COURT OF APPEAL

28 January 2004

PILKINGTON UNITED KINGDOM LTD
v
CGU INSURANCE PLC

[2004] EWCA Civ 23

Before Lord Justice POTTER,
Lord Justice JONATHAN PARKER and
Mr Justice CHARLES

Insurance (product liability) — Glass panels supplied by assured to contractor — Panels installed in roof of Eurostar terminal at Waterloo Station — Small number of panels fracturing once installed — No physical damage or personal injury involved — Station closed pending investigations — Whether assured's product liability insurers liable for third party economic loss claims — Notice of claim — Whether claims co-operation clause a condition precedent to insurers' liability.

This was an appeal by the claimant from the judgment of HHJ Michael Dean QC, dated 25 June 2003, relating to the construction of a policy of insurance issued by the defendant insurers.

Pilkington manufactured and installed some 3,000 panels of heat-soaked toughened glass panels in the roof and vertical panelling of the Eurostar Terminal at Waterloo. The work was undertaken under contracts between Eurostar as owners and operators of the terminal and various companies in the Tarmac Group. Pilkington were sub-contractors and had no direct contractual relationship with Eurostar, although Pilkington had been consulted by Tarmac and the architects to the project as to the suitability of the panels and allegedly made representations as to their suitability. Tarmac then ordered the panels from Pilkington who supplied them.

Up to 13 of the panels were defective in that they fractured once installed. No personal injury was caused to anyone, nor was there any damage to the fabric of the terminal other than the fractures in the panels themselves. In November 1999 Eurostar commenced proceedings against the Tarmac companies, the architects and the overall construction managers of the project claiming £5.93 million damages for loss and expense. The claim was in respect of investigation and management costs relating to various proposed remedial schemes and the costs of the remedial scheme adopted. That scheme did not involve removal or replacement of the panels, but the installation in the building of safety features such as transparent material under the panels and metallic channels designed to prevent any fractured glass falling into areas of the terminal frequented by the public or staff. Eurostar alleged that the cause of such failure was the presence of nickel sulphide introduced into the manufacturing process which had not been removed by the heat-soaking treatment.

On 2 February 2000 Tarmac's solicitors notified Pilkington of their intention to claim indemnity in respect of any liability of Tarmac to Eurostar. In May 2000 Tarmac served a Part 20 claim on Pilkington in the Eurostar proceedings, and thereafter Tarmac commenced separate proceedings against Pilkington claiming an indemnity or contribution in respect of their liability to Eurostar under the Civil Liability (Contribution) Act 1978 based on alleged misrepresentations or breaches of collateral warranty by Pilkington to Eurostar and Tarmac.

Pilkington were insured under a Global Liability Policy in respect of its business. By the insuring clause, CGU agreed to indemnify Pilkington against:

> (a) all sums which the Insured shall become legally liable to pay for compensation and Claimants' and costs and expenses in respect of any Occurrence to which this Policy applies as stated in the Specification and in connection with the Business.
>
> (b) all costs and expenses of litigation incurred with the written consent of the Company in respect of a claim against the Insured to which the indemnity expressed in this Policy applies.

That part of the Specification dealing with products liability extended to:

> (a) Bodily injury to or illness or disease of any person except that arising out of and in the course of his employment by the Insured under a contract of service or apprenticeship
>
> (b) Loss of or physical damage to physical property not belonging to the Insured or in the charge or under the control of the Insured or any servant of the Insured
>
> caused by any commodity article or thing supplied installed erected repaired altered or treated by the Insured and happening during the Period of Indemnity elsewhere than at the Insured's premises.

Particular Clause No 6, headed "Contractual Liability (Product)", excluded

> liability assumed by the Insured by agreement in respect of injury illness disease loss or damage caused by any commodity article or thing supplied installed or erected by the Insured

Particular Clause No 16 headed "Damage to Goods Supplied", stated:

> This Policy shall not apply to liability in respect of recalling removing repairing replacing reinstating or the cost of or reduction in value of any commodity article or thing supplied installed or erected by the Insured if such liability arises from any defect therein or the harmful nature or unsuitability thereof.

The Notice of Claims clause provided that:

> 1. Any one occurrence which might give rise to a claim under the Policy shall be reported in writing to the company as soon as possible and as far as practicable no alteration or repair shall be carried out until the company has had an opportunity of investigating. The Insured shall give immediate notice of any impending prosecution inquest fatal injury or civil proceedings in connection with the occurrence and shall send to the Company immediately every relevant document.

General Condition 7 headed "Observance of Conditions" provided:

> The due observance and fulfilment of the terms and provisions and conditions insofar as they relate to anything to be done or complied with by the Insured and the truth of the statements in the proposal made by him which shall be the basis of this contract and held to be incorporated herein shall be conditions precedent to any liability of the Company.

On 18 May 2000, Pilkington's brokers notified CGU of the claims. On 27 July 2000, CGU rejected Pilkington's claims as falling outside the policy cover. Thereafter the parties to the Eurostar litigation took part in a mediation resulting in settlement of Eurostar's claims on 13 February 2001. Pilkington contributed £330,000 to the overall settlement and incurred legal costs of £709,435.71 plus Swiss Francs 18,746.50. Subsequently, Pilkington obtained £700,000 from its professional liability insurers. On 16 July 2002 Pilkington commenced the present proceedings against CGU claiming £495,506.63 and Swiss Francs 20,081.50 after giving credit for the £700,000 recovery

Two issues were argued before the judge: (i) was the claim one in respect of "loss of or physical damage to physical property not belonging to" Pilkington and not falling within the exception in Particular Clause 16; and (ii) had Pilkington complied with their obligation to give notice of the occurrence or of impending civil proceedings and, if not, did such failure relieve CGU from liability? The judge held that the terminal had not been physically damaged. He went on to hold that, by failing to notify CGU of an occurrence which might give rise to a claim under the policy or of impending civil proceedings until 18 May 2000 (three months after receipt of a letter before action and two weeks after service of proceedings), Pilkington were in breach of the Notice of Claims provision in the policy, provision being rendered a condition precedent by General Condition 7.

Pilkington appealed against each of these rulings.

————*Held*, by CA (POTTER and JONATHAN PARKER LJJ and CHARLES J) that the appeal would be dismissed.

(1) The English authorities made it clear that, in order to establish cover under a products liability cover, the insured had to demonstrate some physical damage caused by the commodity, for which purpose a defect or deterioration in the commodity was not itself sufficient. The loss claimed had to be a loss resulting from physical loss or damage to physical property of another, or some personal injury (*see* para 35);

————*A S Screenprint Ltd* v *British Reserve Insurance Ltd* [1999] Lloyd's Rep IR 430, *Rodan International Ltd* v *Commercial Union* [1999] Lloyd's Rep IR 495, *James Budgett Sugars Ltd* v *Norwich Union Insurance* [2003] Lloyd's Rep IR 110, applied.

(2) In the present case it could not be shown that physical damage or deterioration had occurred within any part of the Terminal other than a small number of the individual panels themselves, so that the appeal could succeed only if the incorporation of a potentially dangerous and defective product into the physical structure of a building owned by another in itself constituted a "loss of or physical damage to physical property not belonging to the insured" (*see* para 22).

(3) The submission that in every case where a defective component was incorporated into a building to the extent of needing substantial work to extract and repair it physical damage had occurred to the building, would be rejected.

(a) Where a product was supplied for incorporation into a building and it was so incorporated without damage of any kind and in a condition such that it and the other components of the building functioned effectively, at best there was the possibility of some fracture or malfunction occurring in the future. To take precautions in advance of such damage was simply to anticipate the occurrence or damage covered by the policy, and the costs of such measures did not in fall within its terms without specific provision (*see* para 49).

(b) In English law, "damage" usually referred to a changed physical state. The relevant words of the policy expressly required physical damge to the property of another. Particular Clause 16 made it clear that the policy only answered to physical damage suffered by property in relation to which it had been introduced or juxtaposed (*see* para 50);

————*Promet Engineering (Singapore) Pte Ltd* v *Sturge* [1997] CLC 966, applied; *Goulandris Bros* v *Goldmann & Sons* [1958] 1 QB 74, distinguished.

(4) It was unnecessary to decide whether the exception clause, construed on a "stand alone" basis, applied to the work carried out on the basis that it was a repair of the product, although there were difficulties in holding that all of the work were within the words of the clause (*see* para 55).

(5) The American authorities did not demonstrate any error in this approach, but it was to be borne in mind that the American courts adopted a much more benign attitude towards the insured based on notions which reflected a substantial element of public policy and which did not form a part of the principles of construction of contracts under English law (*see* paras 46 and 57);

————*dicta* of Stuart-Smith LJ in *Yorkshire Water Services Ltd* v *Sun Alliance & London Insurance plc* [1997] 2 Lloyd's Rep 21, 28, followed; *Eljer Manufacturing Incorporated* v *Liberty Mutual Insurance Company* 972 F 2d 805 (CA 7 1992), not followed; *Travelers Insurance Company* v *Eljer Manufacturing Inc* 757 NE 2d 481 (Ill 2001), considered; *Sturges Manufacturing Company* v *Utica Mutual Insurance Company* 371 NYS 2d 444 (NY 1975), *Maryland Casualty Company* v *W R Grace & Company* 23 F 3d 617 (CA 2 1993), considered.

(6) The insurers coud rely upon the Notice of Claims clause to deny liability.

(a) It was not contested that there had been failure by Pilkington to comply with the Notice of Claims clause (*see* para 57).

(b) In the light of General Condition 7, the terms of the Notice of Claims clause were conditions precedent to the liability of CGU under the policy. There was no ambiguity. Provisions in a policy which were stated to be conditions precedent were not to be treated as a mere formality which was to be evaded at the cost of a forced and unnatural construction of the words used in the policy. They were to be construed fairly to give effect to the object for which they were inserted, but at the same time so as to protect the assured from being trapped by obscure or ambiguous phraseology (*see* paras 63 and 65);

————*George Hunt Cranes Ltd* v *Scottish Boiler & General Insurance Co Ltd* [2002] 1 All ER (Comm) 366, applied; *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415, *Alfred McAlpine plc* v *BAI (Run-off) Ltd* [2001] 1 Lloyd's Rep 437, distinguished.

(c) Where an insurer was entitled to rely on breach of a condition precedent in his policy, there was no requirement for him to establish prejudice as a result of the breach (*see* para 58);

————*Pioneer Concrete (UK) Ltd* v *National Employers Mutual General Insurance Association Ltd* [1985] 1 Lloyd's Rep 274.

The following cases were referred to in the judgment:

A S Screenprint Ltd v *British Reserve Insurance Ltd* [1999] Lloyd's Rep IR 430;

Alfred McAlpine plc v *BAI (Run-off) Ltd* [2001] 1 Lloyd's Rep 437;

Bradley and Essex and Suffolk Accident Indemnity Society, Re [1912] 1 KB 415;

Charter Reinsurance Co Ltd v *Fagan* [1996] 2 Lloyd's Rep 113;

Eljer Manufacturing Incorporated v *Liberty Mutual Insurance Company* 972 F 2d 805 (CA 7 1992);

Etherington, In re [1909] 1 KB 591;

George Hunt Cranes Ltd v *Scottish Boiler & General Insurance Co Ltd* [2002] Lloyd's Rep IR 178;

Goulandris Bros v *Goldman & Sons* [1958] 1 QB 74;

James Budgett Sugars Ltd v *Norwich Union Insurance* [2003] Lloyd's Rep IR 110;

Maryland Casualty Company v *W R Grace & Company* 23 F 3d 617 (CA 2 1993);

Pioneer Concrete (UK) Ltd v *National Employers Mutual General Insurance Association Ltd* [1985] 1 Lloyd's Rep 274;

Promet Engineering (Singapore) Pte Ltd v *Sturge* [1997] 2 Lloyd's Rep 146;

Rodan International Ltd v *Commercial Union* [1999] Lloyd's Rep IR 495;

Sturges Manufacturing Company v *Utica Mutual Insurance Company* 371 NYS 2d 444 (NY 1975);

Travelers Insurance Company v *Eljer Manufacturing Inc* 757 NE 2d 481 (Ill 2001);

Yorkshire Water Services Ltd v *Sun Alliance & London Insurance plc* [1997] 2 Lloyd's Rep 21.

Paul Stanley, instructed by Covington & Burling, for the claimants; Andrew Phillips, instructed by Greenwoods, for the defendants

28 January 2004

JUDGMENT

Lord Justice POTTER:

Introduction

1. This is an appeal from the judgment dated 25 June 2003 of His Honour Judge Michael Dean QC, sitting in the Commercial Court as a judge of the Queen's Bench Division. The judgment relates to the construction of a Global Liability Policy in respect of the business of the appellant ("Pilkington") and its subsidiary and associated companies in relation to their business as glass manufacturers and any other business undertaken by them. The claim arose out of the installation of heat-soaked toughened glass panels manufactured by Pilkington and installed in the roof and vertical panelling of the Eurostar Terminal at Waterloo, a small number of which proved defective in that they fractured *in situ*.

2. The work of installation was undertaken pursuant to contracts between Eurostar as owners and operators of the terminal and various companies in the Tarmac Group. Pilkington were sub-contractors and had no direct contractual relationship with Eurostar. However Pilkington were consulted by Tarmac and the architects to the project as to the suitability of the panels and allegedly made representations and/or gave collateral warranties as to their suitability. Tarmac then ordered the panels from Pilkington who supplied them.

3. Following the failure of various panels in the roof (at most 13 out of some 3,000 panels), Eurostar alleged that the cause of such failure was the presence of nickel sulphide introduced into the manufacturing process which had not been removed by the heat-soaking treatment. No personal injury was caused to anyone, nor was there any damage to the fabric of the terminal other than the fractures in the panels themselves. However, Eurostar were concerned that passengers or staff might be injured if further breakages occurred and they commissioned a technical investigation, closing the terminal for a time. Eurostar did not elect to remove and replace the panels but instead installed safety features such as transparent material under the panels and metallic channels designed to prevent any fractured glass falling into areas of the terminal frequented by the public or staff.

4. In November 1999 Eurostar commenced proceedings against the Tarmac companies, the architects and the overall construction managers of the project claiming £5.93 million damages for loss and expense. On 2 February 2000 Tarmac's solicitors notified Pilkington of their intention to claim indemnity in respect of any liability of Tarmac to Eurostar. In May 2000 Tarmac served a Part 20 claim on Pilkington in the Eurostar proceedings, and thereafter Tarmac commenced separate proceedings against Pilkington claiming an indemnity or contribution in respect of their liability to Eurostar under the Civil Liability (Contribution) Act 1978 based on alleged misrepresentations and/or breaches of collateral warranty by Pilkington to Eurostar and/or Tarmac. It was not alleged that the defects in the panels had caused any physical damage to the terminal apart from the failure of certain of the panels themselves. The claim was in respect of investigation and management costs relating to various proposed remedial schemes and the costs of the remedial scheme adopted which did not involve removal or replacement of the panels, but the installation in the building of the safety features already mentioned.

5. On 18 May 2000, Pilkington's brokers first notified CGU of the claims. On 27 July 2000, CGU rejected Pilkington's claims as falling outside the policy cover. Thereafter all the parties to the Eurostar litigation took part in a mediation resulting in settlement of Eurostar's claims on 13 February 2001. Pilkington contributed £330,000 to the overall settlement and incurred legal costs of £709,435.71 plus Swiss Francs 18,746.50. Subsequently, Pilkington sued its professional indemnity insurers, which claim was settled for £700,000. On 16 July 2002 Pilkington commenced these proceedings against CGU claiming £495,506.63 and Swiss Francs 20,081.50 after giving credit for their recovery against their professional liability insurers.

The terms of the Policy

6. The relevant policy terms were as follows.

7. By the insuring clause, CGU agreed to indemnify Pilkington against

> (a) all sums which the Insured shall become legally liable to pay for compensation and Claimants' and costs and expenses in respect of any Occurrence to which this Policy applies as stated

in the Specification and in connection with the Business.

b. all costs and expenses of litigation incurred with the written consent of the Company in respect of a claim against the Insured to which the indemnity expressed in this Policy applies.

8. The relevant part of the Specification provided:

3. Products Liability

(a) Bodily injury to or illness or disease of any person except that arising out of and in the course of his employment by the Insured under a contract of service or apprenticeship

(b) Loss of or physical damage to physical property not belonging to the Insured or in the charge or under the control of the Insured or any servant of the Insured

caused by any commodity article or thing supplied installed erected repaired altered or treated by the Insured and happening during the Period of Indemnity elsewhere than at the Insured's premises.

This cover was subject to a limit of £10 million for any one period of indemnity.

9. There were a number of "Particular Clauses" two of which were material. Particular Clause No 6 headed "Contractual Liability (Product)" stated:

This Policy shall not apply to liability assumed by the Insured by agreement in respect of injury illness disease loss or damage caused by any commodity article or thing supplied installed or erected by the Insured unless such liability would have attached in the absence of such agreement except as may otherwise be overridden in any other Particular Clause herein.

10. Particular Clause No 16 headed "Damage to Goods Supplied", stated:

This Policy shall not apply to liability in respect of recalling removing repairing replacing reinstating or the cost of or reduction in value of any commodity article or thing supplied installed or erected by the Insured if such liability arises from any defect therein or the harmful nature or unsuitability thereof.

Provided always that this clause shall not apply to liability for damage as defined in this Policy to any component supplied by a third party and incorporated in a product supplied by the Insured.

11. The "Claims Provisions and Procedures" section of the policy provided, *inter alia*, as follows:

Notice of Claims

1. Any one occurrence which might give rise to a claim under the Policy shall be reported in writing to the company as soon as possible and as far as practicable no alteration or repair shall be carried out until the company has had an opportunity of investigating. The Insured shall give immediate notice of any impending prosecution inquest fatal injury or civil proceedings in connection with the occurrence and shall send to the Company immediately every relevant document.

12. General Condition 7 headed "Observance of Conditions" provided:

The due observance and fulfilment of the terms and provisions and conditions insofar as they relate to anything to be done or complied with by the Insured and the truth of the statements in the proposal made by him which shall be the basis of this contract and held to be incorporated herein shall be conditions precedent to any liability of the Company.

The issues

13. When the parties came before the judge, they had prepared a list of some ten issues. However at the hearing the argument was limited to two issues:

(i) Was the claim one in respect of "loss of or physical damage to physical property not belonging to" Pilkington and not falling within the exception in Particular Clause 16?

(ii) Had Pilkington complied with their obligation to give notice of the occurrence or of impending civil proceedings and, if not, did such failure relieve CGU from liability?

The proceedings below

14. Before the judge, as in this court, Pilkington maintained that, in principle, and also by reference to certain American authorities, the terminal was physically damaged by the very installation of the defective glass panels and before any breakage in the panels occurred, let alone a breakage which actually caused damage to other parts of the structure or personal injury to users of the terminal. It was submitted that the effect of the installation of glass panels which were potentially liable to fracture was not merely to make the building less desirable or unsuitable for its particular use but to render it too risky for use by the public without the taking of precautions and that this was sufficient to bring it within the insured cover.

15. It was argued for CGU on the other hand that, on the plain and ordinary meaning of the words of the cover ("physical damage to physical property not belonging to" Pilkington caused by "any commodity article or thing supplied by" Pilkington) the

mere installation of the panels and their incorporation in the building did not, simply because of a risk of future fracture, amount to physical damage to the terminal. It amounted to no more than the supply and installation of glass panels which were unfit or unsuitable for the purpose of such installation in that they created a future risk; physical damage would occur when and if this risk materialised. Loss of use of the terminal once the risk had been appreciated by Eurostar, but before it had materialised, and any expenses incurred in eliminating or reducing the risks of future fracture by the installation of physical barriers to retain any broken glass were loss of an economic nature caused by the unfitness of the panels for their purpose; it was not loss or damage in respect of physical damage to physical property (ie the terminal), which damage had not occurred. Before the occurrence of fracture, the state of the panels had not changed for better or worse since the moment of manufacture. Albeit they had a characteristic which rendered them unsuitable for this purpose and which might give rise to a claim for damages for breach of contract, it did not give rise to a claim for indemnity in respect of physical damage actually caused to the physical property of Eurostar. The true nature of the loss and damage in such circumstances was in any event excluded under Particular Clause 16, being the "reduction in value of any... thing supplied installed or erected by" Pilkington, arising from "any defect therein or the harmful nature or unsuitability thereof".

16. CGU cited a number of English authorities concerning the correct approach to the construction of a products third party liability policy, including *Rodan International Ltd* v *Commercial Union* [1999] Lloyd's Rep IR 495, which related to the same policy wording as in this case.

The decision of the judge

17. The judge held that the authorities demonstrated that, in some circumstances, physical damage may be caused by the mere fact of incorporation of a defective or dangerous element into a previously sound article, the more obviously so when the material introduced is inextricably mixed with the original sound article eg where the insured sold contaminated sugar to a manufacturer of mincemeat so as to render it unmerchantable, the contamination only being discovered after the mincemeat had been sold on to end users: see *James Budgett Sugars Ltd* v *Norwich Union Insurance* [2003] Lloyd's Rep IR 110. However, the judge stated that the matter was a question of fact and degree in each case and, upon the facts of this case, he found no difficulty in saying that the terminal was not physically damaged by an Occurrence which consisted of no more than the intentional installation of the very product designed to be installed.

18. At paragraph 32 of his judgment, the judge stated:

> The panels at the time of installation were in precisely the same physical state as upon manufacture. They may or may not fail. Very few of them have failed so far. Undoubtedly the glass does carry some risk of future failure which is not acceptable to Eurostar. If any do fail they may or may not cause personal injury to people in the terminal or damage to its fabric. It would appear the risk of personal injury is the more serious and the one that concerns Eurostar. It is less likely that fragments of glass would cause significant damage to the physical fabric of the terminal. Only if that were to happen could it be said that the terminal had suffered physical damage. There is no suggestion that the defective panels could not be removed or replaced at a cost. Neither Eurostar or Tarmac have elected to do so, no doubt for good financial reasons. Expenditure incurred to avoid the risk of physical damage to the terminal or, more realistically, personal injury to people in the terminal, is not expenditure incurred as a result of an occurrence involving physical damage to the physical fabric of the terminal. This policy contains no sue and labour clause of a type commonly found in marine insurance policies.

19. The judge continued:

> 33. The real complaint is not that the terminal sustained physical damage upon installation of the glass, but that the glass was not suitable for the terminal operators' purpose under their contracts with Tarmac. This may well have produced an economic loss in terms of the expense of remedial measures and loss of use but such loss was not as a result of physical damage to physical property in terms of the distinction recognised in the three English cases which I have considered. In truth, the claimants are seeking an indemnity by way of a guarantee of the quality and fitness of their product for a particular purpose rather than liability to a third party as a result of an occurrence causing physical damage to the physical property of a third party. Apart from the fact that, in my judgment, such a liability does not fall within the ordinary meaning of the basic cover, such a liability is expressly excluded by condition 16 of the policy...

20. In the light of his decision as to the extent of the cover it was not necessary for the judge to deal with the question of Pilkington's failure to comply with the notice provisions in the policy. However, he went on to do so, holding that, by failing to

notify CGU of an occurrence which might give rise to a claim under the policy or of impending civil proceedings until 18 May 2000 (three months after receipt of a letter before action and two weeks after service of proceedings), Pilkington were in breach of the Notice of Claims provision in the policy (*see* paragraph 11 above). He went on to find that this was fatal to the claim in the light of General Condition 7 of the policy, which he held rendered the Notice of Claims provision a condition precedent to the liability of CGU (*see* paragraph 12 above).

The extent of the cover

21. In order to establish liability under the insuring clause in this policy, Pilkington must establish that its claim is in respect of legal liability for the claims of Eurostar and/or Tarmac for compensation and claimants' costs in respect of an Occurrence as stated in the Specification. In the Specification, the Occurrence concerned is defined under the heading "Products Liability" as "Loss of or physical damage to physical property not belonging to Pilkington . . . caused by . . . [the] commodity article or thing supplied . . . by" Pilkington. The meaning of this clause falls to be construed in the context of the policy as a whole which includes two relevant exclusions. First, that the policy shall not apply to "liability assumed by [Pilkington] in respect of . . . loss or damage caused by [any such commodity so supplied] unless such liability would have attached in the absence of such agreement . . . " (Particular Clause 6). Secondly, that the policy shall not apply to "liability in respect of recalling removing repairing replacing reinstating or the cost of or reduction in value of any commodity article or thing supplied" by Pilkington "if such liability arises from any defect therein or the harmful nature or unsuitability thereof".

22. Because, in this case, it cannot be shown that physical damage or deterioration has occurred within any part of the Terminal other than a small number of the individual panels themselves, it is accepted by Mr Stanley for Pilkington that he can only succeed on this appeal if he can demonstrate that the incorporation of a potentially dangerous and defective product into the physical structure of a building owned by another in itself constitutes a "loss of or physical damage to physical property not belonging to the insured".

23. There are three reported English decisions which bear upon this question. Of these, most assistance is to be derived from the judgment of Hobhouse LJ in *Rodan* v *Commercial Union* (*supra*). Rodan were manufacturers of soap powder which they sold in bulk to a customer called Newbrite. The bulk powder was delivered to a packing company which broke it down and packaged it into cardboard cartons for sale to the retail trade by Newbrite. Newbrite's customers returned the powder as defective. The powder had broken down over time so that its liquid constituents migrated to the cartons in which it was packed causing them to stain. These constituents attracted moisture from the atmosphere of the cartons which in turn migrated into the powder within the cartons causing it to cake. Newbrite claimed damages for breach of contract against Rodan (i) for the difference between the sound value of the powder and its reduced value in its damaged state; (ii) expenses incurred in extra handling; (iii) the cost of the cartons which had been ordered in anticipation of further deliveries of powder from Rodan which Newbrite did not then order; (iv) loss of future sales by reason of damage to Newbrite's brand name. Rodan were insured under a policy with Commercial Union in identical terms to this case.

24. The trial judge held that the claims under (i) and (ii) were excluded by the exception in Special Clause H of the policy before the court (which was in identical terms to Particular Clause 16 in this case), but that claims (iii) and (iv) fell within the terms of the indemnity. However, the Court of Appeal held that none of the claims was covered. The Court of Appeal held by a majority that the staining of the cartons and the caking of the powder supplied by Rodan constituted physical damage within the meaning of the primary indemnity cover but that the damage did not consist of the original defective quality of the powder as manufactured by Rodan. The damage was sustained and the occurrence occurred when the powder caked after the property in it had passed to Newbrite when the cartons were stained and the water attracted from the atmosphere migrated through the cartons causing the powder to cake.

25. Hobhouse LJ stated at page 499 col 2–500 col 1:

> . . . there was on any view an occurrence but it is still necessary to identify what the extent of that occurrence was. In my judgment on the facts found by the Official Referee, Judge Kershaw was right to include as a consequence of that occurrence the damage that was caused to the commodity itself, that is to say the caking of the powder which was caused by the hydroscopic effect of the staining of the cartons which had been caused by a defect in the commodity. *But I do not consider that Judge Kershaw was right to construe the clause as if an occurrence could include mere damage caused by the commodity to itself. Such a construction fails to give effect to the natural meaning of the language which clearly contemplates that the commodity will cause physical damage to something else. Further, that view would contemplate that, without*

more, the products liability policy would cover deterioration in the commodity supplied. In my judgment the correct analysis is that there was an occurrence — the staining of the cartons — of which a consequence was the damage to the commodity — the caking of the powder. (emphasis added)

26. On that basis, the majority of the court held that both heads (i) and (ii) of the liability to Newbrite were covered by the primary indemnity as being in respect of physical damage to goods which belonged to a third party at the time the damage was sustained. However, it went on to hold that liability under (i) was a liability in respect of the reduction in value of goods supplied by the insured and (ii) was an expense related to the cost of recalling or removing the goods so that both heads were excluded by the exception in Special Clause H.

27. The court also rejected liability for the damage under heads (iii) and (iv). In this respect Hobhouse LJ stated at page 500 col 1:

> The phrase "in respect of" carries with it a requirement that the liability relate to the identified occurrence. The effect of the decision of the judge to treat the words "in respect of the occurrence" as meaning no more than "in connection with the same causes of action as gave rise to the liability for the occurrence" transforms this cover from a products liability cover to a policy covering general contractual liabilities. *A products liability policy in which the cover provided is defined in words such as those used in the present policy is confined to liability for physical consequences caused by the commodity or article supplied.* The liability of the assured in damages will have to be expressed in terms of money *but that liability must be in respect of the consequences of the physical loss or damage to physical property* (or some personal — bodily — injury). (emphasis added)

28. In respect of Special Clause H, Hobhouse LJ said:

> The general intention of special clause H is apparent from its wording and is supported by the heading used "Damage to Goods Supplied". It makes it clear that the cover in the policy relates to physical consequences, not mere financial consequences and relates to the liability for physical consequences of the supply of defective goods but not to breaches of contract as such.

29. In *A S Screenprint Ltd* v *British Reserve Insurance Ltd* [1999] Lloyd's Rep IR 430, the plaintiffs were a company carrying on a printing business who fulfilled a print order to print gift boxes for Maltesers. The packaging caused contamination to the Maltesers which gave rise to claims against the plaintiffs who were insured under a policy with an element of product liability cover which provided indemnity "against all sums which the Insured shall become legally liable to pay in respect of death, bodily injury, illness, loss or damage happening anywhere in the World . . . during the period of insurance and caused by goods . . . treated in the course of the Business . . . ". The policy wording was less clearly favourable to the insurer than in this case. In upholding the decision of the judge below that a claim settled by the plaintiffs in respect of loss of goodwill on the part of the party with which they had contracted was outside the cover, Hobhouse LJ said at page 434 col 1:

> . . . the relevant head of loss is not caused by any defects in the packaging but is caused by Mars choosing not to place further orders with LMG. The same point can be demonstrated by appreciating that causation is, in the context of this cover, a physical concept: the loss or damage has to happen physically during the period of the insurance. It is not possible to treat a liability to pay compensation in respect of an economic loss which arises from a loss of goodwill as being in respect of physical loss or damage physically caused.

30. Beldam LJ observed at page 435 lhc:

> It is clear that death, bodily injury, illness, loss or damage are all physical consequences. The type of loss claimed against the insured for which the indemnity is sought, that is to say, the loss of profit on repeat orders, is not loss or damage of the physical kind usually understood by those words.

31. The *Rodan* and *A S Screenprint* cases were both considered by Moore-Bick J in *James Budgett* v *Norwich Union* (*supra*). In that case the insured had sold sugar to a customer for use in the production of mincemeat. The sugar had been contaminated with magnetite which was only discovered after it had been mixed with the mincemeat and sold on to end users. The customer claimed damages in respect of loss of future business and goodwill against the insured who sought a declaration that the defendants were liable to indemnify them under the terms of their product liability policy which provided an indemnity for liability " . . . in the event of . . . accidental loss of or damage to property" defined as " . . . physical damage . . . to material property . . . ".

32. Having considered both *A S Screenprint* and *Rodan*, Moore-Bick J commented that it was plain that those cases established a distinction between liability for purely economic loss (which fell outside the terms of the policy) and liability in respect of physical damage (which fell within them) even if both heads of loss stemmed from the same breach

of contract. Despite the differences in the policy wording, Moore-Bick J held that the distinction recognised in those two decisions was applicable and that the cover in the case before him did not extend to liability "in respect of" loss of business.

33. Mr Stanley for the appellants rightly comments that, in each of the cases cited, the Court of Appeal was not concerned to examine in depth the question raised on this appeal, namely whether physical damage had in fact been caused to the property of the third party by the use of the contaminated products concerned, in that it was accepted or assumed on the facts of these cases that physical damage had indeed been so caused when the supplier's product was absorbed into the product of the third party. He submits that all that can be derived from these cases is (a) that physical deterioration of the product supplied will not normally be regarded as property damage, in which respect he relies upon the third of the italicised sentences in the extract of the judgment of Hobhouse LJ in the *Rodan* case, quoted at paragraph 25 above; and (b) that cover provided by a products liability policy in this form is confined to liability for the physical consequences, and does not extend to "mere financial consequences", of the supply of defective goods or breaches of contract as such (ibid as quoted at paragraph 27 above).

34. While I accept that the cases demonstrate proposition (b), I consider that proposition (a) is too restricted a view of the observations in *Rodan*. The preceding sentences in the italicised passage make clear that, to construe the insuring clause as if an occurrence could include mere damage caused by the commodity to itself, would fail to give effect to the natural meaning of the language which contemplates that physical damage will be caused by the commodity to something else.

35. In my view, while the English authorities are not in themselves determinative of the issue in this case, they make clear that, in order to establish cover in respect of the loss claimed, the insured must demonstrate some physical damage caused by the commodity for which purpose a defect or deterioration in the commodity is not itself sufficient and that the loss claimed must be a loss resulting from physical loss or damage to physical property of another (or some personal injury).

36. I do not consider that the American authorities referred to by Mr Stanley demonstrate any error in such an approach. The case of *Eljer Manufacturing Incorporated* v *Liberty Mutual Insurance Company* 972 F 2d 805 (CA 7 1992), upon which Mr Stanley principally relied, concerned an industry-wide standard form Comprehensive General Liability Insurance policy against "Physical Injury to Tangible Property". The issue considered, as stated in the majority judgment of Circuit Judge Posner, was "if a manufacturer sells a defective product or component for installation in the real or personal property of the buyer, but the defect does not cause any tangible change in the buyer's property until years later, can the installation itself nonetheless be considered a "physical injury" to that property?" In answering that question in the affirmative, Judge Posner departed from what he acknowledged to be the plain, ordinary meaning of the words used in the policy. He said (at 808–809):

> The central issue in this case — when if ever the incorporation of one product into another can be said to cause physical injury — pivots on a conflict between the connotations of the term "physical injury" and the objective of insurance. The central meaning of the term as it is used in everyday English — the image it will conjure up in the mind of a person unschooled in the subtleties of insurance law — is of a harmful change in appearance, shape, composition, or some other physical dimension of the "injured" person or thing. If water leaks from a pipe and discolours a carpet or rots a beam, that is physical injury, perhaps beginning with the very earliest sign of rot — the initial contamination (an important question in asbestos cases as we shall see). The ticking time bomb, in contrast, does not injure the structure in which it is placed, in the sense of altering the structure in a harmful, or for that matter in any way — until it explodes. But these nice, physicalist, "realistic" (in the philosophical sense) distinctions have little to do with the objectives of parties to insurance contracts. The purpose of insurance is to spread risks and by spreading cancel them . . .
>
> Nor are literal interpretations, which assume that words or phrases are always used in their ordinary-language sense, regardless of context, the only plausible interpretation of contractual language, especially when the contract is between sophisticated business entities. We should at least ask what function "physical injury" might have been intended to perform in a comprehensive general liability policy beyond just drawing a commonsensical, lay person's, ordinary-language distinction between physical injury and physical non-injury.
>
> Apparently the term was intended to distinguish between physical and non-physical injuries rather than to distinguish between injuries and non-injuries.

37. Judge Posner then proceeded to review the drafting history of the particular form of policy, in the course of which he said:

We can now see more clearly that two senses of "physical injury" are competing for our support. One, which the insurers want to adopt, is an injury that causes a harmful physical alteration in the thing injured. The other, which is what the draftsmen of the Comprehensive General Liability Insurance policy apparently intended and what rational parties to such a policy would intend in order to make the policy's coverage real and not illusory, is a loss that results from physical contact, physical linkage, as when a potentially dangerous product is incorporated into another and, because it is incorporated and not merely contained (as a piece of furniture is contained in a house but can be removed without damage to the house), must be removed, at some cost, in order to prevent the danger from materializing.

38. He concluded his judgment with the observation:

... the drafting history of the property damage clause, and the probable understanding of the parties to liability insurance contracts, persuade us that the incorporation of a defective product into another product inflicts physical injury in the relevant sense on the latter at the moment of incorporation — here, the moment when the defective Quest systems were installed in homes.

39. In his dissenting judgment (at 814–815), Circuit Judge Cudahy considered that the decision was a departure from previous decisions in Illinois law. He rejected the view of the majority as to what the parties intended by use of the phrase "physical injury". He said:

There is immediately something counter-intuitive about saying that physical injury has been done to a house in which a functioning plumbing system has been installed. Of course when we determine later (years later) that a good number of the systems will fail — 5 per cent in this case — then perhaps there is a sense in which the "injury" was present from the moment of installation: this is the majority's "ticking time bomb" metaphor. But is there physical injury? The majority believes that interpreting the phrase is all a matter of emphasis — "physical injury" versus "physical injury". In my view, the phrase must be interpreted as "physical injury", with both words given effect. The majority's account cannot give both words meaning at the same time. Something physical occurs when the plumbing is installed — but it is not injury; and we might say that there is injury (of a sort) when the plumbing is installed — but it is not physical.

But I am not one to get too bogged down in assertedly "plain" or "objective" language. The majority properly relies on the purpose of insurance: spreading risks. That purpose, however, does not extend to risks which were not bargained for ex ante. (When courts impose risks on insurers that were not paid for by the insured, other insureds will ultimately pay in the form of higher premiums.) The question, then, is what the parties contemplated when they contracted for insurance to cover "physical injury" ...

I am not at all convinced that these parties intended to refer to the installation of plumbing systems that would fail years later. As counsel for Travelers explained at oral argument, Eljer could have purchased other kinds of insurance that would have covered risks from installation — although we can safely assume that the costs of such insurance would have been higher...

Another difficulty with the majority's approach is its reliance on the indeterminate notion of a "defective" product to perform the function of the word "physical". In this case the Quest systems failure rate was 5 per cent, so perhaps we could say that each system installed was "defective". But all products have some failure rate. If a product has a failure rate of 1 per cent, or 1/10th of 1 per cent, is it "defective" such that it caused "physical injury" when installed?

40. In my view the approach of Judge Cudahy better reflects the approach of an English court. It is to be observed that in *Travelers Insurance Company* v *Eljer Manufacturing Inc* 757 NE 2d 481 (Ill 2001) the Illinois Supreme Court held that the majority decision in *Eljer* v *Liberty Mutual* was wrong according to the law of Illinois, and found no ambiguity in the phrase "physical injury to tangible property" on the basis of an interpretation of the words in their "plain, ordinary and popular meaning". In the judgment of the court at 502 it was stated:

[18] In sum, this court now finds that, under its plain and ordinary meaning, the term "physical injury" unambiguously connotes damage to tangible property causing an alteration in appearance, shape, color or in other material dimension. We reject the policyholders' assertions that under the post-1981 excess CGL policies, the very installation of a functional Quest system into a structure constitutes "property damage".... The plain language of the policies unambiguously states that the insurable event that gives rise to the insurers' obligation to provide coverage is the physical damage to tangible property. The term "physical" limits the word "injury" in the policies' definition of "property damage".

[19–21] We also conclude that under its plain and ordinary meaning, the phrase "physical

injury" does not include intangible damage to property such as economic loss . . .

41. Finally, the court observed at paragraph [23] on page 503 that if it were to interpret the policies as urged by the policyholders:

> The policy would not only provide insurance against tort liability, but would function as a performance bond as well.

42. Mr Stanley has referred us to two further American cases: *Sturges Manufacturing Company* v *Utica Mutual Insurance Company* 371 NYS 2d 444 (NY 1975), a decision of the Court of Appeals of New York and *Maryland Casualty Company* v *W R Grace & Company* 23 F 3d 617 (CA 2 1993), a decision of the United States Court of Appeals, 2nd circuit. The former is a decision which was said in *Travelers* (at 493) to stand for the proposition that under New York law an "injury to tangible property" includes "tangible property which, as a result of the integration of a defective product, has been diminished in value to an extent greater than the value of the defective product". The judgment is short, the clause construed refers simply to "injury" rather than "physical injury" and I derive no assistance from it in this case.

43. The latter decision was a case in which the New York court held that the incorporation into a building of asbestos which later cost money to be removed caused "property damage" from the time of incorporation. In the *Travelers* case, the Illinois Supreme Court considered an earlier decision of its own to similar effect. The court explained that decision as based upon:

> the unique nature of asbestos products, which disseminate toxic fibres upon installation and continuously contaminate a structure and its contents subsequent to installation. It follows, therefore, that this contamination, which Wilkin held constituted the "physical" injury to the property, occurs upon installation of these toxic products. Wilkin was premised upon the specific facts before the court in that case and not upon a general proposition that incorporation of a defective component into another structure constitutes "physical injury".

44. The court made clear its view that cases involving the installation of a contaminant or toxic substance, taking instant and damaging effect upon the property, was a different case from the installation of a component not alleged to contain any such substance, the defect in which simply consisted of a propensity to cause damage in the future (pages 498–499). I agree. In my view it is clear that the attitude of the American courts in cases of contamination by asbestos affords no useful parallel for guidance in a case such as this.

45. The decision of the New York Court of Appeals in *Sturges* (*supra*) was acknowledged in the *Traveler's* case. The Illinois Supreme Court nonetheless did not follow it.

46. In relation to Pilkington's reliance upon American authority, it seems to me that the comments of Stuart-Smith LJ in *Yorkshire Water Services Ltd* v *Sun Alliance & London Insurance plc* [1997] 2 Lloyd's Rep 21, 28 should be borne in mind, namely that

> . . . the American Courts adopt a much more benign attitude towards the insured; this seems to be based variously on the "folly" argument in Leebov or "general principles of law and equity" (Slay at page 1368) or that insurance contracts are: "contracts of adhesion between parties who are not equally situated" giving rise to the principle:
>
> > . . . that doubts as to the existence or extent of coverage must generally be resolved in favour of insured . . .
>
> or because the Courts have —
>
> > . . . adopted the principle of giving effect to the objectively reasonable expectations of the insured for the purpose of rendering a "fair interpretation" of the boundaries of insurance cover. [Broadwell at page 80].

47. As further observed by Stuart-Smith LJ:

> For the most part these notions which reflect a substantial element of public policy are not part of the principles of construction of contracts under English law. These are well known and can be summarised as follows:
>
> 1. The words of the policy must be given their ordinary meaning and reflect the intention of the parties and the commercial sense of the agreement. Thus they must be construed in their context or, as Lord Mustill put it in *Charter Reinsurance Co Ltd* v *Fagan & others* [1996] 2 Lloyd's Rep 113 at p 117 col 1 . . . "the words must be set in the landscape of the instrument as a whole".
>
> 2. A literal construction that leads to an absurd result or one otherwise manifestly contrary to the real intention of the parties should be rejected, if an alternative more reasonable construction can be adopted without doing violence to the language used.
>
> 3. In the case of ambiguity the construction which is more favourable to the insured should be adopted; this is the *contra proferentem* rule.

48. Mr Stanley has repeated and elaborated the submissions which he made below. He submits that, in every case where a defective component is incorporated into a building to the extent of needing substantial work to extract and repair it, physical

damage has occurred to the building. He submits that, in that situation, the existence of the need for such repair renders the building a damaged building and is therefore an occurrence within the definition of the cover.

49. I do not agree for several reasons. In particular, it does not seem to me that, where a product is supplied for incorporation into a building and it is so incorporated without damage of any kind and in a condition such that it and the other components of the building function effectively, subject only to the possibility of some future failure or malfunction, that is in any ordinary sense an occurrence or event which gives rise to physical damage in those other components or to the building as a whole. At best, it creates the possibility of some fracture or malfunction occurring in the future. To take precautions at that stage is simply to anticipate the occurrence and/or damage covered by the policy and the costs of such measures do not in my view fall within its terms without specific provision which makes that clear.

50. In English law, "damage" usually refers to a changed physical state: see *per* Hobhouse LJ in *Promet Engineering (Singapore) Pte Ltd* v *Sturge* [1997] CLC 966 at 971. The precise borderlines of the definition depend upon the context of the word or words used. Thus, while for the purposes of indemnity it will normally be necessary to demonstrate that physical change has occurred to the property damaged, a clause ensuring "loss or damage in connexion with the goods" under the Hague Rules for carriage of goods by sea includes economic loss even in the absence of such physical damage, see: *Goulandris Bros* v *Goldman & Sons* [1958] 1 QB 74, 105 *per* Pearson J. However, that is not this case. The relevant words expressly require physical damage and further that it must be to the physical property of another. At the same time, the policy makes clear by Particular Clause 16 that damage sustained, insofar as it relates to a defect in or the harmful nature of the product itself, is excluded i.e. the policy only answers in respect of the physical damage shown to have been suffered by property in relation to which it has been introduced or juxtaposed.

51. As already observed, generally speaking, damage requires some altered state, the relevant alteration being harmful in the commercial context. This plainly covers a situation where there is a poisoning or contaminating effect upon the property of a third party as a result of the introduction or intermixture of the product supplied: cf the three English cases to which I have referred. However, it will not extend to a position where the commodity supplied is installed in or juxtaposed with the property of the third party in circumstances where it does no physical harm and the harmful effect of any later defect or deterioration is contained within it.

52. It has to be accepted that difficulties of application of such a test may arise in cases where a product or commodity supplied is installed by attachment to other objects in a situation in which it remains separately identifiable but, by reason of physical changes or deterioration within it, it requires to be renewed and replaced. In such a case, resort is necessary to the usual canons of construction in order to resolve the difficulty. In this policy, as it seems to me, Particular Clause 16 makes clear that such cover is not intended.

53. I would therefore uphold the construction accorded to the policy by the judge. In my view it gives effect to the ordinary meaning of the words and reflects the apparent intention of the parties. In the context of insurance law it makes commercial sense of an agreement which is designed to protect the insured against liability for physical damage to physical property and not to afford an indemnity by way of guarantee for the quality and fitness of the commodity supplied. I consider that to adopt the construction argued for by Mr Stanley would do violence to the language used, in the sense that the words cannot reasonably be read in the sense propounded. Finally, I do not consider that the words used and the overall sense to be accorded to them, whether taken at face value or viewed in the overall context of the contract, raise a case of ambiguity requiring or justifying resort to the *contra proferentem* rule.

54. Since I am satisfied that the damage claimed in this case is not within the cover provided by the insuring clause, it is unnecessary to resolve the question whether or not the claim in any event falls within the exception provided for in Particular Clause 16. The judge considered that it did, without elaboration.

55. As I have already indicated, the existence of that exception clause is relevant to the construction of the insuring clause in that, whatever its precise ambit as an exception, it clearly indicates that physical damage or deterioration confined to the product itself is not intended to fall within the policy. However, if the necessity arose for the clause to be construed on a "stand alone" basis, I consider that there would be difficulties in its application, given the need for a *contra proferentem* approach in that connection. The clause does not deal expressly with the situation where precautions are taken to prevent the necessity for removal or repair of the product (ie the roofing panels). It seems to me that it is arguable that some of the work carried out should be properly classified as repair of the product but to bring other parts of that work within the words used in the clause it would be necessary to adopt a very

wide, rather than a literal approach to the wording of the clause. Such an approach is generally inappropriate in respect of a policy exception. However, as already indicated, it is unnecessary to decide the point.

Notice of claim

56. The Notice of Claims clause (*see* paragraph 11 above) required three things: (i) that any occurrence which might give rise to a claim should be reported in writing "as soon as possible", (ii) that the insured should give "immediate notice" of any "impending" civil proceeding, (iii) that the insured should send to CGU "immediately" every "relevant document". All these actions were something "required to be done or complied with by the insured" and, on the face of it, therefore fell to be treated as "conditions precedent to any liability of the company" under General Condition 7.

57. It has not been contested on this appeal that there was a failure to comply with (i) and (ii) on the part of Pilkington. As held by the judge, the delay in failing to notify the insurers under (i) was some seven months. The first notification which CGU received was notification of proceedings on 18 May 2000, some 16 days after the proceedings were actually served upon Pilkington. Pilkington had been notified of Tarmac's intention to claim on 2 February 2000 in a letter which requested Pilkington to save identified classes of documents and, by 7 April 2000, Pilkington had appointed its own solicitors to defend the claim, also having been advised by their brokers to notify insurers. Thus the delay in reporting impending proceedings under (ii) was arguably $3\frac{1}{2}$ months and, on any view, around six weeks. No explanation was advanced by Pilkington to explain the delay and the judge therefore rightly held that, under part (ii) of the clause there had been a manifest failure to give immediate notice of the impending civil claim, preceded by some seven months delay under part (i) of the clause.

58. It has not been in issue between the parties that, because CGU repudiated Pilkington's claims as falling outside the policy cover in any event, the underlying purpose of a clause of this kind, namely to enable the insurer to make timely investigation of the nature and genuineness of the claim and to control any proceedings to the mutual advantage of insurer and insured, was not in practice prejudiced in this case. However, as Bingham J made clear in *Pioneer Concrete (UK) Ltd* v *National Employers Mutual General Insurance Association Ltd* [1985] 1 Lloyd's Rep 274 at 281 rhc, in any case where an insurer is entitled to rely on breach of a condition precedent in his policy, there is no requirement for him to establish prejudice as a result of the breach.

59. The *Pioneer Concrete* case concerned the construction of a policy containing terms remarkably similar to those in this case. It required the insured to notify the insurers "immediately" if he had knowledge of any accident, claim or proceedings. It also contained a clause in materially the same terms as General Condition 7 in this case. Bingham J held that the policy "expressed in clear terms" that the notice provision was a condition precedent upon which the insurers were entitled to rely.

60. Mr Stanley has urged us not to follow that decision. He places particular reliance upon *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415 for the proposition that a clause in such general terms as General Condition 7 should not be construed literally so as to render a large number of provisions in the policy conditions precedent, but that each of the putative conditions should be considered on its merits. Mr Stanley points out that *Re Bradley* was not cited as an authority in the *Pioneer Concrete* case. It is not clear that that is correct, the report simply identifying the cases referred to in the judgment. However, even if it were, I do not consider that it would have altered the decision of Bingham J.

61. In *Re Bradley*, the policy was an indemnity against employer's liability under the Workmen's Compensation Act 1906. The policy contained a term requiring the employer to keep a wages book containing the names of all employees and their remuneration and to notify the insurers of details of all remuneration paid during the period of insurance within one month from the end of the period, with provision for retrospective adjustment of the premium if the figures differed from those which had been used to calculate the original premium. The insurers repudiated liability of a claim on the grounds that the insured, who was a small farmer with one employee, did not keep a wages book. The policy contained a clause providing that observance "of the conditions of this policy" should be a condition precedent to insurer's liability. The majority of the court (Cozens-Hardy MR and Farwell LJ) confirmed the decision of the judge that since the sole object of the condition was to provide for the adjustment of premiums, compliance with it was not a condition precedent to liability. Cozens-Hardy MR, at 421–422, held that the clause could not have been intended to refer to all the provisions of the policy as some were incapable of being conditions precedent. Having analysed the wages clause and held that parts of it were not so capable, he concluded that the condition:

> . . . is one and entire, and it is to my mind unreasonable to hold that one sentence in its middle is a condition precedent while the rest of the condition cannot be so considered. A policy of this nature, in case of ambiguity or doubt, ought to be construed against the office and in favour of the policy-holder, and it seems to me unreasonable to hold that the office can escape from all liability by reason only of the omission to duly record in a proper wages book the name of every employee and the amount of his wages. This is only required for the purpose of the statement which, by the proposal, the insured agreed to render at the end of each period of insurance. In my opinion, it ought not to be regarded as in any sense a condition precedent, and it follows that, in my opinion, the appeal fails and must be dismissed with costs.

62. Farwell LJ, concurring, stated:

> It is especially incumbent on insurance companies to make clear, both in their proposal forms and in their policies, the conditions which are precedent to their liability to pay, for such conditions have the same effect as forfeiture clauses, and may inflict loss and injury to the assured and those claiming under him out of all proportion to any damage that could possibly accrue to the company from non-observance or non-performance of the conditions.
>
> Accordingly, it has been established that the doctrine that policies are to be construed "contra proferentes" applies strongly against the company: *In Re Etherington.*

63. The court found no ambiguity of application in the *Pioneer Concrete* case; nor is there ambiguity here. Counsel were agreed before us that in this policy there are four clauses containing obligations of Pilkington to which General Condition 7 could apply: the Notice of Claims clause, which contains within it the distinct obligations enumerated as (i), (ii) and (iii) in paragraph 56 above; the Control of Claims clause which provides that "no admission of liability or offer promise or payment shall be made without [CGU's] written consent; the Alteration of Risk clause which requires that "if at any time anything shall occur materially affecting the risk insured, the Insured shall within seven days give notice in writing to [CGU]" and the Adjustment of Premium clause, requiring the insured to keep an accurate record containing all relevant particulars of any estimates given by the insured in relation to the calculation of premium. Mr Stanley submits that, in the face of this variety, the obligations in the Notice of Claims clause should not be treated as conditions precedent to liability but as innominate terms apt only to create a defence to a claim under the policy if the consequences of breach are so serious as to give the insurers a right to reject the claim: see *Alfred McAlpine plc* v *BAI (Run-off) Ltd* [2001] 1 Lloyd's Rep 437.

64. In my view the judge was right to reject this approach. *Alfred McAlpine plc* v *BAI* concerned the construction of a condition which did not on its face indicate the consequence of a failure to comply; nor was there a condition elsewhere in the policy such as General Condition 7 in this case.

65. As stated in *MacGillivray on Insurance Law* (10th ed) at paragraph 19–35, provisions in a policy which are stated to be conditions precedent should not be treated as a mere formality which is to be evaded at the cost of a forced and unnatural construction of the words used in the policy. They should be construed fairly to give effect to the object for which they were inserted, but at the same time so as to protect the assured from being trapped by obscure or ambiguous phraseology: see also *George Hunt Cranes Ltd* v *Scottish Boiler & General Insurance Co Ltd* [2002] 1 All ER (Comm) 366 at 370.

66. I consider that the judge was right to find that, in the light of General Condition 7, the terms I have identified as (i) and (ii) of the Notice of Claims clause were conditions precedent to the liability of CGU under the policy.

Conclusion

67. For the reasons given above, I would dismiss this appeal.

Lord Justice JONATHAN PARKER:

68. I agree.

Mr Justice CHARLES:

69. I also agree.