that the judge considered that Heatwave was liable to Mr. Atta, the claimant, and that the appellant was liable to indemnify Heatwave in respect of the liabilities which had been incurred to Mr. Atta. The amount of the indemnity was the £34,000 which was set out in paragraphs [128] and [129] of the judgment.

*The grounds of appeal*

33. On this appeal the appellant succeeded in obtaining permission to appeal partly from the judge, partly from Mrs. Justice Yip and partly on a renewed application to Mrs. Justice Heather Williams. The submission of the appellant in summary is that the judge was wrong to conclude that the policy provided any indemnity to Heatwave for any liability towards the claimant.

34. There were three points on which permission to appeal was granted. In order, ground 5 raised what I consider to be a pure point of law, namely the interrelationship between the public and product liability sections of the relevant policy. Ground 6 was a question which can best be viewed as a mixed question of fact and law. The third ground, which is in ground 7, was essentially a question of fact.

35. Ground 5 was that the claim did not fall under the public liability section of the policy and the judge was wrong to conclude that that section of the policy was applicable. It was the product liability section of the policy which, in the appellant's submission, was the one which was applicable.

36. In relation to this ground, matters developed in the course of argument yesterday and today. The upshot of that is that this is not a point on which I need to say very much. The reason for that is that Mr. Malam has realistically accepted that it makes no difference on the facts of this case whether it was the product liability section of the policy or the public liability section of the policy which mattered. Whether or not the appellant had any liability depended upon the outcome of the arguments which were raised under grounds 6 and 7. Those arguments, if good, would apply to both of the sections of the policy, but if bad would not enable a claim to be resisted.

37. The substance of ground 6 concerned the element of the liability of Heatwave for the removal of the CWI. As Mr. Malam said in the course of his submissions, the schedule which had been produced by Mr. Smitheringale showed that the majority of the costs which were being claimed were referable to what one might call refurbishment of damaged areas of the house. However, at least a third of the costs

for which damages were awarded related to the need to remove the CWI itself. There was no claim made for the cost of replacing the CWI with some better insulated material.

38. Under ground 6, the appellant argued that the insurance did not cover that element of Heatwave's liability. The argument was that that aspect of Heatwave's liability was not (as the policy required): "for and/or arising out of Damage occurring during the Period of Insurance". So the argument there is that that element of Heatwave's (inaudible) does not come within the insuring clause of the product liability section of the policy or indeed the public liability section of the policy, whichever is applicable.

39. Ground 7, in summary, was that there was a failure by the claimant sufficiently to prove a claim for the other elements of cost which were within the judge's £34,000 award. The appellant submitted in its notice of appeal that the "judge was wrong to conclude that all the liability that Heatwave was proven to have to the Claimant arose from damage during the [appellant's] policy period". The argument here relates to the timing of damage, and in particular the fact that there had been subsequent progression of the damage and deterioration of the property. The substance of the argument on the part of the appellant is that there was no basis on which the judge could have allocated the repair costs to damage which had been suffered during the appellant's policy period.

*The policy terms*

40. The relevant terms of the policy are set out in the judge's judgment at paragraphs [69] to [82]. Some of these terms are, in view of the way in which the argument has developed, no longer so material. I will nevertheless refer to them so that those are set out in one place.

41. The policy was a liability policy and it covered a number of heads of liability. The operative insuring clause on page 1 of 16 of the policy provided that an indemnity "against the insured's liability to pay damages, including the claimant's costs, fees and expenses in accordance with the laws of any country", but with an exclusion for litigation in the United States. So this was in principle a liability policy which covered the insured's liability to pay damages.

42. However, the clause went on to limit that by providing that the indemnity:

> "applies only to such liability as is set out in each insured Section of this insurance, arising in the ordinary course of the Business specified in the Schedule, subject always to the terms and conditions of such Section and of this Insurance as a whole.

There is no dispute in the present case that the relevant liabilities did arise in the ordinary course of the business of Heatwave. However, it is then necessary to look at the terms of the particular sections under which the claim arose.

43. The policy was then divided into a number of sections. Section A concerned employers' liability, with which this case is not concerned. Section B was for public liability. The insuring clause there (in clause 13) was as follows:

> "The insured is indemnified by this Section in accordance with the Operative Clause for and/or arising out of Injury and/or Damage occurring during the Period of Insurance but not against liability more specifically insured against elsewhere in this Insurance".

44. The third section, section C, was for product liability. It provided as follows (in clause 16):

> "The insured is indemnified by this Section in accordance with the Operative Clause for and/or arising out of Injury and/or Damage occurring during the Period of Insurance but only against liability arising out of or in connection with any Product, but not against any liability more specifically insured elsewhere in this Insurance".

*Discussion*

45. There is a considerable similarity between the insuring provisions in clause 16, which concerns product liability, and clause 13 which covers public liability. The only material distinction between the two is that the product liability cover is applicable where there is a liability arising out of or in connection with any product. The issue raised by ground 5, on which permission to appeal was granted, concerned the question of whether this was a case where the liability arose out of or in connection with any product, and therefore fell within the product liability section of the policy.

46. In the end, it is not necessary for me to give a detailed judgment on that point, because Mr. Malam has accepted realistically, as I indicated in the course of an *ex tempore* judgment given earlier this morning, that this is not a point which in fact goes anywhere in terms of providing a reason to set aside the judge's judgment. I did not in the end have to hear full argument from Mr. Plunkett on the question of whether the claim in these proceedings was within the public liability or the product liability section. He maintained before the judge and would have maintained in argument before me that the claim would more appropriately be regarded as a claim for public liability rather than product liability.

47. Since I did not hear full argument on this question, I will say very little about it, although I understand that this is a point which may recur in subsequent cases, and so whatever I say may need to be considered in the light of the fact that Mr. Plunkett did not develop his full submissions. However, it did seem to me that there was considerable force in the point which Mr. Malam made, that the claim in these proceedings did relate to a liability covered under the product liability section.

48. Where questions arise as to whether or not the product liability section or the public liability section of a policy is engaged, as they did in a case to which the judge referred, namely *Aspen Insurance UK Limited v Adana Construction Limited* [2015] EWCA 176, it is always necessary to pay very careful regard to the precise terms of the cover which is provided by each section. As Mr. Malam said, in the present case the effect of the words "but not against liability more specifically insured elsewhere in the insurance" means that a claim will potentially fall under one or other section of the policy, but they are mutually exclusive.

49. In the present case I consider that there is considerable force in Mr. Malam's submission that on the terms of this policy, the claim was in connection with any product. It is true that the claim does not concern any allegation that the product itself was defective: there is no suggestion that the product was anything other than a sound product. The problem arose because of the installation of this particular product in that house and in particular the negligent manner of installation.

50. However, it does seem to me that a claim for misuse of the product, which is essentially what this case was, would be a claim which is covered by the words: "arising out of or in connection with any Product". In particular, the words "in connection with any product" seem to me to be wide words which are generally construed as having a broad connecting factor with the subject matter of whatever words they are related to.

51. However, as I say, that is only a view which I formed, albeit having considered the matter with some care before the hearing and having heard Mr. Malam's submissions, but without having heard in full from Mr. Plunkett. So future readers of this judgment, or people who are interested in the issues raised by this case, may well consider it sensible (where an issue such as this does arise) to advance a claim under both sections of the policy in the alternative. Indeed, this was done in the pleadings in this case.

52. That means that it is not necessary for me to deal in any more detail with what was ground 5, and I therefore turn to the other two grounds which are live, which are grounds 6 and 7. Mr. Malam dealt first with ground 7 and that is where I propose to start. As I have described already, it seemed to me that this raised essentially a factual question. For the purposes of ground 7, Mr. Malam drew a distinction between the costs of removing the defective and unsatisfactory CWI and the other costs of refurbishing the house. The focus of ground 7 was what one might call the refurbishment costs excluding the costs of removing the CWI which was the subject of his argument on ground 6. The thrust of the argument was that there was no basis for the judge awarding in relation to the refurbishment costs anything at all, because it had not been shown that those refurbishment costs were referable to damage in the policy period as distinct from damage which occurred subsequently.

53. It was a critical part of the argument on this aspect of the case that the initial discovery of the damage was relatively late in the policy period. It was discovered, on the claimant's evidence, for the first time in April or May 2014 and the policy was one which expired in July 2014. Mr. Malam referred, as I have indicated, to the evidence of the claimant and his wife as to when damage had been discovered. He also referred to the passages in the judgment which made it clear that, when the judge was considering the position of the second and third defendants, there was some progressive damage which occurred after the policy period.

54. I do not accept that these matters give rise to a valid criticism of the judgment. It seems to me that this ground of appeal is really an attempt to go behind the judge's fact-findings. The liability of Heatwave and the liability of the appellant depends upon when damage occurred and the extent of the damage which had occurred during the period of the policy. The judge said, for example in the passages to which I have already drawn attention, that there had been damage to the fabric of the house. That is his conclusion in paragraph [119]. He referred there to the damage first becoming

visible to the claimant five or six months after the installation, and he says it is highly likely that there had been damage to the fabric of the house.

55. The judge had well in mind the possibility that there could be an allocation of damage between different policy periods. He referred to that expressly in paragraph [115 (4)] of his judgment and to the decision of the Court of Appeal in *Bolton MBC v Municipal Mutual Insurance* [2006] 1 EWCA Civ 50 at [15]. He had well in mind the need to decide the extent to which damage requiring repair work had occurred during the period of the appellant's policy.

56. In *Bolton MBC*, Lord Justice Hobhouse described this kind of issue as being very much a jury question for the trial judge. In the present case, there was a trial which lasted the best part of four days and the judge produced a careful and very thorough judgment, having reserved judgment for a number of weeks. In the end, he rejected the case against the second defendants and indeed the third defendants essentially on the basis that there was no compensable incremental damage which had been caused in subsequent policy periods. The reason for that was that significant damage had been caused during the currency of the appellant's policy and indeed had become visible to the claimants. In a case of this kind, as is implicit in paragraph [119] of the judgment, it is obvious that damage to the fabric of the property may not be entirely visible and apparent to the occupiers, even though it has in fact been caused. In the context of a policy of the present kind, it is the causation of the damage rather than the discovery of the damage which is critical for the liability of the insurer.

57. Here, it was apparent that there was, on the judge's findings, a pretty terrible installation of this material and significant damage was visible to the claimant well within the policy period. Ultimately, the judge formed the view, having considered the evidence as a whole, that the incremental damage had not materially added, in terms of the costs of refurbishment, to the costs which were required in respect of the damage which occurred during the policy period. That, as it seems to me, is his finding in paragraph [127] and I do not consider there is any basis on which I can or should revisit that fact-finding. It was, as I see it, a jury question for the judge and it seems to me to be a perfectly rational decision for the judge to reach the decision that there was no compensable incremental damage thereafter.

58. The case is, as Mr. Plunkett submitted in his skeleton argument, analogous to the approach taken in *Performance Cars v Abraham* [1962] 1 QB 33. In that well-known case, a motor vehicle had been damaged in an accident which necessitated a respray of the lower part of the vehicle, but before the respray was performed the vehicle was involved in a second accident, the result of which would have necessitated the respray of the same lower part of the bodywork which was already damaged. It was held that the second tortfeasor was not liable for the costs of respray or even to make a contribution, because he had not caused any additional loss in relation to what was already a damaged vehicle.

59. The position here is a little bit more complicated because there was further incremental damage which occurred subsequent to the policy period. However, the substance of the judge's reasoning and fact-finding is that if the position had been frozen at the end of the policy period, the same costs of repairing significant damage and taking out the defective CWI would have been incurred. So, I consider that there

is no basis on which, on appeal, I should reverse the judge's conclusions in relation to that point.

60. The second argument with which I must deal is ground 6. This concerns the liability for the cost of removing the CWI. I emphasise that I am not here concerned, as Mr. Malam pointed out on a number of occasions in his submissions, simply with the question of whether the installer was liable to the claimant for those costs. The question is whether those costs can properly be claimed by the installer under the policy issued by the appellant.

61. This requires consideration of the terms of the policy, which I have already outlined. The operative clause at the start of the policy provides that the insurer provides an indemnity against the insured's liability to pay damages, including the claimant's costs, fees and expenses. So the starting point is to consider the liability of the insured, Heatwave, to pay damages. In the present case, of course, there is a liability to pay damages but that is not the end of the story, because the policy requires consideration of whether the liability is covered in each succeeding section of the insurance.

62. For reasons which I have given, I am going to concentrate on the product liability section, although the public liability section is in this respect materially identical. The question which arises under the product liability section is whether or not the liability for damages is one which is "for and/or arising out of … Damage occurring during the Period of Insurance".

63. So the critical question is whether this is a liability <u>for</u> damage occurring during the policy period, or a liability which <u>arises out of</u> damage occurring during the policy period.

64. There is no dispute that the insured Heatwave was liable in tort for the cost of stripping out the defective CWI and that such liability in tort would have arisen no later than the time when the extensive damage to the house was discovered. It would in fact have arisen when the damage to the house occurred but certainly no later than by the time that it was discovered.

65. Mr. Malam accepted that Heatwave's tortious liability would extend to those costs and he accepted that there would be tortious liability for the costs of removal of the defective CWI. However, he submitted that it does not follow that that liability was either "for" or arose out of damage which occurred during the policy period. He submitted that there needs to be a sufficient causal connection between the liability and the damage. He has referred me to the decision of Christopher Clarke J in *Beazley Underwriting Limited v Travelers Companies Inc* [2011] EWHC 1520 (Comm). In paragraph [123] of that judgment, Christopher Clarke J referred to an earlier decision of the Court of Appeal in *Dunthorne v Bentley* [1999] 1 Lloyd's Rep IR 560, in which the Court of Appeal had said that the words "arising out of" required a degree of causal connection and can include less immediate consequences. However, he went on to say at paragraph [130] that, in the context of that particular contract, which was not in fact an insurance policy but a deed of indemnity, a relatively strong degree of causal connection was required.

66. The submission of Mr. Malam is essentially as follows. From the moment that this product was installed in the house, Heatwave had a contractual liability to remove it, because it should not have been installed and certainly should not have been installed in the way that it was. Accordingly, that was when Heatwave's liability arose. It did not, in his submission, arise when the damage subsequently occurred or when it subsequently was discovered. He submits, particularly relying upon the decision of the Court of Appeal in *Horbury Building Systems v Hampden Insurance* [2004] EWCA Civ 418, that this is a case, just as it was in that case, where to allow recovery of that element of the claim would transform the cover from a products liability cover to a policy covering general contractual liabilities: see the approach taken by Lord Justice Keene in paragraphs [25] and [26] of the decision in *Horbury*.

67. In my judgment, there is in this case a very close and direct connection between the damage to the house which existed and which gave rise to the tortious liability, and the liability for the cost of taking out the defective CWI. I would in fact go so far as to say that this was a liability for the damage which was caused to the house, but it was certainly a liability which arose out of the damage to the house. Here, the position was, on the facts found by the judge, that the insulating material was positively harmful to the house. It had damaged it and had, in the judge's words, damaged its fabric. The judge rejected an argument that there were other methods of putting right the harm, such as inserting some more insulation. On the judge's fact-findings, the only practical method of putting right the harm to the house, and reinstating it into the condition that it was in beforehand, was to remove the CWI and obviously to repair the areas where it had caused visible and indeed invisible damage in the form of mould, staining and matters of that kind.

68. It was only by doing that, but in particular removing the defective CWI, that the house which had been damaged could be made whole and thereby restored to the position that it was in prior to the installation of the CWI. Whatever Heatwave's contractual liability may or may not have been at an earlier stage, once the damage had occurred, Heatwave had a clear tortious liability for the repair costs in doing that removal work.

69. That was the judge's conclusion in paragraph [122] of his judgment, where he says as follows:

> "…Had the damages been assessed during the operational period of the First Defendant's Policy, then a court would have awarded to the Claimant the full cost of removing the Technitherm from the cavity. That would have been regarded as both reasonable and necessary since, unless it was removed, further damage would have continued unabated and the Claimant was entitled to have the Property restored to his pre-damaged state."

70. Accordingly, the position is that damage to the house had been caused and the cost of repairs was clearly the liability of the policyholder. In this case, I consider that it was the obligation of the insurer as well. Repairs to the house could only be properly carried out, if they were to be effective repairs, by removing the CWI which had caused the damage by reason of its installation in the first place. Given that there was here damage and that a repair was needed, no-one could say that a proper repair could be carried out unless the offending CWI was removed.

71. It seems to me that in factual terms the connection between the damage to the house and the removal of the CWI could not really have been closer. This is not a case where any problem with the CWI had been identified or manifested itself at or close to the time when the product was installed in the first place. Had that happened, then there might well have been difficulties in establishing a tortious claim, because it would be said that all that had happened was that a defective product had been integrated into a property, but that was not a situation where any damage had been caused. If there had, in this different world, been a dispute which arose on day one or day two after the installation, and the claimant had asserted a contractual claim, there might well have been a substantial argument as to whether or not there was any valid claim. Experts may have been called in on each side in order to argue whether or not there was anything wrong. Indeed, at the trial itself there were issues as to whether Heatwave had acted in breach of duty and whether the cause of all or some of the problems was in fact the CWI or, rather, other matters such as leaking gutters. As it is, the problems with the CWI were not identified prior to the time when significant damage to the property manifested itself.

72. So at the end of the day this is a case where there was serious damage to the fabric of the house, the house needed to be made whole and the only way of doing that was to remove the defective CWI. I consider that given the width of the language in the insuring clause, this was a liability for damage occurring during the period of the insurance or if not, a liability arising out of damage which occurred during the period of insurance.

73. I do not accept that it is appropriate, as Mr. Malam's submissions implied, to go back any further in time beyond the time when the damage occurred. In the *Beazley* case, for example, it was the defendants who were seeking to do that by referring not to the immediate cause but to events which happened in the more distant past. In the present case it seems to me that one can simply take the view that the need to remove the CWI was an elementary step in remediating a house which had suffered damage to its fabric and where a proper repair required removal of the CWI.

74. I do not accept that on a proper view of the facts this was simply a cost arising out of fear of damage or anticipation of future damage. On the judge's findings, it was a cost that arose out of existing damage since a proper repair could not simply leave the CWI in place.

75. Mr. Malam referred to the decision in *Horbury*, to which I have already referred. The judge dealt with this in detail in his addendum to his judgment. He said this:

> "4. The First Defendant had sought to argue that the costs of removal of the CWI were not the costs of repairing the damage and were not costs "*for and/or arising out of...Damage*".
>
> 5. In his submissions Mr Malam had referred to *Horbury Building Systems Limited v Hampden Insurance NV* [2004] EWCA 418 and sought to persuade me that the Claimant's costs of the removal of the CWI which forms his quantification of damages did not arise out of the physical damage caused to the Property, but rather from his anticipation of further damage and that a distinction should be drawn between say repairing

plaster which were plainly repair costs and the costs of removal.

6. *Horbury* concerned a policy which indemnified a sub-contractor against liability for damages "*in respect*" of amongst other things "*damage to property*". Physical damage was caused to only part of the cinema multiplex and the insurers did not accept that the policy covered the loss of profits from the closure of the entire complex. The Court of Appeal agreed with deputy judge at first instance, that "*in respect of* .." were words of limitation and that the cover did not extend to the economic consequences of the physical damage, so that the loss of profits in respect of the closure of all the cinemas (as opposed to the specific one in which the ceiling collapsed) were irrecoverable under the policy. As Keene LJ explained at [26] it was the possible defects in the construction of the other cinemas in the complex which had led to their closure and not their physical damage.

7. I did not find *Horbury* of assistance to the First Defendant but I acknowledge that I did not specifically refer to the authority in my reasoned judgment. I also accept that I dealt with Mr Malam's submission in a somewhat attenuated form.

8. So for clarity, I will add the following, which should be treated as an addendum to my Judgment.

(1) I have found that physical damage, in the sense of more than nominal damage, was caused to the Property during the operational period of First Defendant's Policy. For the purposes of my Judgment it was not necessary for me to quantify the extent of the damage given that the presence of more than nominal damage was sufficient both to attract liability in tort and to trigger the coverage under the First Defendant's Policy.

(2) The damages which I have assessed in my judgment is to remedy the physical damage which had occurred during the operational period of the First Defendant's Policy and was based on the entire removal of the CWI as the means of reinstating the Property and is not the independent choice of the Claimant. It represents the First Defendant's liability *for and/or arising out of ... Damage* (as defined). Although the removal will also reinstate the damage which progressed further, such costs was a liability which did not increase in quantum from the time of expiry of the First Defendant's Policy.

(3) Such repair costs are neither (a) pure economic loss as had been contended for by the First Defendant or (b)

> analogous to the loss of profits relating to the undamaged cinemas, with which *Horbury* was concerned."

76. Subject to one point, I agree with that analysis. The one point which is perhaps not so well expressed is where the judge says at the end of paragraph 8 (2):

> "Although the removal will also reinstate the damage which progressed further, such cost was a liability which should not increase in quantum from the time of expiry of the First Defendant's Policy".

77. The judge, when he said that the removal will also reinstate the damage which progressed further, was not saying that removal would magically repair all the internal damage which required refurbishment. He is there stating that there had been further damage beyond the policy period and therefore it could be said that removal would have the effect of dealing with that further damage. However, the point which the judge made was that although there was further damage, and although it could in theory be said that that further damage would have itself have required removal, the existing state of affairs at the expiry of the policy period was such that the product needed to be removed anyway in order to carry out a proper repair. It seems to me that that is how that sentence of the judge's judgment is to be understood.

78. I do not consider that there is anything in the judgment or in the addendum which indicates that the judge was thinking that removal of the CWI would simply on its own have the magical effect of refurbishing the house. The judge must have been fully aware, having looked at the schedule by reference to which he awarded damages, that the relevant costs which the claimant was seeking were concerned not simply with the removal of the CWI so as to take it out, but also that there would need to be redecoration and other works which would be carried out inside the house in order to refurbish it. So I do not consider that the judge's judgment proceeded on some misapprehension as to what the claim was for.

79. It seems to me that the argument that there was a pre-existing contractual liability to pay for removal also fails for another reason given by Mr. Plunkett in the course of argument. The position is that even if there was a pre-exiting contractual liability, it does not detract from the fact that when damage occurred there was a tortious liability for removal of the CWI that arose when the house was damaged and required repair. The mere fact that there may exist a contractual remedy does not mean that there can be no recovery for a tortious remedy. The possibility of there simply being a contractual remedy is dealt with by one of the exclusions to the policy which the judge dealt with in paragraph 83 of his judgment and against which there is no appeal. In substance, the judge said that this was a case where there was a tortious liability and it did not matter whether or not there was a contractual liability alongside it.

80. In summary on this point, it seems to me that the facts of the present case had moved well beyond simply a potential contractual remedy for which there could have been no recovery by Heatwave under its policy, which contractual remedy existed at the time of installation. No-one knew about that contractual remedy or that there was any problem and no-one gave any thought to exercising any contractual remedy. The facts moved so that there was damage to the house which required repair and this

gave rise to a classic liability in tort which would ordinarily be recoverable under a liability insurance policy such as the one that I am considering.

81. For reasons which I have given, the causal connection between the damage and the need to remove the CWI was very strong and I consider that it very clearly fell within the language in the insuring clause. It was a liability for damages for or arising out of the damage occurring during the period of the insurance. Subject to the one qualification which I have made, the reasoning of the judge in his addendum, which went into this point in greater detail than in his original judgment, is in my view sound.

82. So for all those reasons I dismiss the appeal.