COURT OF APPEAL

Sept. 21 and 22, 1987

THORMAN AND OTHERS
v.
NEW HAMPSHIRE INSURANCE CO. (U.K.) LTD. AND HOME INSURANCE CO.

Before Sir JOHN DONALDSON, M.R., Lord Justice STOCKER and Lord Justice RUSSELL

Insurance (Professional Negligence) — Transfer of cover — Architects insured against building defects — Professional negligence insurance cover transferred from one insurer to another — Claims made under insurance policy — Whether previous insurers liable for only part of claim.

In May 1973 the plaintiff architects were engaged by the building owners in connection with a housing development at Rose Duryard, Exeter, which was completed in 1977.

The plaintiffs were covered in respect of professional negligence by the first defendants (NHIC) under a Scheme Insurance for Architects and the insurance was renewed from year to year until Sept. 30, 1983 when the scheme insurance was transferred to the second defendants (HIC), with effect from Oct. 1, 1983.

The relevant provisions in the NHIC and HIC policies were identical and provided inter alia:

> Section 1 Professional Liability. The Company will indemnify the Insured against loss arising from any claim or claims for breach of duty in the professional capacity . . . by reason of any neglect omission or error whenever or wherever the same was or may have been committed by the Insured . . . during the subsistence of this Policy.
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> Conditions 4. The Insured shall as a condition precedent to their right to be indemnified under sections 1 and 2 of this Policy give to the Company immediate notice in writing:—
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> (a) of any claim made against them (b) of the receipt of notice from any person of an intention to make a claim against them.
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> 8. If during the currency of this Policy the Insured shall become aware of any occurrence which may be likely to give rise to a claim falling within Section 1 . . . and shall during the period of this insurance give written notice . . . of such occurrence any claim which may subsequently be made against the Insured arising out of the occurrence of which notification has been given shall be deemed to be a claim arising during the period of this Policy whenever such claim may actually be made.
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> 12. There shall be no liability hereunder in respect of any claim for which the Insured are entitled to indemnity under any other policy.

In August and September, 1976 certain complaints were made regarding cracking of the brickwork and a site meeting took place in September, 1976. Certificates of completion were issued between November, 1976 and February, 1977. The owners took possession of the houses constituting the development between November, 1976 and November, 1977. In 1978 and 1979 the owners informed the plaintiffs that they required remedial works to be carried out to the brickwork. The plaintiffs informed NHIC of a claim for the cost of remedial works, and by November, 1979 NHIC had filed their papers.

In May, 1982 the plaintiffs were advised of further problems which had arisen in connection with the development.

On June 27, 1982 an action was commenced by the owners. The writ was endorsed in general terms alleging breaches of professional duty by the plaintiffs. The statement of claim served on Jan. 10, 1984 and the experts' reports served by the owners in December, 1983 put forward a variety of defects in respect of which damages were claimed.

NHIC claimed that as the only claim notified to them during the period in which they covered the risk related to brickwork they were liable to indemnify the plaintiffs only in respect of the first three of the eight heads of defects, each of which related to defective brickwork and contended that the remainder of the items which were complaints of defects other than brickwork were covered by HIC.

Held, by STEYN J., that NHIC were only liable for the claims relating to defective brickwork.

The second defendants (HIC) appealed.

Held, by C.A. (Sir JOHN DONALDSON, M.R., STOCKER and RUSSELL, L.JJ.), that (1) the issue of the writ endorsed in wide general terms constituted a claim which embraced all the matters subsequently pleaded in the statement of claim and set out in the Scott schedule; this was when the claim by the owners against the plaintiffs was made and the detailed allegations later pleaded constituted different and further amplification of the original claim and not a new claim or a series of new claims; the issue of the writ was notified to NHIC within the period of the policy issued by them (*see* p. 12, col. 1; p. 17, cols. 1 and 2; p. 18, col. 2);

(2) the true test was what was the claim being put forward by the claimant not what the proposed defendant thought it was; the learned Judge had erred in deciding that the claim related only to the brickwork; and a claim covering all the defects alleged was made by the issue of the writ (*see* p. 12, col. 1; p. 17, col. 2);

(3) the issue of the writ constituted an "occurrence which may be likely to give rise to a claim falling within Section 1" within the meaning of condition 8 and the plaintiffs having informed NHIC of that occurrence any claim against them arising out of that occurrence would be deemed to have been made during the period of the policy; NHIC were liable to indemnify the plaintiffs in respect of all of the building owners' claims to the exclusion of liab-

ility on the part of HIC; the appeal would be allowed (*see* p. 12, col. 2; p. 13, col. 1; p. 18, col. 1; p. 19, col. 1).

The following cases were referred to in the judgment of Lord Justice Stocker:

Idyll Ltd. v. Dinerman Davison & Hillman and Others, (1971) 1 Const L.J. 294;

Steamship Mutual Underwriting Association Ltd. v. Trollope & Colls (City) Ltd., (C.A.) [1986] 33 B.L.R. 77.

West Wake Price & Co. v. Ching, [1956] 2 Lloyd's Rep. 618; [1956] 3 All E.R. 821.

This was an appeal by the second defendants, Home Insurance Co., from the decision of Mr. Justice Steyn in which he held that the first defendants, New Hampshire Insurance Co. (U.K.) Ltd., were liable to indemnify the plaintiff architects, Mrs. Patricia Thorman, Mr. Dennis Frederick Lambeth and Mr. Alan Miller Williams, only in respect of the defects relating to the brickwork at the housing development at Rose Duryard, Exeter and that the second defendants were liable for the non-brickwork defects.

Mr. John Griffiths Q.C. and Mr. John Slater Q.C. (instructed by Messrs. Davies Arnold & Cooper) for the second defendants; Mr. Stephen Desch Q.C. and Mr. Roger Ter Haar (instructed by Messrs. Kennedys) for the first defendants; Mr. Roger Toulson Q.C. and Mr. Christopher Gibson (instructed by Messrs. Penningtons Ward Bowie agents for Messrs. Ashford Bevan of Tiverton) for the plaintiffs.

The further facts are stated in the judgment of Sir John Donaldson, M.R.

Judgment was reserved.

Thursday Oct. 8, 1987

JUDGMENT

Sir JOHN DONALDSON, M.R.: This appeal is concerned with the problems which can arise when professional men, in this case a firm of architects, transfer their professional negligence insurance cover from one set of underwriters to another. The transfer occurred at midnight on Sept. 30/Oct. 1, 1983.

In May, 1973, the architects were engaged by the building owners in connection with a housing development at Rose Duryard, Exeter, which was completed early in 1977. Thereafter various defects became apparent which are alleged by the building owners to be the result of professional negligence on the part of the architects. In fairness to the architects, I should make it clear that it has not yet been established that they were negligent and similar allegations are made against the consulting engineers employed on the development. Both are defendants in consolidated proceedings due to be heard by an official referee some time within the next six months. For the purposes of the present proceedings, it has been assumed that liability will be established against the architects, the primary issue in this appeal being whether, as Mr. Justice Steyn has held, New Hampshire are under an obligation to indemnify the architects in respect of only part of their liability to the building owners, Home Insurance being obliged to indemnify them in respect of the remainder of that liability. The alternative contention advanced by the appellants, Home Insurance, is that the whole liability is that of New Hampshire. The architects are indifferent which of these contentions is upheld. However Home Insurance advances a secondary contention, namely, that even if New Hampshire are only obliged to provide the architects with a partial indemnity, they, the Home, can escape liability for the remainder upon grounds of non-disclosure. This does not commend itself to the architects.

The action brought by the building owners against the architects was begun by a generally endorsed writ issued on June 30, 1982, but not served until Dec. 20, 1983. Since then the building owners' claims have been particularized in a Scott Schedule which shows that they fall into two main categories, although there may be some overlap. These are (a) brickwork and (b) other matters and, in particular, roofing.

It is accepted that any liability in respect of the brickwork complaints is covered by the New Hampshire policies. What is not accepted is that any liability in respect of the other complaints is so covered. Whether such a liability attracts indemnity under the New Hampshire policies, the later Home Insurance policies or neither, depends upon the terms of those policies and the events which occurred.

The policies

Both companies provided what is known as "scheme" insurances, namely, insurance on terms approved by the R.I.B.A. and designed

specifically for members of the architects' profession.

The New Hampshire policies, which were in force until Sept. 30, 1983, contained the following material terms and conditions:

SECTION 1 — PROFESSIONAL LIABILITY

The Company will indemnify the Insured against Loss arising from any claim or claims for breach of duty in the professional capacity stated in the Schedule which is made against them during the period set forth in the Schedule by reason of any neglect omission or error whenever or wherever the same was or may have been committed or alleged to have been committed by the Insured or any person now or heretofore employed by the Insured or hereafter to be employed by the Insured during the subsistence of this Policy.

CONDITIONS

4. The Insured shall as a condition precedent to their right to be indemnified under Sections 1 and 2 of this Policy give to the Company immediate notice in writing:—

(a) of any claim made against them.

(b) of the receipt of notice from any person of an intention to make a claim against them.

7. It is hereby agreed by the Insured that in the event of the Company being at any time entitled to void this Policy ab initio by reason of any inaccurate or misleading information given by the Insured to the Company in the proposal form the Company may at their election instead of voiding this Policy ab initio give notice in writing to the Insured that they regard this Policy as of full force and effect save that there shall be excluded from the indemnity afforded hereunder any claim which has arisen or which may arise and which is related to circumstances which ought to have been disclosed in the proposal form but which were not disclosed to the Company. This Policy shall then continue in full force and effect but shall be deemed to exclude as if the same had been specifically endorsed ab initio the particular claim or possible claim referred to in the said notice.

8. If during the currency of this Policy the Insured shall become aware of any occurrence which may be likely to give rise to a claim falling within Section 1 or 2 and shall during the period of this insurance give written notice to the Company of such occurrence any claim which may subsequently be made against the Insured arising out of the occurrence of which notification has been given shall be deemed to be a claim arising during the period of this Policy whenever such claim may actually be made.

12. There shall be no liability hereunder in respect of any claim for which the Insured are entitled to indemnity under any other policy.

The Home policies, which were in force at all material times on and after Oct. 1, 1983, contained identical terms, but in addition provided as follows:

SPECIAL PROVISIONS

1. INNOCENT MISREPRESENTATION AND NON-DISCLOSURE:

The Company will not exercise its rights to avoid this Policy where it is alleged that there has been non-disclosure or misrepresentation of facts or untrue statements in the proposal form, provided always that the Insured shall establish to the Company's satisfaction that such alleged non-disclosure, misrepresentation or untrue statement, was innocent and free of any fraudulent conduct or intent to deceive.

ALL OTHER TERMS, EXCEPTIONS AND CONDITIONS OF THIS POLICY REMAIN UNALTERED.

EXCEPTIONS

This Policy does not indemnify the Insured against liability

7. Arising out of any circumstance disclosed in the proposal for this insurance as likely to result in a claim against the Insured.

Both policies contained identical definitions, differently numbered, as follows:

Loss as referred to in Section 1 shall be deemed to mean (a) damages (b) legal costs and expenses awarded against the Insured to any claimant or claimants.

It will be seen that under section 1 cover is dependent not upon when the alleged negligent act or omission, or damage caused thereby, occurred, but upon a claim being made against the insured during the period of the policy. This is subject to two qualifications. The first is contained in condition 4 and makes it a condition precedent to liability under the policy that not only shall the insured give immediate written notice of any such claim, but that he shall also give such notice of any —

. . . receipt of notice from any person of an *intention* to make a claim against them . . . [my emphasis].

The second qualification is contained in condition 8. Section 1 does not apply to claims made at a later time, of which advance notice has been given to the insured during the period

of the policy and passed on to underwriters pursuant to condition 4(b). In the absence of some further provision, this would create a situation in which the architects were bound to inform underwriters of claims which were likely to be made during the currency of future policies, but underwriters would, on the issue of those future policies, be able to exclude liability for those claims. This would be an impossible situation. Hence condition 8.

Condition 8 has the effect that upon the insured complying with his obligations under condition 4(b), the *intended* claim whenever made, will be deemed to have been made during the currency of the policy and so will attract the protection of section 1. However it goes further than this and enables, but does not oblige, the insured to give notice to underwriters of any "occurrence" of which he becomes aware "which may be likely to give rise to a claim falling within Section 1", even though no claim has yet been made or even indicated by his client. If and when the client does make a claim against him "arising out of the occurrence" that claim too will be deemed to have been made during the currency of the policy, whenever in fact made. A typical example would be a belated realization, based upon a study of professional journals, that perhaps he had specified inadequate foundations for a building which he had designed and which had already been erected.

As a matter of construction there is, as I think, a very clear distinction between "a *claim* falling within Section 1" and "any *claim* subsequently made against the Insured". Taking account of the definition of "loss", a claim falling within section 1 means a claim by the insured against underwriters for indemnity in respect of a liability under a judgment or arbitration award. Thus, for example, in the absence of special agreement on the part of underwriters, no claim could be made under section 1 for indemnity in respect of liability under a consensual agreement between the architect and his client in settlement of the client's claim. The claim subsequently made against the insured and arising out of the occurrence may or may not be a claim falling within section 1 and condition 8 does not affect this aspect one way or the other. It simply provides that any such claim, whenever made, shall be deemed to have been made during the currency of the policy.

I shall revert to the special terms of the Home insurance policy, but first I should turn to the facts.

In the period between August, 1976 and July, 1979, the building owners made a number of complaints which were regarded by the architects, and probably rightly, as really all relating to the brickwork. The architects also took the view that responsibility for the defects lay primarily with the consulting engineers. The New Hampshire were kept fully informed. The complaints were of a fairly minor character and this phase ended without recourse to underwriters by remedial work paid for "without prejudice" by the engineers, subject to a small contribution from the architects. The correspondence records that by Nov. 1, 1979 both the brokers and New Hampshire had all —

> . . . filed their papers [— and that the architects, when renewing the policy, were able to assert truthfully that —] as far as we are aware there are no claims pending, nor circumstances which could give rise to a claim.

In the succeeding months there were indications that the building owners were not entirely satisfied that all the defects had been successfully remedied, but there were no significant developments until on May 18, 1982 Michelmores, solicitors acting on behalf of the building owners, wrote to the architects as follows:

> Devon & Cornwall Housing Association
> Rose Duryard Contract
>
> We have just been consulted by the Association about the problems that have arisen in connection with this development and it has become immediately obvious to us that very early action must be taken by us to avoid any possibility of proceedings being statute-barred. Obviously in the ordinary case we would have had more time to obtain an independent report and to consider questions of liability in the light of such report, but in the circumstances as they are it seems probable that we shall have no option but to issue Writs in the High Court if only to preserve our clients' position. We suggest that you consult your own Solicitors immediately and ask them to confirm to us that they have instructions to accept service.

Later, on June 29, 1982, it apparently occurred to Michelmores that the contract between the building owners and the architects might be governed by an arbitration clause and, again with a view to avoiding any claims becoming time barred, they wrote to the architects:

> You were engaged in May 1973 to act as architects in connection with the housing development at Rose Duryard, Exeter. As you know serious problems have arisen in this development, inter alia, with regard to cracking and defective brickwork, for which

we hold you responsible. There is accordingly a dispute between us and we hereby give you notice that we require you to concur or agree in the appointment of an arbitrator to determine the dispute or, failing such concurrence or agreement, that the matter should be referred to an arbitrator appointed in accordance with the terms of the contract between us made in 1973.

These letters were all sent on to the New Hampshire with the comment that—

> . . . unless new aspects of this matter are raised against us, we do not believe that a valid claim can be made against us.

By "new aspects" the architects obviously meant matters other than those relating to the brickwork.

As soon as they were told that a writ was to be issued, New Hampshire instructed Wellington & Clifford, solicitors, to conduct the proceedings on behalf of the architects. Those solicitors undertook to accept service of the writ and, on June 2, 1982, wrote Michelmores asking, without prejudice, for—

> details of allegations of negligence which you intend making against our Insured and, at the same time, [for] information in respect of any problems which are alleged to have arisen.

Michelmores replied that they had not yet received a preliminary technical report from the building owners' consulting engineers, but that they would be pleased to discuss the matter once that had been received. They also reiterated that the writ was being issued at that stage solely in order to preserve their clients' position in relation to the Limitation Acts.

The position was no clearer in November, 1982, when Michelmores wrote on behalf of the building owners—

> Until [the report of our consulting engineers] is to hand, none of us have any idea about liability or even about the extent and size of the problem.

In the event the writ was not served until Dec. 20, 1983 (18 months after it was issued) and it was only when the statement of claim was received on Jan. 10, 1984 that the architects and New Hampshire knew for certain that the complaints of the building owners extended beyond what can be described as "brickwork deficiencies". Some time before then consulting engineers had been appointed by New Hampshire to advise them and the architects, but, in the absence of detailed information on the size, nature and extent of the building owners' claim or claims, they were only able to make limited progress, confined in the main to considering the respective responsibilities of the architects and of the civil engineers involved with the development. It is not, however, without interest that by Oct. 18, 1983, shortly after the final policy underwritten by New Hampshire had expired, their solicitors were advising them that—

> . . . our initial investigation revealed that this might turn out to be a very large claim indeed.

The learned Judge held that a claim within the meaning of the policy was the assertion by a third party against the insured of a right to some relief because of the breach by the insured of the duty referred to in section 1 of the policy, i.e. professional negligence. He then went on to say that if a building owner suffered loss due to faulty workmanship in respect of the floors and roof of the building and this assertion is notified to the insurers, that may be regarded as one claim. Thus far I agree. But he went on to hold that if the building owner subsequently adds a new and unrelated assertion of damage to windows, which is passed on to the insurers, both the man of business and the lawyer would say that it is a new claim under the policy. It is at this point that I have reservations.

Section 1 of the policy contains a promise to indemnify the insured against loss, i.e. liability established under a judgment or award, in specified circumstances. Those circumstances are (a) that the liability arises from a claim or claims for breach of professional duty and (b) that the claim or claims are made against the insured during the currency of the policy. Taking the learned Judge's example, it seems to me that he begs the question when he posits a new and *unrelated* assertion of damage to windows. If it really is unrelated, clearly he must be right. But he does not particularize what he means.

Let me take some examples. An architect has separate contracts with separate building owners. The architect makes the same negligent mistake in relation to each. The claims have a factor in common, namely the same negligent mistake, and to this extent are related, but clearly they are separate claims. Bringing the claims a little closer together, let us suppose that the architect has a single contract in relation to two separate houses to be built on quite separate sites in different parts of the country. If one claim is in respect of a failure to specify windows of the requisite quality and the other is in respect of failure to supervise the laying of the foundations, I think that once again the claims would be separate. But it would be

otherwise if the complaint was the same in relation to both houses. Then take the present example of a single contract for professional services in relation to a number of houses in a single development. A single complaint that they suffered from a wide range of unrelated defects and a demand for compensation would, I think, be regarded as a single claim. But if the defects manifested themselves seriatim and each gave rise to a separate complaint, what then? They might be regarded as separate claims. Alternatively, later complaints could be regarded as enlargements of the original claim that the architect had been professionally negligent in his execution of his contract. It would, I think, very much depend upon the facts.

I fully accept the learned Judge's conclusion that it was not until the statement of claim was delivered that Mrs. Thorman, the partner principally concerned, realized that the building owners were complaining of matters in addition to brickwork. It may also be that her attitude was reasonable and that anyone else might have jumped to the same conclusion, although I am not convinced that the New Hampshire's solicitors were of the same mind after the completion of their initial investigation —

> this might turn out to be a very large claim indeed [letter of Oct. 18, 1983].

But this does not seem to me to be the point. What matters is what claim was being made by the building owners, not what claim was perceived by the insured.

The answer to this question is to be found in the terms of the letter of June 29, 1982 claiming arbitration:

> Serious problems have arisen in this development, inter alia, with regard to cracking and defective brickwork, for which we hold you responsible.

Note the words "inter alia". This is the clearest possible claim in respect of all serious problems which had arisen by that date and is not confined to brickwork. The fact that it was unparticularized and uninformative is nothing to the point. All the matters listed in the Scott Schedule are in this category and it follows that all were the subject-matter of a claim before New Hampshire came off risk.

Another answer may be found in the generally endorsed writ. I am inclined to the view that the issuing of the writ also constitutes a claim covering all matters subsequently particularized in the statement of claim and in the Scott Schedule. The only objection to this view is that the writ was not served upon the architects until much later and it could be argued that the letters telling them that a writ had been issued were more accurately to be regarded as notice of an intention to make a claim at a later date by serving the writ.

If the latter is the true view, in my judgment the issue of the writ, as distinct from its service, constitutes an "occurrence which may be likely to give rise to a claim falling within Section 1" within the meaning of condition 8 and, the architects having informed underwriters of that occurrence, any claim against them arising out of that occurrence would be deemed to have been made during the period of the policy. The service of the writ and, a fortiori, the service of the statement of claim clearly arises out of the issue of the writ.

The learned Judge rejected the submission that the claims in respect of the non-brickwork matters were made during the time when the New Hampshire were on risk, because he considered that they were separate and unrelated claims made for the first time when the statement of claim was delivered. In this I think that he overlooked the wide terms of the letter of June 29, 1982, claiming arbitration. It may be that he should also have regarded the issue of the writ, coupled with notice of its issue, as the making of an all-embracing claim.

The learned Judge also rejected a submission in reliance upon condition 8 because —

> the Insured did not know that [the non-brickwork] items were being put forward as claims or part of a claim and could not reasonably have done so until after October 1983.

pointing out that condition 8 presupposes awareness on the part of the insured. This may well be right, but in my judgment the insured's knowledge of non-brickwork items was not the relevant occurrence. The relevant occurrence was the issue of the writ, of which the architects were fully aware. Nothing is more likely than a writ to give rise to a claim falling within section 1, when it is appreciated that such a claim is for indemnity in respect of a liability under a judgment and that, when the claim is made at a later date, it is made in the statement of claim which arises directly out of the issue of the writ. Were it otherwise an architect would be wholly unprotected if, towards the end of a policy year, a client wrote saying:

> I have issued a writ against you claiming damages for professional negligence. I shall serve it within 12 months, but I decline to give you any other information.

This would at least be notice of intention to make a claim and, under condition 4(b), would

have to be communicated to underwriters. If it was neither an actual claim nor attracted the operation of condition 8, underwriters would not be liable under the existing policy and would be able to exclude the claim upon renewal.

I would therefore allow the appeal and declare that New Hampshire were liable to indemnify the architects in respect of all the building owners' claims, to the exclusion of liability on the part of the Home Insurance Company. (See section 12.)

Strictly speaking this makes it unnecessary to consider the remainder of the learned Judge's judgment, in which he considered the issue of non-disclosure. The facts were somewhat complicated and, if and insofar as there was any non-disclosure in the proposal form submitted to the Home Insurance Company, the fault may well have been that of the brokers rather than of the architects. However the learned Judge had to express a view on the construction and the combined effect of condition 7 and special provision 1 (relating to non-disclosure) in the Home policy and I understand that this is a matter of great importance to the market.

I can give no authoritative guidance on this point for two reasons, namely, that we only heard very brief argument, because we did not wish to involve the parties in the expense attendant upon the hearing going into a third day, and that any view which I express is necessarily obiter. I have, however, to say that I entertain very considerable doubts whether the learned Judge's view was right as a matter of construction.

The learned Judge held that the premise of condition 7 was that underwriters were "entitled to void this policy ab initio", but that, where it was common ground that the insured had acted honestly, special provision 1 negatived this entitlement.

The result of this construction is startling in the extreme. Two firms of architects, A and B, make proposals for insurance to the Home, which has not previously insured them. Firm A discloses that he anticipates a claim arising out of a particular development. The Home thereupon include a special exception excluding any right to indemnity in respect of that claim. Firm B innocently fails to disclose that he anticipates a claim arising out of a particular development. On the learned Judge's view the Home will be liable to indemnify Firm B, unless they can rely upon condition 4(b), which they will not be able to do if Firm B anticipated a claim, but had not yet received notice of the client's intention to make such a claim. This puts the non-disclosing insured in a better position than one who makes full disclosure. This cannot be right.

As at present advised, I consider that the starting point is the position at common law, in the absence of both condition 7 and special provision 1. Innocent, but material, non-disclosure would give rise to a right to avoid the whole policy upon returning the premium. The insured would be uninsured not only in respect of the undisclosed potential liability, but in respect of *all* liabilities. If the non-disclosure came to light, and the policy was avoided, towards the end of the policy year, this would be a calamity for the insured, because it is most unlikely that there would be any way in which he could insure retrospectively. Condition 7 varies the common law by permitting, but not obliging, underwriters to waive the right of avoidance and to affirm the policy, but to do so subject to a deemed exclusion of liability for undisclosed actual or potential claims. Special provision 1 then requires underwriters to give the architect an opportunity of satisfying them that the non-disclosure was innocent and, if he can do so, further obliges underwriters to elect to affirm the policy, subject to the deemed exclusion. So construed no practical problem arises.

I acknowledge the strict logic of the learned Judge's reasoning, but find the result wholly unacceptable and have come to the conclusion that there are two lines of escape, either of which could be adopted. The first is to adopt an even stricter construction of the clauses than that adopted by the learned Judge. Condition 7 gives underwriters a right of election either to avoid the policy in the exercise of their common law rights or to affirm it subject to a deemed exclusion. Condition 7 does not purport to deprive them of the right to avoid the policy. It simply requires them in certain circumstances not to exercise that right, but instead to affirm the policy subject to the deemed exception. The second is to remind myself that this is a commercial contract designed to give effect to the commercial needs, and therefore the deemed mutual intentions, of the parties. Those needs, and indeed intentions, require that clauses be construed as I have construed them.

Suffice it to say that in relation to other claims under the Home, or similar, policies, of which I understand there are not a few, it should not be assumed that the learned Judge's view of the interaction of condition 7 and special provision 1 is correct.

Lord Justice STOCKER: I agree. I add

observations of my own since we are differing from the learned Judge.

From 1973 the plaintiffs (TLM), a firm of architects, were concerned on behalf of the building owners, a housing association (the owners), in and about the erection of a housing development know as Rose Duryard Development. TLM designed and supervised the erection of this development. The engineers to this project were Donald Butler Associates. In August and September, 1976 certain complaints were made regarding cracking of the brickwork, and a site meeting took place in September 1976. Certificates of practical completion were issued between November, 1976 and February, 1977. The owners took possession of the houses constituting the development between November, 1976 and November, 1977. In 1978, and again in 1979, the owners informed TLM that they required remedial works to be carried out to the brickwork. TLM informed their insurers, through brokers, of a claim for the cost of remedial works. In fact, by agreement between the engineers and TLM, the remedial works were carried out, TLM making a modest contribution to the cost, without recourse to the insurers and the insurers were notified of the payment made by TLM which had been made without admission of liability. By November, 1979, both the brokers and the insurers had filed their papers and it appeared to all concerned (except, presumably, the owners and their advisers) to be the end of the matter.

The insurers concerned at this stage were New Hampshire Insurance Company (NHIC) who covered TLM against claims for professional negligence. This cover was afforded by NHIC under a scheme insurance for architects, and was renewed from year to year until the transfer of the scheme insurances to another insurer. The problem, which has been the subject of this appeal, arises out of this transfer of the scheme insurances to that other company, the Home Insurance Company (HIC). NHIC came off risk on Sept. 30, 1983 and HIC came on risk on Oct. 1, 1983. An action was commenced by the owners by writ issued on June 27, 1982, but not served until Dec. 20, 1983. The writ was endorsed in general terms alleging breaches of professional duty by TLM. The statement of claim served on Jan. 10, 1984 and experts' reports served by the owners in December, 1983 put forward a variety of defects in respect of which damages were claimed. The action is pending before the Official Referee and a Scott Schedule has been produced in the usual form. NHIC claims that as the only claim notified to them during the period in which they covered the risk related to brickwork, they are liable to indemnify TLM only in respect of the first three of the eight heads of defects set out in the schedule, each of which relates to defective brickwork, and contend that HIC cover the matters contained in items five to eight of the schedule, which are complaints of defects other than brickwork. The learned Judge accepted the contentions of NHIC and held that NHIC were liable under their policies only for the first three items, all of which relate to defective brickwork, and HIC for the remaining five. The contention by HIC that they were entitled to repudiate on the grounds of non-disclosure was rejected by the Judge. The question in issue, therefore, arises by reason of the transfer of the architect's scheme insurance from one insurer to the other and poses the question —

> which policy covers the non-brickwork defects if negligence is proved against the TLM?

Put shortly, therefore, the questions which arise on this appeal are (1) what constitutes a "claim" for the purpose of the policies, (2) which policy covers the claims for defects other than brickwork — NHIC conceding that they are liable for the brickwork claims one to three — and (3) are HIC entitled to repudiate the claims by virtue of terms and conditions contained in the policy issued by them?

Apart from certain special conditions contained in the HIC policy, but not in that issued by NHIC, which conditions relate solely to the third issue, the relevant provisions in NHIC and HIC policies are in identical terms. The relevant provisions of these policies are as follows:

> SECTION 1 — PROFESSIONAL LIABILITY
>
> The Company will indemnify the Insured against Loss arising from any claim or claims for breach of duty in the professional capacity stated in the Schedule which is made against them during the period set forth in the Schedule by reason of any neglect omission or error whenever or wherever the same was or may have been committed or alleged to have been committed by the Insured or any person now or heretofore employed by the Insured or hereafter to be employed by the Insured during the subsistence of this Policy.
>
> CONDITIONS
>
> 4. The Insured shall as a condition precedent to their right to be indemnified under

Sections 1 and 2 of this Policy give to the Company immediate notice in writing:–

(a) of any claim made against them

(b) of the receipt of notice from any person of an intention to make a claim against them.

8. If during the currency of this Policy the Insured shall become aware of any occurrence which may be likely to give rise to a claim falling within Section 1 of 2 and shall during the period of this insurance give written notice to the Company of such occurrence any claim which may subsequently be made against the Insured arising out of the occurrence of which notification has been given shall be deemed to be a claim arising during the period of this Policy whenever such claim may actually be made.

12. There shall be no liability hereunder in respect of any claim for which the Insured are entitled to indemnity under any other policy.

The HIC policy also contained the special provisions referred to which it is unnecessary to relate in this judgment having regard to the conclusions I have reached upon the main issues.

Both policies define "loss" as follows:

Loss as referred to in Section 1 shall be deemed to mean

(a) damages

(b) legal costs and expenses

awarded against the Insured to any claimant or claimants.

Turning, therefore, to the first issue — what constitutes a claim for the purposes of the policy — the learned Judge cited and accepted the first meaning ascribed to the word in the Oxford Dictionary, "a demand for something as due: an assertion of a right to something", and cited with approval in this context dicta of Mr. Justice Devlin in *West Wake Price & Co. v. Ching*, [1956] 2 Lloyd's Rep. 618; [1956] 3 All E.R. 821 when at pp. 627 and 829 he says:

> 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 it 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.

and at pp. 629 and 831 he said:

> . . . 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.

A little later he goes on:

> . . . In particular, if a claim is identified as something that has to be paid . . . it must be something that is capable of separate payment: one 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.

For my part, these appear to me to be definitions which can be accepted without further refinement. They do not, however, solve the question since the application of the definition may vary according to the circumstances in which it falls to be construed. For a "claim" to be substantiated against a defendant, whether expressed in contract or in tort, it obviously must be proved in every case (1) that a duty was owed, (2) that there was a breach of that duty and (3) damage resulted from that breach. As a matter of formal procedure they can be pleaded as an assertion of a general duty, an allegation of its breach and causative proof of damage for that breach. In a case where substantial building works are concerned there may be a variety of heads of damage, and a variety of breaches of duty arising out of different aspects of the general duty owed. Thus, for example, in one claim there may be allegations of a breach of the duty to design, with defects and damage resulting from that breach; a breach of the duty to supervise, with different and distinct resultant damage; and a breach of the duty to specify, again with its own separate consequential damage. These may all be brought in one action, particularized by the various distinct breaches of duty and consequential damage. They may, however, be brought as separate actions provided neither the breaches of duty nor the damage claimed in the first action embrace the breaches and damage claimed in the second. I agree with the dicta of Lord Justice May in *Steamship Mutual Underwriting Association Limited v. Trollope & Colls (City) Ltd.*, [1986] 33 B.L.R. 77, that a plea of "res judicata" could not arise in such circumstances. Thus, in such a context the word "claim" is apt

to embrace both the general claim, subsequently particularized as a series of temperate breaches and damage, or can apply to each of a series of separate and distinct claims, all arising from the negligence of the architect in the course of performing a single contract. In the former case there would, in my view, be only one "claim", in the latter, several claims. Which is appropriate will depend upon the facts of each case and the circumstances in which the word "claim" falls to be considered and construed. In this regard I derive little assistance from cases arising out of the operation of the Limitation Acts. Plainly, a claim can only be enforced by legal proceedings where the appropriate cause of action is pleaded and proved, but the cause of action is not, itself, a claim but the necessary vehicle for its legal enforcement and the contrary has not been contended in argument in this case. Cases such as *Idyll Limited v. Dinerman, Davison & Hillman and Others*, (1971) 1 Const L.J. 294 and the *Steamship* case above cited are, therefore, to my mind, of no great assistance in resolving the present problem. Each was concerned with an application to add, after the expiry of the relevant period of limitation, a new "claim". Order 20, rr. 5(2) and 5(5) grant a discretion to the Court to allow such an amendment out of time. Whether or not a claim is statute barred under the Limitation Acts depends upon when the cause of action arose. Section 35(2) of the Limitation Act, 1980, defines a "new claim" as —

> . . . any claim involving (a) the addition or substitution of a new cause of action . . .

In the *Idyll* case it was sought to add a claim for defective design of a roof, an allegation not raised in the original pleadings. The Court held that this was not a new cause of action, but a different and further application of the original claim. Lord Justice Megaw said, at p. 298:

> Was this a new cause of action? I agree with the view which has been expressed by my Lord, Davies L.J. on this issue. In some cases it is perfectly clear that a proposed amendment does involve the addition or substitution of a new cause of action. In some cases it is clear that it does not do so. In other cases there is a somewhat undefined borderline. In cases falling within the borderline it is, I think, a question of degree. I do not accept the proposition of Mr. Lloyd for the fifth defendants that it is not, and cannot be, a question of degree.

The facts in the *Steamship* case inclined the Court to the opposite conclusion. Lord Justice May said:

> In the light of the definitions of a cause of action already referred to, I do not think one can look only to the duty on a party, but one must look also to the nature and extent of the breach relied upon, as well as to the nature and extent of the damage complained of in deciding whether, as a matter of degree, a new cause of action is sought to be relied upon. The mere fact that one is considering what are, as it is said, after all only different defects to the same building, does not necessarily mean in any way that they are constituents of one and the same cause of action.
>
> Thus I conclude that whether there is a new cause of action in any circumstances is a mixed question of law and fact.

It seems to me, therefore, that the question whether there is one claim or a series of separate claims depends upon the facts of each case and the context in which the question falls to be decided. The context, in my view, is whether all the defects as embraced in a general claim, or only those relating to the brickwork, were notified as a claim during the relevant period of insurance. Section 1 of the policies relates to —

> . . . loss arising for any claim or claims made against them during the period set forth in the schedule.

I have already expressed the definition of "loss" contained in the policy.

My view, therefore, is that the question depends upon whether or not the defects set out in items 5 to 8 of the Scott Schedule are, in truth, unrelated to the general claim earlier made. This, in turn, involves an examination whether or not the claim notified to the insurers during the subsistence of the NHIC policy was apt to embrace all the matters later specified in the Scott Schedule, or whether those claims were, as the NHIC contend, confined solely to brickwork. If the latter, then those matters would constitute a separate claim and would not fall within the ambit of Section 1 unless the provisions of condition 8 apply.

What was the factual position with regard to the nature of the claim made against TLM? It seems clear that at the outset in 1978 and 1979 this claim was confined to the brickwork and it was considered by those concerned with the rectification of those brickwork defects that the necessary work had been done and completed. Certainly that was the view of Mrs. Thorman who gave evidence, a view clearly shared by the brokers and insurers. In my view, it is not the subjective view of the insured, or their representatives, which is decisive of the matter, but the nature of the claim formulated by the

owners, and it is with the history of the events after 1979 to which reference must be made. It seems clear that whatever view TLM and their representatives took with regard to the matter of complaints having been fully dealt with the owners did not share their view since in May 1982 they instructed their solicitors, and on May 18, 1982 those solicitors informed TLM that they were issuing a writ. This letter states:

> Early action must be taken to avoid the possibility of proceedings being statute barred.

They point out that in the ordinary case they would have had more time to obtain "an independent report and to consider questions of liability". They advised TLM to consult their own solicitors immediately.

This letter may have been construed by TLM and their advisers as doing no more than re-opening the earlier claim concerned with brickwork. Certainly no specific allegations of other defects are raised, but the letter is, in terms, wide enough to foreshadow a claim in respect of defects not confined to brickwork. On June 29 TLM were notified of the issue of the writ and on the same date the owners' solicitors wrote a letter requiring TLM to appoint an arbitrator. This was presumably to preserve the position against the possibility that the contract between TLM and the owners contained an arbitration clause. The letter, which was forwarded to NHIC, contains the phrase —

> . . . serious problems have arisen in this development inter alia with regard to defective brickwork . . .

This, to my mind, clearly foreshadows the possibility of claims not concerned with brickwork; indeed, it can hardly bear any other meaning. The phrase "inter alia" seems to have been construed by TLM and their representatives as mere lawyer's cautionary jargon. On Oct. 1 HIC came on risk. On Oct. 18 solicitors were advising NHIC, who had by then come off risk, that —

> . . . investigations reveal that this might turn out to be a very large claim indeed.

The writ, the issue of which had been notified in June, was served on Dec. 20, and on the 23rd the owners' solicitors sent a number of experts' reports. These reports contained the matters of complaint, subsequently included in the statement of claim served on Jan. 10, 1984. It would seem to be probable, though there is no precise evidence of this, that some general indication of defects had been given to the owners' solicitors and prompted the issue of the protective writ.

It is my view that the issue of the writ, endorsed in wide general terms, constituted a claim which embraced all the matters subsequently pleaded in the statement of claim and set out in the Scott Schedule. This was when the claim by the owners against TLM was made and the detailed allegations later pleaded constitute different and further amplification of the original claim, and not a new claim or series of new claims. The issue of the writ was notified to NHIC within the period of the policy issued by them.

In my opinion the learned Judge was in error in deciding the issue by reference to the general belief of TLM and their representatives that the reopened claim (and the action commenced by the issue of the writ) related only to brickwork. In my view the true test is what was the claim being put forward by the claimant, not what the proposed defendants thought it was.

I therefore differ from the conclusion expressed by the learned Judge and would hold that a claim covering all the defects alleged was made by the issue of the writ.

If this view is correct, then the many difficulties and anomalies which might arise if defects subsequently pleaded constitute separate claims cease to create a problem. The fact that the construction for which the respondents contend involves these difficulties does not, of course, determine the proper construction to be placed on the word "claim" in this case. I have given my reasons for the construction which I consider to be correct.

If I am wrong in my conclusion, then the letter notifying that a writ had been issued and the issue of the writ itself are matters which fall to be considered in the context of condition 8. For some time during the course of the argument before this Court I was of the view that neither of these matters could be an "occurrence" within the meaning of that condition since I felt that the word "claim" would have to be construed as meaning the same thing wherever it appeared in this condition. This would involve construing the "claim falling within Section 1 or 2" as referring to a claim made by the owners against TLM which was of a nature covered by the insurance under section 1. I am of the view that such a construction of the word "claim" is not correct having regard to the definition of "loss" in the policy since the liability of the insured to indemnify under section 1 only arises upon the award of damages against the insured. It must follow, in my view, that the phrase "claim falling within Section 1" must relate to a claim by the insured directed to the insurers following such an award of damages, and the words must be read conjunctively. This

phrase is in contradistinction to the phrase used later in the condition —

> . . . any claim which may subsequently be made against the insured.

If this is the correct construction, notification of the issue of the writ, and the issue of the writ itself, was an —

> . . . occurrence which may be likely to give rise to a claim.

As written notice of this "occurrence" was given to NHIC, then such a claim is deemed to be a claim arising during the period of the policy. As the condition precedent in condition 4(b) had been complied with, NHIC policy covers the whole of the claim embraced in the statement of claim and the Scott Schedule.

For these reasons I consider this appeal must be allowed.

It is, therefore, unnecessary to consider the third issue which does not now arise.

Lord Justice RUSSELL: I agree that this appeal should be allowed.

The facts of the dispute are set out fully in the judgment of Sir John Donaldson, M.R. and need not be repeated. In my judgment the crucial question is whether, in the circumstances prevailing at the time, the issue of the writ, coupled with notice of the issue to NHIC, constituted a claim or claims within section 1 of the NHIC policy, although the precise nature and extent of the claim was then unknown.

Section 1 of the policy provided:

> The Company will indemnify the Insured against Loss arising from any claim or claims for breach of duty in the professional capacity stated in the Schedule which is made against them during the period set forth in the Schedule by reason of any neglect omission or error whenever or wherever the same was or may have been committed or alleged to have been committed by the Insured or any person now or heretofore employed by the Insured or hereafter to be employed by the Insured during the subsistence of this Policy.

Thus it will be observed that indemnity against loss covered a wide spectrum of claims.

The general endorsement of the writ reads as follows:

> The Plaintiffs claim against the first and or the second Defendants damages (and interest) for breach of a contract made about May 1973 whereby the first and or the second Defendants agreed for reward to act as Architects in connection with a housing development at Rose Duryard, Exeter (consisting of some 102 dwellings and associated works) and or for negligence by the first and or second Defendants in advising upon and or designing and or supervising the construction of the said development and or in carrying out the functions and duties of an Architect in connection with the said development and or for breach of statutory duty in carrying out the above.

This, too, in terms embraced any breach of duty committed by the architects in connection with the housing development at Rose Duryard, Exeter.

The learned Judge adopted a subjective approach when he said:

> In my judgment the realistic view is that this is a case where the Housing Association claim was limited and confined to brickwork only, until in December 1983 and January 1984 the non-brickwork items were put forward.

With respect, I think this is where the Judge fell into error. I see nothing in the terms of the general endorsement of the writ which limited the claim, nor in section 1 of the policy save that damages were being claimed for —

> . . . breach of contract . . . and or for negligence . . . in connection with the housing development at Rose Duryard, Exeter.

Even if the building owners, the architects and the insurers all contemplated a claim limited to brickwork there was in my judgment nothing in the endorsement which excluded other matters of complaint being subsequently identified and quantified in terms of damages "in connection with the housing development at Rose Duryard". I am firmly of the opinion that the general endorsement of the writ, notice of the issue of which was given to the insurers, itself constituted a claim which embraced all those matters subsequently particularized in the statement of claim and the Scott Schedule. In my view if the insurers took the view right up to the date that they came off risk that the claim was limited to brickwork that belief is not to the point.

Much the same considerations apply to the letter dated June 29, 1982 which the solicitors for the building owners addressed to the architects. The letter was written the day before the issue of the writ. It contained the following passage:

> As you know serious problems have arisen in this development, inter alia with regard to cracking and defective brickwork, for which we hold you responsible.

There followed a claim to arbitration. The letter did not identify any problem other than

cracking and defective brickwork but in my judgment its terms were such that like the general endorsement of the writ, it embraced a claim for damages which was not confined to brickwork. In my view this letter, as well as the endorsement of the writ, constituted a claim against the architects under section 1 of the policy which required indemnity to the full extent of the damages which may be awarded in the current litigation between the building owners and the architects.

As to condition 8 I have to confess that I am not entirely happy with the proposition that the issue of the writ was an —

> . . . occurrence which may be likely to give rise to a claim falling within Section 1

and, for my part, I would prefer to express no concluded view upon this aspect of the matter; I would allow the appeal for the reasons that hitherto I have indicated.

As to the issue of non-disclosure, there is nothing I wish to add to the observations of Sir John Donaldson M.R., though I wish to emphasize that we did not hear full argument upon this part of the case.

[Order: Appeal allowed; declarations for the first and second defendants as agreed; second defendants and plaintiffs to have their costs here and below against the first defendants; application by first defendants for leave to appeal to the House of Lords refused.]

COURT OF APPEAL

June 2, 3, 4, 5, 8, 9, 10, 11 and 12, 1987

FORSIKRINGSAKTIESELSKAPET VESTA

v.

J. N. E. BUTCHER, BAIN DAWES LTD. AND THE AQUACULTURAL INSURANCE SERVICE LTD.

Before Lord Justice O'CONNOR
Lord Justice NEILL and
Sir Roger ORMROD

Reinsurance — Repudiation — Insurance brokers — Storm caused damage to fish farm — Reinsurers repudiated liability — Whether insured in breach of warranties — Whether reinsurers entitled to avoid policy — Whether insurance brokers liable for breach of duty — Whether Law Reform (Contributory Negligence) Act 1945 applied to contractual claim.

Mr. Pedersen of Fjordlaks Tafjord S.A. insured his fish farm with the plaintiffs (Vesta) against inter alia loss of living fish from any cause whatsoever for 12 months from Oct. 26, 1977, for N.Kr. 750,000. The fish farm consisted of some 14 large net cages moored in the fjord and containing rainbow trout and salmon.

Vesta were reinsured as to 90 per cent. of the risk they had accepted with London underwriters through brokers (AIS) a subsidiary of Lloyd's brokers Bain Dawes.

AIS had obtained in London in June, 1977, from some 30 Lloyd's syndicates and companies a slip (binder slip) in the form of 12 months open cover worldwide on all risks of mortality and other perils on all types of aquatic creatures, terms of cover to be agreed with leading underwriters in each case. The slip was in the form of a binder given by all the underwriters to AIS to give limited temporary cover and by following underwriters to the leading underwriters to write risks on their behalf, and all underwriters authorized AIS to issue cover notes on their behalf and to cancel cover.

The specific slip under which Vesta were reinsured was prepared by Bain Dawes and was on Dec. 30, 1977, initialled by the three leading underwriters on behalf of all the underwriters who had underwritten the open cover together with an endorsement increasing the sum insured to N.Kr. 8,000,000. The slip provided inter alia that property covered was that set forth in the original policy and that the policy form was Form J1, a standard form of Lloyd's reinsurance policy. It was an express term of the form that the reinsurance was to be on the same terms and conditions as the original insurance and it also included an express follow settlements provision. The document attached to the slip was the Aquacultural wording No. V which contained the terms of the original insurance and which provided inter alia: