[QUEEN'S BENCH DIVISION.]

* WEST WAKE PRICE & CO. v. CHING.

[1956 W. No. 1792.]

1956
Oct. 29, 30, 31; *Nov.* 1, 14.

Devlin J.

Insurance—Liability insurance—Professional negligence—Accountants indemnified against loss for any claim made against them in respect of their neglect, default or error or that of their servants—Queen's Counsel clause—Mixed claim involving negligence and dishonesty—Whether within scope of policy.

Accountant.

The plaintiffs, a firm of accountants, took out a policy of insurance to cover themselves against loss for any claim which might be made against them in respect of any act of neglect, default or error arising out of the conduct of their business as accountants. The policy, in addition to the main indemnity, contained a "Queen's Counsel clause" whereby the underwriters agreed to pay any such claim without requiring the plaintiffs to dispute it, unless a leading counsel (to be mutually agreed upon between the parties) advised that the claim could be successfully contested and the plaintiffs consented to it being contested, their consent not to be unreasonably withheld.

A clerk employed by the plaintiff firm received from two of the clients certain sums of money which ultimately could not be accounted for; and, subsequently, the clients issued writs against the plaintiffs. In their statements of claim three causes of action were alleged: first, damages for negligence or breach of duty as accountants; secondly, money had and received; and, thirdly, moneys converted by the plaintiffs to their own use. A request for indemnity was refused by the underwriters and the plaintiffs sought a declaration that the claims formulated in the writs issued against them were claims based in negligence, and in consequence brought into operation the Queen's Counsel clause under which the underwriters were bound to indemnify them:—

Held, that despite the form of the statements of claim, there was in each action only one claim, which was primarily in respect of fraud; that to fall within the scope of the policy the character of the claim must not be a mixed one of fraud and negligence but negligence alone and, accordingly, the claim was outside the scope of the policy.

Goddard and Smith v. *Frew* [1939] 4 All E.R. 358 and *Reischer* v. *Borwick* [1894] 2 Q.B. 548; 10 T.L.R. 568 considered.

ACTION.

By a Lloyd's accountants inndemnity policy dated February 6, 1950, granted to the plaintiffs, West Wake Price and Co., a firm of accountants, by the defendant and other Lloyd's underwriters, the underwriters agreed to indemnify the plaintiffs up to a sum not exceeding £25,000 against "Loss for any claim or claims "which may be made against them . . . in respect of any act of "neglect, default or error on the part of the assured . . . or their "partners or their servants, in the conduct of their business as

[Reported by Miss J. EPHRON, Barrister-at-Law.]

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" accountants. . . ." In addition, the policy contained a further clause whereby it was agreed to pay " any such claim or claims " which may arise without requiring the assured to dispute any " claim, unless a King's Counsel (to be mutually agreed upon by " the underwriters and assured) advise that the same could be " successfully contested by the assured, and the assured consents " to such claim being contested, but such consent not to be " unreasonably withheld."

The plaintiffs had one Bell in their employ as an accountant clerk; and between the years 1949 and 1952 he received and paid out moneys for two of the firm's clients, Hammer (Southern) Ltd. and Mr. William Hinds, who were promoters and financiers of theatrical enterprises. At the end of that period it was discovered that sums of money amounting to £20,000 had been received by Bell which could not be accounted for.

On April 26, 1946, writs were issued by the clients (hereinafter called " the claimants ") claiming (1) damages for negligence and/or breach of duty as accountants in failing to keep proper books and ledgers, conduct annual audits and supervise their servant Bell; (2) money had and received; and alternatively (3) moneys converted by the plaintiffs, through Bell, to their own use.

The plaintiffs, considering the claims to be of the class covered by their policy, made a request to the defendant, as underwriter, for indemnity, but this was refused on the ground that the claims did not, in fact, fall within the scope of the policy. Thereupon, the plaintiffs sought a declaration that the defendant was bound to pay the claims made against them in accordance with the provisions of the Queen's Counsel clause.

Gilbert Paull Q.C. and *R. J. Parker* for the plaintiffs.
Neil Lawson Q.C. and *W. G. Wingate* for the defendant.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Leyland Shipping Co. Ltd.* v. *Norwich Union Fire Insurance Society* [1]; *Davies* v. *Hosken* [2]; *In re Windsor Steam Coal Co. (1901) Ltd.* [3]; *Yorkshire Dale S.S. Co. Ltd.* v. *Minister of War Transport* [4]; *Ocean Steamship Co. Ltd.* v. *Liverpool & London War Risks Association.* [5]

Cur. adv. vult.

Nov. 14. DEVLIN J. stated the facts and continued: The plaintiffs assert that the claimants have made claims which are covered by the Q.C. clause; and the plaintiffs have brought this action in order to have that point determined. They contend

[1] [1918] A.C. 350; 34 T.L.R. 221.
[2] (1937) 53 T.L.R. 798; [1937] 3 All E.R. 192.
[3] [1929] 1 Ch. 151.
[4] [1942] A.C. 691; 58 T.L.R. 268; [1942] 2 All E.R. 6.
[5] [1946] 1 K.B. 561.

that for this purpose the nature of the claims is sufficiently and conclusively set out in the statements of claim. The underwriters contend that the nature of the claims cannot be ascertained without an investigation into the facts on which they are based; and they also dispute that the claims formulated in the statements of claim are within the Q.C. clause. That clause refers to "any such claims," which takes one back to the body of the policy, where they are described as "claims in respect of "any act of neglect, default or error." These words are apparently wide, but it is plain on the authorities—and Mr. Paull does not contend otherwise—that they do not extend to acts of dishonesty by the claimants or their servants, or to claims against the plaintiffs for money had and received, at any rate unless it is shown that those claims are in respect of an act of neglect, default or error. The problem in this case is how to deal with a "mixed" claim in which questions both of dishonesty and negligence are raised.

In speaking of negligence or dishonesty, I am using broad terms and I must now analyse more closely the nature of the claims as formulated in the writs and statements of claim. Three causes of action are alleged: first, damages for negligence or breach of duty as accountants; secondly, money had and received; and, thirdly, "monies converted by the defendants to "their own use." The statements of claim, which were delivered at the same time as the writs, show that the third head is restricted to the acts of Bell, which are alleged as wrongful conversion. Any direct allegation of fraud or dishonesty is avoided. A person can, of course, convert money innocently; he can even convert it to his own use innocently if he believes he has a good title to it; but it has, I think, been taken for granted in this case that Bell, if these allegations are proved, was dishonest. The point may not matter for Mr. Paull's purpose, since he is ready to concede that a claim for money had and received would not be a claim within the policy. I have no doubt that it would be outside the policy if the failure to account was due to dishonesty. I wish, however, to guard against a decision that all claims for money had and received are necessarily outside an indemnity policy in the terms of the present one or that the authorities by which I am bound would compel me so to decide. It might be—I do not have to decide it—that a failure to account which was due to a payment made to a third party, who was in good faith believed to be entitled to it, would be an "error" within the meaning of the policy. For the purposes of this case it has not been found necessary in the argument to draw precisely the boundaries between an indemnity policy and a fidelity policy, and the broad distinction that has been used is the distinction between negligence and fraud. I shall in this judgment use the word "negligence" to describe the ambit of the policy and to save the constant repetition of "any act of neglect, default or error"; and I shall

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by way of contrast with it use the term "fraud," though I am well aware that there may be acts of conversion which fall short of fraud and yet are outside the policy.

There are thus three causes of action set out in each action and there is one loss claimed, for the whole loss is attributed to one or other of the three causes. The question I shall have to determine in the end is whether there is more than one claim.

If there is only one claim, I may also have to determine what its real nature is, whether it ought to be described as a claim in respect of fraud or a claim in respect of negligence. In each document—writ and statement of claim—negligence is put as the main claim and the other heads of claim are alleged as alternative. Mr. Paull submits that the court is not entitled, in ascertaining the true nature of the claim, to look outside these documents; but he does not carry this submission so far as to say that the court is bound by the order in which the pleader chooses to arrange them and bound to accept as the main claim that which the pleader or those instructing him have selected. I find the selection in this case rather a curious one. The truth is, to put it bluntly, that Bell is alleged to have stolen the claimants' money. It seems an inversion from the natural in these circumstances to begin by saying that the plaintiffs were careless in not discovering that their servant was stealing money; and then to add by way of alternative that in fact he was stealing money. The statement of claim was delivered six months ago and the defence has not yet been filed. The claimants have very reasonably granted time while the plaintiffs' differences with their insurers are being resolved. I may take it, I suppose, that the claimants are now aware of the policy of insurance in this case and I suppose I ought not to speculate about when they first became aware of it or whether they thought that a claim put into a form apparently covered by a Lloyd's policy might be more valuable to them than one which was not. But I am satisfied that if I have to ascertain the real nature of the claim, I am entitled to look at the matter as well as the form of the statement of claim and to reach my own conclusions about it, and I am satisfied that this claim is a claim based primarily on the fraud of Bell.

Of course, if there was a real doubt about whether Bell was the servant of the assured, it would be more understandable that the claimants should keep the allegation of his fraud as a second string. But Mr. Paull has admitted that Bell was employed by the assured as an accountant clerk and was their general servant. He made that admission subject to the qualification that in these particular matters Bell might have been acting outside his employment, and also subject to the reservation that the facts about Bell's position, as distinct from the allegations about it, were irrelevant and inadmissible. I am not prepared, for reasons which I shall give later, to take as strict a view on the latter point as Mr. Paull would wish me to. I think that if I have

to ascertain the true nature of the claim, it is permissible for me to satisfy myself, as I do, that the allegation that Bell is a servant is substantial and not flimsy.

I turn now to the construction of the policy. It seems that the effect upon a policy in these terms of a mixed claim in fraud and negligence has not yet been judicially considered—in the relevant cases hitherto fraud has been admitted; and it will, I think, prove helpful to consider the effect of a mixed claim upon the main indemnity clause in the policy before tackling the complications created by the Q.C. clause.

The essence of the main indemnity clause—as indeed of any indemnity clause—is that the assured must prove a loss. The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until they have been found liable and so sustained a loss. If judgment were given against them for the sum claimed, they would undoubtedly have sustained a loss and the question would then arise what was the cause of the loss. If the proximate cause (this seems to be the test; *Goddard and Smith* v. *Frew* [1]) of the loss was the dishonesty of their servant, they could not recover under the policy; if on the other hand it was their own neglect, they could recover. If the action between the claimants and the assured did not settle the question of causation, it would in all probability settle the facts in the light of which the question could be answered. But all this would involve publicity which, where charges of professional negligence are made, might do considerable harm to an assured over and above the amount of any judgment obtained against him. For this reason professional men may prefer paying a bad claim to fighting it. Obviously one of the main objects of the Q.C. clause is to give the assured additional cover, not only against the costs of litigation but also as a protection against unwelcome publicity.

I said that the question would be what was the proximate cause of the loss—dishonesty or negligence. Mr. Paull submits that that would not in fact be the right question. He submits, quoting as authority the dictum of Lindley L.J. in *Reischer* v. *Borwick*,[2] and a passage in Halsbury's Laws of England, 2nd ed., vol. 18, p. 306, that is largely founded upon it, that it would be enough for him to show that negligence was one of the proximate causes of the loss. I think that as the argument developed it became apparent that this point would not play as large a part in the determination of this dispute as was at first thought. I do not for the purposes of my judgment find it necessary to decide it. But since in the course of the discussion I have had occasion to look at what I said about *Reischer* v. *Borwick*[2] six years ago in *Heskell* v. *Continental Express*,[3] I must comment that I do not find the relevant passage altogether satisfactory. I doubt that

[1] [1939] 4 All E.R. 358.
[2] [1894] 2 Q.B. 548, 551; 10 T.L.R. 568.
[3] [1950] 1 All E.R. 1033, 1043.

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it is correct to describe the dictum of Lindley L.J. as "the rule "laid down in *Reischer* v. *Borwick*."[4] I should still like to find a way of avoiding the making of minute distinctions between two causes "of approximately equal efficacy"; but if the price that has to be paid for the solution is the interposition of a category labelled "cause of equal efficacy" between "the cause" and "a cause," the price may be too high.

I turn now to an analysis of the Q.C. clause. It comprises three promises by the underwriters, and while this combination of promises produces a clause which is sui generis in contracts of insurance, each of the promises looked at individually is, I think, based on a conception which is not a novelty in insurance law. The three promises, each contingent upon the happening of certain events, are: (1) that the underwriters will pay the costs of legal proceedings; (2) that they will pay a claim against the assured without proof of actual loss, if it is more likely than not that there will be a loss, the question of likelihood being determined by Queen's Counsel; (3) that they will pay a claim without proof of loss, and even if it is unlikely that it would cause a loss, if the assured reasonably objects to fighting it.

There is no great dispute about the meaning and effect of the first promise. It is an engagement "supplementary to the con-"tract of insurance"—I adopt the phrase by which a suing and labouring clause (to which this part of the Q.C. clause bears some similarity) is described in the Marine Insurance Act, 1906, section 78. A suing and labouring clause is not part of the contract of indemnity: see *Johnston* v. *Salvage Association*.[5] The performance of this promise does not involve the underwriters in any liability to indemnify the assured against the loss. If the action against the assured succeeds, a loss will be proved; but it would still be open to underwriters to assert that the loss is not within the policy. For example, a claim which appeared on presentation to be in respect of negligence might turn out in reality, when all the facts were known, to be in respect of fraud. It would then be open to the underwriters, irrespective of whether they could properly be made liable for the costs of the action, to refuse to pay the claim.

The second promise comes into operation if a claim is made and Queen's Counsel advises that it cannot successfully be contested. The underwriters' liability in this event to pay the claim bears some similarity to the conception in marine insurance of constructive total loss. There is behind it the same notion, namely, that there are circumstances in which a business man does not want to have to wait until he can prove that a loss has actually occurred. In the conception of constructive total loss he recovers if he can show that a peril insured against has operated in such a way as to be more likely than not to cause

[4] [1894] 2 Q.B. 548, 551.

[5] (1887) 19 Q.B.D. 458; 3 T.L.R. 744.

an actual total loss of the thing insured, the question of likelihood being determined as a question of fact by the court. The similar question which arises under the Queen's Counsel clause, namely, whether the action can be successfully contested, is to be determined by Queen's Counsel.

The third promise involves underwriters in the obligation of paying the claim, whether or not it can be successfully contested, if the assured has reasonable grounds for refusing to contest it. This is not, I think, an indemnity insurance at all. The underwriters undertake to pay on the happening of an event, namely, the making of a claim within the categories defined in the policy, even though it may be beyond question a bad claim and therefore one which cannot legally involve the assured in any loss; the assured need prove neither that the loss has occurred nor that there is any likelihood of a loss occurring. It is, in short, what is called contingency insurance.

The making of a claim is the event or "peril" which brings the Q.C. clause into operation and so puts it upon the underwriters to fulfil one or other of the three obligations in the clause. It may be indeed that it is more truly expressed as one obligation, which is a conditional obligation to pay the claim unless underwriters establish grounds for substituting one or other of two alternative promises. It does not, for the purposes of this case, matter how that point of construction should be decided. This case turns on whether the event which brings the clause into operation has occurred, that is, whether a claim for negligence within the policy has arisen. Quite clearly a claim has been made and Mr. Paull submits that in considering whether or not it is within the policy, that is, whether it is in respect of negligence, all that can be looked at is the claim as formulated by the claimants—the writ and Statement of Claim. As this is at least inter alia a claim in respect of negligence, the plaintiffs contend that the clause has come into operation, and a declaration to that effect is in substance the relief which they are asking for in this action. Or, put another way, since the question whether or not the clause has come into operation depends entirely on whether a claim has been made within the meaning of the policy, the court is in effect being asked to declare that the claim in the statement of claim is one that falls within the policy.

Mr. Lawson disputes that this is the right approach to the Q.C. clause. He is bound, I think, to concede that if a claim within the meaning of the clause arises, the underwriters' obligations also arise. But he submits that a claim within the meaning of the clause does not arise unless it is a claim which is in some way connected with loss. He submits that the clause is part of the contract of indemnity and that there can be no indemnity without proof of loss. He therefore submits that it is not enough for the assured to produce a claim which appears to be in form within the policy; they must also prove, before the clause comes

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into operation at all, that it is a claim which is connected with loss. The word " connected " is not one that Mr. Lawson used. It is the best one that I can think of to describe what I understood him to mean. For he does not say that the assured must prove that the claim has actually caused him a loss: clearly, if the assured had to prove that, the Q.C. clause would give him no rights over and above the main indemnity clause. Nor does he make the unqualified contention that the assured must prove that the claim is one that is likely to cause a loss: for one easy way of disputing such a proposition would be to show that the claim was a bad one and would be likely to fail; and Mr. Lawson is bound to concede that under the Q.C. clause that issue is reserved for Queen's Counsel. So he phrases the connexion in this way—that the assured must show that the claim, if pursued to a successful conclusion, would cause him to sustain a loss within the policy. How does the assured set about proving this? The sort of inquiry that Mr. Lawson envisages would take a curious form. The assured would call evidence to show that he was negligent and that as a result of his negligence he would have to pay the claim. The underwriters would be, by reason of the Q.C. clause, as it were, estopped from contending that the assured was not careless—in something of the same way, I suppose, as a tenant may be estopped from denying his landlord's title—but might contend that the admitted negligence was not, or would not be, the true cause of the loss. On the particular facts of this case—if such an inquiry took place—Mr. Lawson would hope to establish that it was Bell's dishonesty and not the firm's negligence, if any, that was the true cause of the loss.

If the assured emerged successfully from this ordeal and showed that his negligence, if proved, would be the true cause of the loss, the matter would then be remitted to Queen's Counsel to decide whether the issue of negligence ought to be fought at all. If he decided that it ought to be fought, and if the assured was unable to find reasonable grounds for withholding his consent, the trial between the claimant and the assured would then take place—the claimant being, it must be hoped, a man of sufficient patience to consent to holding up his claim while the assured was fighting his preliminary bouts with his insurers—and the assured would then contend that he was not negligent. If judgment went against the assured, it is quite possible, and indeed probable in a case such as the present, that the judge, if he found that Bell was fraudulent and that the firm was negligent, would not determine which was the cause of the loss, since the assured was plainly responsible for both. The contest would then enter upon its third phase. Hitherto it would have been dealing with probabilities. The assured would have succeeded in showing that his negligence, if successfully proved, would probably (no one could say more than that) be the cause of the loss which would be actually incurred only if the action against him was successful. By this means he would

have satisfied the requirements of the Q.C. clause and obtained the rights which that clause grants to him. In the third phase, where he seeks an indemnity under the main indemnity clause, he must show that his negligence was in fact the cause of judgment being given against him. Many facts might have come out at the trial when the claimant's case was heard which would have been unknown to the judge who had to try the question whether the Q.C. clause had come into operation. It would be open to the underwriters, therefore, to contend once again that dishonesty was the real cause. When the assured emerged triumphant from this third phase, he would obtain full relief under the policy.

With all respect to underwriters, these sort of contentions really make nonsense of the Q.C. clause. It does not have to be read twice to see that its main object is to protect the assured from having to face litigation which, whether successful or not, might be damaging to his reputation. If before the clause comes into operation underwriters can require the assured to expose the whole nature of the claim in a court of law, the object is completely defeated. Worse than that, a clause which is manifestly designed so that it may be concealed from the public that the assured has been charged with negligence would have as a preliminary to its operation a set of proceedings conducted by the assured on the assumption that he was in fact negligent. Such proceedings would form a most unhappy preliminary to the action between the claimant and the assured in which the assured might wish properly to dispute his negligence. But, of course, they are unlikely to be a preliminary to anything. In nine cases out of ten the claimant would decline to hold his hand while proceedings under the policy were taking place, the assured would be driven to fight and the Q.C. clause would be quite worthless.

I do not go as far as do Mr. Paull's contentions in this matter. I do not consider that the underwriters are bound by the way in which the claimant has chosen to formulate his claim. I think that underwriters can properly invite the court at this stage to ascertain the true nature of the claim and to make such inquiry as may be necessary for that purpose. An example may be given in relation to a claim for money had and received of the sort which I have already considered. I think it would be open to the underwriters to show, for example, that, while that might be the form of claim which commended itself to a pleader, the writ had been preceded by a letter charging embezzlement. Similarly, I think it might be open to the assured to show that the issue raised by such a claim was whether or not a person to whom he had in good faith paid away the claimant's money was authorized to receive it. But there is all the difference between a limited inquiry of this sort confined to ascertaining the true nature of the claim and the inquiry into the whole circumstances which would

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be necessary in order to determine whether fraud or negligence was the probable cause of the loss.

I should therefore reject Mr. Lawson's interpretation of the Q.C. clause for the sufficient reason that it robs the clause of all sense and meaning. But I reject it also on the ground that there is no justification for reading into it the limitations which Mr. Lawson wants to introduce. The clause says in effect that in the event of "any such claim or claims" arising the underwriters are to do one of three things. "Any such claim" clearly means any claim "in respect of any act of neglect default or error." There is no justification for introducing the additional qualification that it also means any claim which, if successfully prosecuted, would be likely to result in a loss. Mr. Lawson's reason for introducing this additional qualification is that one must import into the clause the conception of indemnity. I do not see why one should. The conception of indemnity may arise to some extent from the clause itself; for example, if one of the promises may be regarded as in effect a promise to pay a constructive total loss, it would be a contract of indemnity. But the clause at least in part, and perhaps in whole, is not a contract of indemnity; but is, as I have described it, a supplementary contract outside the main contract of indemnity. Mr. Lawson has submitted as a matter of construction that as the limitation of loss to £25,000 is contained in the contract of indemnity, the Q.C. clause must be read as part of the contract of indemnity, since otherwise there would be an obligation under the Q.C. clause to pay claims up to any amount. I think that a limitation to £25,000 can however be implied into the Q.C. clause as a matter of common sense without troubling whether it is a part of the contract of indemnity or not. In a commercial document it is reasonable to think that commercial men will regard some things as being too obvious to require statement.

The rejection of Mr. Lawson's main submission clears the ground for his alternative argument which seems to me to raise the real point in the case. In the action which has been brought against the assured, is there one "claim" or more than one "claim" in the sense in which the word "claim" is used in the policy? If the claim is to be related to the amount claimed, there is only one sum claimed either as a liquidated amount or by way of damages (it is not argued that for this purpose a distinction is to be drawn between them), although the claim is supported by three alternative causes of action. If, on the other hand, "claim" means "cause of action," then there are three, of which one is undoubtedly within the policy. Mr. Paull submits that "claim" means "cause of action," that there has therefore arisen against the assured a claim for negligence, that that brings the Q.C. clause into operation and that it is immaterial that the document which contains the claim should also contain other claims based on different causes of action which are not within the policy. Mr. Lawson submits that only one claim has arisen.

If he is right about that, it does not determine the matter, for it would then be necessary to consider whether that claim was a claim for negligence or not. If, however, Mr. Paull is right that there are two or more claims, then he must succeed, for one is undoubtedly within the policy.

I think that the primary meaning of the word "claim"—whether used in a popular sense or in a strict legal sense—is such as to attach it to the object that is claimed; and is not the same thing as the cause of action by which the claim may be supported or as the grounds on which it may be based. In the Oxford Dictionary "claim" is defined as: first, "A demand for some-"thing as due; an assertion of a right to something"; secondly, "Right of claiming; right or title (to something or to have, be, "or do something; also on, upon the person, etc., that the thing "is claimed from)." All the examples given under these two heads are examples of claims made to an object or upon a person. Under the verb "to claim" it is observed that it is "often loosely "used, especially in the United States for: contend, maintain, "assert." I do not doubt that the word is frequently used in this looser meaning of "contention," or that it is often used by lawyers as if it meant the same thing as a cause of action. It is quite natural to speak of a claim in fraud or a claim in negligence, and Mr. Paull has advanced many powerful arguments to show that it is as "cause of action" that the word is used in this policy. His strongest point is, I think, that the words that I have to construe are "claim . . . in respect of any act of neglect, "default or error." This would seem to show that the policy is itself characterising claims according to their causes of action. Mr. Paull can also argue that his interpretation makes the policy more workable, at any rate from a lawyer's point of view. Thus, a claim in negligence comes into existence when an allegation of negligence is made and continues until the allegation fails or succeeds; a claim in the sense of a cause of action must always be either inside or outside the policy for the whole of its life. A claim for a sum of money, however, may start outside the policy if it is based solely on fraud; perhaps be brought within the policy if a charge of negligence is added; and then disappear from the scope of the policy if the charge of negligence is disproved at the trial. I do not see any insuperable difficulty about this. A claim need not always have the same character. Under the policy there are only two points of time when its character is relevant; the first is when it is made and the second when (if it does) it succeeds; and it is not essential to the working of the policy that it should bear the same character on both occasions. But Mr. Paull is justified in submitting that this point is at least a helpful indication.

He illustrates the same sort of point by reference to the clause in the policy which requires immediate notice in writing to be given of any claim. When the assured received a claim in the form in which it is set out in this case, that is, for fraud

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and negligence, ought he to give notice of it? Ought his duty to give notice to depend upon the view he forms of the real nature of the claim—whether it is in fraud or negligence? If he failed to give notice and the action proceeded and the claim in fraud failed, would the claim then for the first time come within the policy? And would not underwriters have cause for complaint that they had not been notified of the claim when it was first made? I find this last consideration rather artificial. The clause in the policy requires "immediate notice in writing of any "claim made upon them." I think that the object of the clause is that underwriters want to be told at once of any claim that is likely to be of interest to them under the policy and I have no doubt that a sensible assured would act in that spirit without sitting down first to construe the words "act of neglect, default "or error." Still, the phrase "any claim" must on a strict construction refer only to any claim that falls within the policy; and if an assured liked to stand on his strict rights and declined, for example, to report a claim for money had and received until the point when it became manifest that it involved neglect or error, underwriters might have a grievance but no remedy. The value of the point can be exaggerated but again it is helpful as showing the sort of sense in which the parties might understand the word.

The machinery of the policy does not work so smoothly under Mr. Paull's interpretation when one comes to apply the Q.C. clause; but, nevertheless, it may be said, except at one point, to work. If the Queen's Counsel is presented with the statement of claim in this case, he will, on Mr. Paull's interpretation, be asked to advise merely in relation to one paragraph, ignoring another. He will have to advise whether the claim in negligence can be successfully contested. If it is quite obvious that there is no answer to the claim in fraud, the exercise will, except for the purpose of the policy, be academic, but it must be performed. One of the ways in which the claim might be successfully contested would be to say that while negligence might have to be admitted, it was not the cause of the loss; and that would, I suppose, have to be considered as if someone other than the assured was responsible for Bell's acts. If counsel advised that the action should be contested, and it was contested, the underwriters would be liable to pay all the costs in connexion with the negligence, but not any costs relating to fraud if that was also contested. This division of finance might be inconvenient but it is not impracticable. The clause is not a subrogation clause; the assured remains in full control of the action. He is not, it may reasonably be contended, entitled to call for funds in advance but merely to be reimbursed costs, charges and expenses that have been incurred. If at the end of the case the division cannot be agreed, any dispute that is brought to the courts about it would doubtless be referred to a taxing master and settled by him.

Moreover, on any view of the clause, a division may be inevitable; for separate claims in respect of separate sums of money, one claim based on fraud and the other on negligence, may be combined in the same action against the assured and there could then be no doubt that under the Q.C. clause the claims would have to be dealt with separately.

The real difficulty in the application of the Q.C. clause arises if underwriters are required to pay the claim. This difficulty is to my mind a most formidable one. The underwriters cannot pay the claim in negligence without also discharging the claim in fraud; and they can therefore, if the plaintiffs' contention is right, be compelled under the Q.C. clause to pay a claim that is not within the policy.

This difficulty, in spite of all the attractiveness of Mr. Paull's argument, seems to me to be, if not decisive, at least enough to drive me back to a favourable reconsideration of the ordinary and primary meaning of the word "claim." If the word is to be used with any precision, it must be defined in relation to the object claimed. The grounds for the claim or the causes of action which support it can give it colour and character, but cannot give it its entity. If you say of a claim against a defendant that it is for £100, you have said all that is necessary to identify it as a claim; but if you say of it that it is for fraud or negligence, you have not distinguished it from a charge or allegation. In particular, if you identify a claim as something that has to be paid (and that is how it is referred to in the Q.C. clause), it must be something that is capable of separate payment: you cannot pay a cause of action. It follows, I think, that if there is only one object claimed by one person, then there is only one claim, however many may be the grounds or the causes of action which can be raised in support of it: likewise, where several claims are each dependent on the same cause of action (as, for example, where one cause of action leads to alternative claims for an injunction, damages or an account or other different forms of relief), there remains only one cause of action, however many claims it may give rise to. In my judgment there is in each of these actions against the assured only one claim and I have therefore to consider whether this "mixed" claim is a claim in respect of negligence within the meaning of the policy.

Several tests have been considered in the course of the argument which may be applied to the claim in order to answer this question. One is that the court must look at the real nature of the claim, irrespective of the form in which it is pleaded, and determine whether it is wholly or mainly a claim in respect of fraud or in respect of negligence. If this is the right test, for reasons that I have already indicated I should determine it as a claim in fraud.

Another test is to follow, as closely as the altered circumstances permit, the method adopted in *Goddard and Smith* v.

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Frew.[6] The Court of Appeal there determined that the true proximate cause of the loss being embezzlement, it was not within the policy. There is nothing in this case to show that the Court of Appeal had to distinguish between two suggested causes; but presumably if it had had to do so, it would have done it by ascertaining which of the two was the proximate cause (subject to Mr. Paull's contention based on *Reischer* v. *Borwick*[7]). For that purpose it would have had access, if necessary, to proved or admitted facts. Here, in my judgment, Mr. Paull is right in submitting that if causation enters into the matter at this stage at all, which he disputes, it must be determined on the facts alleged. On the assumption that all the facts in the statement of claim are to be taken as true—as they would be, for example, in demurrer proceedings—I am satisfied that the true cause of the loss is the dishonesty of Bell. Indeed, it seems to me to be plain that the charge of negligence cannot be regarded as anything other than an alternative. In order to sustain the charge that the plaintiffs were careless in not discovering that Bell was failing to account for money, the first matter to prove is that Bell was in fact failing to account for money; as soon as it is established that a servant of the plaintiffs failed to account for money the cause of action against them is complete and any investigation into the question, whether it ought to have been detected or not, is superfluous.

If, therefore, either of these were the tests, I should decide the point in favour of there being one claim. But I have reached the conclusion that there is in fact a simpler and more effective test which is the correct one. It depends simply on the true construction of the policy. Business men often want to write into a document words which they think will amplify its meaning, but which lawyers reject as superfluous; nevertheless, the writing in of superfluities sometimes helps to clarify questions of construction. If a layman wanted a phrase such as "claims in respect of "negligence" to be altered to read "claims in respect of negli-"gence only" or "claims in respect of negligence but not in "respect of fraud," a lawyer would tell him that these additions were superfluous, since negligence meant negligence and nothing else and did not include fraud. That is plainly enough the effect of the decision in *Goddard and Smith* v. *Frew*.[8] But if words such as these were there, they would serve to show that a claim in respect of negligence and in respect of fraud is excluded from the description in the policy. To come within the policy the character of the claim must be unmixed. It must be negligence alone. Applying this test, which I think is the right one, the claim in this case is outside the policy.

It is true that a decision to this effect can deprive the assured of the benefit of the Q.C. clause in a case in which, if the true facts were known, he would be entitled to it; but that is the

[6] [1939] 4 All E.R. 358.
[7] [1894] 2 Q.B. 548.
[8] [1939] 4 All E.R. 358.

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inevitable result of a clause whose very nature compels it to be applied to cases where the true facts are still unknown. Under the main indemnity clause the assured has all his rights intact under the policy, if he wishes to wait until the true facts are known. The Q.C. clause is an additional right which he can claim before the true facts are known. But he must take with it all the virtues and vices inherent in the character of a clause which is dealing not with certainties but with possibilities. In general, the clause will work to his advantage; claims will get paid which on the true facts have no validity. It does not seem to me that the clause is stultified because it may occasionally work the other way. There is no practical danger that claims for negligence will frequently be overlaid by unsustainable charges of fraud and so taken outside the policy; businessmen do not as a rule make charges of fraud without justification.

But it is not in any event simply a question of giving a literal meaning to the word "claim" in a case in which a more liberal meaning might be urged as being more consistent with the presumed intention of the parties. While a loose or liberal meaning would ensure that the assured derived all possible benefit from the Q.C. clause, it would also mean that the underwriters were compelled to discharge a claim which admittedly, good or bad, was outside the limits of the policy. If I were entitled to determine the case by setting these two considerations in opposite scales, I think that I should find that the latter weighed more heavily with me. But in truth where considerations of this sort are at all finely balanced, it cannot be disputed that the right method—perhaps it is the right method in all cases—is to take the words in their primary meaning, certainly whenever that corresponds with the ordinary usage of business men.

In my judgment therefore the plaintiffs have failed on the material they have produced to establish that a claim, which is within the meaning of the policy, has arisen against them; and accordingly have failed to prove the event which brings the Q.C. clause into operation. Their claim must therefore be dismissed.

Judgment for the defendant.

Solicitors: *Ward, Bowie & Co.; William Charles Crocker.*

[CHANCERY DIVISION.]

* BRIDGES (INSPECTOR OF TAXES) v. HEWITT. SAME v. BEARSLEY.

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Oct. 23, 24, 25; *Nov.* 8.

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Revenue — Income tax — Employment — Voluntary payment — Transfer of shares — Transfer in compliance with wishes of deceased shareholder — Transfer expressed to be in consideration of transferee remaining in service of the company — Nature of transfer changed by deed — Shares taxable — Schedule E — Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 156, *Sched.* 9, *r.* 1.