Neutral Citation no. (2000) 2160

Ref:	CARC3302

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered:	13/12/00

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

RESOURCE UNDERWRITING LIMITED

(Plaintiff) Appellant

and

EAMON McHUGH and MARIE LYNCH

(Defendants) Respondents

CARSWELL LCJ

This is an appeal against an order made by McLaughlin J on 10 March 2000, whereby he gave answers to a series of questions posed in an originating summons concerning the construction of a contract of insurance. The respondents carry on practice as chartered accountants and took out policies with the appellant underwriter covering them against claims for professional negligence and losses caused by dishonesty or fraud on the part of partners or employees. They discovered in 1995 that their former partner H Wilson Gordon had been guilty of committing substantial frauds upon clients of the practice, who have brought proceedings against the respondents. The matter in issue is the construction of the

several insurance documents in order to determine the extent to which the appellant is liable to indemnify the respondents. The appellant contends that the cover afforded by the policy is limited to an aggregate sum of £1 million in respect of all the claims, while the respondents submit that the limit of £1 million applies to each of the claims separately.

The respondents carried on practice in partnership with Mr Gordon under the firm name of H Wilson Gordon & Co for a number of years up to 1995. In early 1995 it came to light that Mr Gordon had been involved in a fraud upon a client of the practice, by then deceased, by withdrawing sums from the client's building society account over a period of years. A police investigation began, but was discontinued when Mr Gordon settled the claim by paying £110,000.00 to the estate of the client out of his own resources. Mr Gordon retired from the partnership on 31 March 1995, apparently at the insistence of the respondents. This did not end the matter, however, for the Securities and Investments Board and the Institute of Chartered Accountants in Ireland, the respondents' professional body, instituted an inspection and investigation into the affairs of the practice. Further serious defalcations came to light, which have led to claims being made against the respondents.

The respondents' policy of insurance for the year from 9 June 1994 to 8 June 1995 was in a standard form ICA3 negotiated by the Institute of Chartered Accountants for accountancy practices. Section I defined the cover in the following terms:

> "1 To indemnify the Assured against any claim or claims first made against the Assured during the period of

insurance as shown in the Schedule in respect of any Civil Liability whatsoever or whensoever arising (including liability for claimants' costs) incurred in connection with the conduct of any Professional Business carried on by or on behalf of the Assured.

2 To indemnify the Assured for any loss which during the period specified in the Schedule they shall first discover they have sustained by reason of any dishonest or fraudulent acts or omissions of any former or present partner director or employee of the Firm(s) subject always to Special Condition 5 hereof."

It may be seen from the terms of Section I that the policy is of the type known as a "claims made" policy. The cover is related to claims made or losses discovered in the instant year, rather than to the time when the defalcations leading to the making of the claims or the incurring of the losses were committed. Under General Condition 3 the assured has to give notice in writing to the underwriters as soon as practicable –

"a) of any claim made against them or any of them

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

c) of any loss suffered by them or any of them

d) of the discovery of reasonable cause for suspicion of dishonesty or fraud on the part of any former or present partner consultant sub-contractor director or employee of the Firm(s) whether giving rise to a loss or claim under this Certificate or not"

General Condition 4 then goes on to provide:

"The Assured shall give to the Underwriters notice in writing as soon as practicable of any circumstance of which they shall become aware during the period specified in the Schedule which may give rise to a loss or claim against them. Such notice having been given any loss or claim to which that circumstance has given rise

> which is subsequently made after the expiration of the period specified in the Schedule shall be deemed for the purpose of this Certificate to have been made during the subsistence hereof."

The limit of cover under the policy was defined in General Condition 1 in the following terms:

> "1 The liability of the Underwriters under this Certificate shall not exceed the sum specified in Item 3 of the Schedule for any claim or loss or losses
>
> a) arising out of one occurrence
>
> OR
>
> b) consequent upon or attributable wholly or substantially to the same original cause or source"

The sum specified in Item 3 of the Schedule to the policy in respect of Section I was "£1,000,000 any one claim or loss", subject to an excess of £3500 per claim, the aggregate excess being limited to £14,000.

On 8 June 1995 the respondents submitted a proposal on the standard form to the appellant for renewal of the policy. On a sheet annexed to the form and referred to in their replies to Questions 1a, 1b and 2b of the Claims section of the form they made a declaration of the defalcations and investigations in the following terms:

> "Mr H. W. Gordon now retired from the firm was involved in a matter with client now deceased.
>
> He was accused by the beneficiaries of our late client of stealing from him approximately £100,000 while he was resident in a nursing home.
>
> This was done by withdrawing a number of cash sums from the building society over a period of 3 to 4 years.
>
> The police were involved but withdrew when £110,000 was paid to the beneficiaries in April 95 by H W Gordon

> personally. This was done without the knowledge of Mr McHugh and Miss Lynch.
>
> We became aware of rumours re this matter by another client. This was substantiated by a member of staff who informed us of the police involvement. At this stage Mr McHugh and Miss Lynch are investigating to ascertain if any other clients are involved.
>
> The practice is currently under investigation by the SIB and the Institute of Chartered Accounts in Ireland.
>
> At this stage we are not aware of any further problems involving Mr Gordon or the other partners."

The appellant decided to renew the policy with the same amount of cover at a somewhat increased premium. The terms of the policy, in the form ICA4, were unchanged, save that a clause entitled "Specific Claims Exclusion Clause" was attached to the certificate:

> "It is hereby understood and agreed that all liability arising out of the circumstances and claims disclosed in Questions 1a, 1b, 2a, and 2b of the claims section in the Proposal Form dated 8th June 1995 are excluded from this Certificate."

The investigations into the affairs of the respondents' practice revealed that Mr Gordon had been guilty of considerably more substantial defalcations over a period of some years. Ms Lynch states in paragraph 7 of her affidavit sworn on 6 January 2000 that neither she nor Mr McHugh had been aware of any of these frauds prior to the investigations. She sets out in the same paragraph details of the frauds which came to their knowledge as a result of the investigations:

> "(a) **<u>Robert Aiken</u>**
>
> The Plaintiff in this action is the surviving executor of the estate of the late Mrs. Margaret Aiken whose late husband, together with herself, had been clients of

H. Wilson Gordon for many years. The late Mrs. Aiken lived in a Nursing Home in Portrush and H. Wilson Gordon visited her there to deal with her business affairs. So far as I am aware the late Mrs. Aiken never visited the offices of the partnership. Between November 1990 and November 1991 H. Wilson Gordon effected withdrawals from bank and Building Society accounts of the late Mrs. Aiken to a value of £237,939.63 lodged such monies to our firm's clients' monies account, withdrew such monies from the said account and lodged the proceeds to his own private account.

(b) **George Canning and Harry Canning**

These Plaintiffs owned and carried on business in a Shop/Post Office in Bellarena, had been clients of H. Wilson Gordon for many years but, so far as I am aware, had never visited the firm's offices. On 31 March 1993 Mr. Harry Canning provided H. Wilson Gordon with a cheque in the sum of £5,049.00 in relation to a pension payment. This cheque was not lodged to any of the firm's bank accounts.

In or about March/April 1995 the Plaintiffs provided H. Wilson Gordon with 3 bank drafts to a total value of £95,592.43 but none of those Bank drafts were lodged in any of the firm's bank accounts.

(c) **Samuel Morrell McCollum and Edith McCollum**

These Plaintiffs carried on business together as a farming partnership and had been clients of H. Wilson Gordon for many years. Again I am not aware of either of the Plaintiffs ever having visited the firm's offices. In January 1987 and January 1988 H. Wilson Gordon received cheques from the Inland Revenue in relation to repayment of income tax relating to the Plaintiffs and in May 1987 and September 1990 H. Wilson Gordon transferred these monies to a private Building Society account.

On 29 January 1992 H. Wilson Gordon received a cheque from the Plaintiffs in the sum of £16,156.59 which was lodged to the clients' monies account. In the following months H. Wilson Gordon used those monies to make

payments to the Inland Revenue in respect of both the firm and another client of the firm.

(d) **Eileen Porterfield**

The Plaintiff is a retired Teacher for whom the firm primarily completed Income Tax Returns. So far as I am aware H. Wilson Gordon was the sole point of contact between the Plaintiff and the firm and I am never aware of the Plaintiff ever having visited the firm's offices. Between September 1992 and April 1994 on 6 occasions, H. Wilson Gordon sold Glaxo Holdings plc shares belonging to the Plaintiff, realising a sum of approximately £220,841.00. The proceeds of these sales of shares were lodged to the firm's Investment Business Clients' Monies Account but thereafter withdrawn by H. Wilson Gordon and credited to various accounts in which he had an interest. Apart from one such transaction in which the Plaintiff did sign a Share Transfer Form, all the other Share Transfer Forms bore the signature of the Plaintiff but that signature appears to have been forged by H. Wilson Gordon.

Furthermore, on 9 September 1992 H. Wilson Gordon received the sum of £10,000 which had been withdrawn from one of the Plaintiff's Building Society Accounts, for the purposes of making a further investment on her behalf. In the event no such investment was made and H. Wilson Gordon made use of the monies on his own behalf.

(e) **Moyra Porterfield**

The Plaintiff, who is a retired Teacher, had been a client of H. Wilson Gordon for a long number of years. H. Wilson Gordon visited the Plaintiff at her own home and the Plaintiff, so far as I am aware, never visited the firm's offices. On 11 September 1992 the Plaintiff apparently authorised H. Wilson Gordon to withdraw £12,000.00 from one of the Plaintiff's Building Society accounts for the purposes of making an investment on her behalf. The monies were so withdrawn but no investment was made on behalf of the Plaintiff and the

monies were used by H. Wilson Gordon on his own behalf.

(f) **Evelyn M. M. Wilson**

The late Miss Wilson was not only a client but was also a personal friend of H. Wilson Gordon and he visited her initially in her home and thereafter in a Residential Home, but so far as I am aware the late Miss Wilson never visited the firm's offices. Upon her admission to the Residential Home H. Wilson Gordon then sold furniture on her behalf, the proceeds of which amounted to approximately £8,000.00. These monies were lodged to an account in which H. Wilson Gordon had an interest.

Over a period between September 1989 and January 1994 18,305 Guinness Shares belonging to the late Miss Wilson were sold on the instructions of H. Wilson Gordon and proceeds amounting to approximately £67,898.27 were realised. I believe that H. Wilson Gordon forged the signature of Miss Wilson on each of the relevant Share Transfer forms. Between October 1989 and January 1994 monies arising from the said of such shares were withdrawn from both our Clients' Monies Account and Investment Business Client Monies Account and lodged to private account in which H. Wilson Gordon had an interest.

(g) **Glaxo Holdings plc**

Following the discovery of the improper sale of Miss Eileen Porterfield's shares in Glaxo Holdings plc (insofar as Miss Porterfield's signature had been forged by H. Wilson Gordon) Glaxo Holdings plc restored Miss Porterfield's shareholding save for the shares relating to the transaction where she had in fact signed the Share Transfer Form. However, Glaxo Holdings plc have instituted proceedings in England against the first named Defendant and myself seeking recovery of the monies expended by it in the restoration of Miss Porterfield's shareholding."

Claims were instituted by the respective claimants by writs of summons issued on a number of dates, the earliest of which was 23 February 1996. The total amount which the claimants stand to recover from the respondents is likely to be considerably in excess of £1 million, probably of the order of £1.5 million in all.

The appellant issued an originating summons on 30 November 1999, seeking to have two questions determined. The questions posed in the summons were amended on 18 January 2000, and in their amended form read:

> "(a) Whether the Defendants, on the assumption that they are otherwise entitled to cover, are entitled to be indemnified to a limit of £1m in respect of the aggregate of the cases arising out of the fraud of H Wilson Gordon.
>
> (b) Whether the Defendants, on the assumption that they are otherwise entitled to cover, are entitled to be indemnified to a limit of £1m in respect of each proceedings issued against them;
>
> i. jointly with H. Wilson Gordon
> ii. only,
>
> and arising out of his fraud.
>
> (c) Whether the Defendants are entitled to be indemnified to a limit of £1m in respect of loss sustained by them by reason of the dishonest and fraudulent acts or omissions of H Wilson Gordon.
>
> (d) Whether interest paid to a Plaintiff who has claimed against the Defendants in respect of loss arising from frauds committed by H Wilson Gordon upon such a Plaintiff, subscribe toward the limit of the indemnity provided under the Policy.
>
> (e) Whether costs incurred by and paid to a Plaintiff who has claimed against the Defendants in respect of loss arising from frauds committed by H Wilson Gordon upon such a Plaintiff, subscribe

toward the limit of the indemnity provided under the Policy.

(f) Whether the Defendants are required to take action to sue H Wilson Gordon for and to obtain reimbursement from him before the Defendants are entitled to the indemnities under the Policy."

It was agreed at the hearing before McLaughlin J that he should answer Questions (d), (e) and (f) in the form set out in his order and that no answer was required to Question (c). The debate before the judge and in this court was limited to the answers which should be given to Questions (a) and (b). The net issue to be decided was the interpretation of General Condition 1, and whether on its true construction the claims or losses arose out of one occurrence or were consequent upon or attributable wholly or substantially to the same original cause or source, the fraudulent behaviour of Mr HW Gordon.

Mr Thompson QC submitted on behalf of the appellant that in the sheet annexed to the renewal proposal of 8 June 1995 the respondents gave notice of a circumstance or circumstances of which they had become aware during the currency of the certificate expiring on that date and which might give rise to a loss or claim against them, viz the defalcation by Gordon and his restitution to the client, together with the institution of an investigation by themselves and by the SIB and the ICA. The effect of General Condition 4 was that the losses or claims which were subsequently incurred or made were deemed to have been incurred or made during the subsistence of that certificate. The Specific Claims Exclusion Clause in the 1995 certificate was complementary to this and had the effect of excluding all liability arising out of the circumstances disclosed in the renewal proposal of 8 June 1995.

Mr Morrow QC submitted on behalf of the respondents, however, that the claims fell to be dealt with under the 1995 certificate, not that issued in 1994. The circumstances which gave rise to them were not known to the respondents on 8 June 1995, only that Gordon had defrauded a client and made restitution and that an investigation was under way to see if there had been any other defalcations. The disclosure of these facts in the proposal of 8 June 1995 did not amount to the giving of notice of circumstances of which they had become aware and which might give rise to a loss or claim against the respondent, and accordingly it did not have the effect of triggering the operation of General Condition 4. It followed, on this argument, that the Specific Claims Exclusion Clause in the 1995 certificate did not exclude the claims eventually made against the respondents, because they did not arise out of the "circumstances and claims" disclosed in the renewal proposal.

We do not agree that the respondents' argument on this part of the case is correct. It seems to us that the intention of General Condition 4 was that if potential claims were adumbrated by the disclosure of circumstances such as those set out in the sheet annexed to the 1995 renewal proposal, the claims when they eventually matured were to be regarded as arising from those circumstances and were deemed to have been made during the subsistence of the 1994-5 certificate. The basis on which this rested was the wiping of the slate clean each insurance year, which was effected by this condition and, probably *ex abundanti cautela*, by the Specific Claims Exclusion Clause in the 1995 certificate. It was then open to the insurer to accept or decline the proposal for the year 1995-6 and to take on the business in subsequent years, freed from the possibility that those potential claims might mature and fall to

be dealt with in years subsequent to 8 June 1995, which would make the fixing of a premium extremely difficult and in practice would probably mean that the insured could not obtain cover. Clauses similar to General Condition 4 are not unknown in claims made policies: an example may be found in *Haydon v Lo & Lo* [1997] 1 WLR 198 at 202E. The interpretation which we have adopted seems to us to recognise the commercial purpose and realities of the insurance contract and to accord with the modern approach to construction of commercial contracts encapsulated in the propositions set out by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 114-5.

We come then to the issue which lies at the heart of this appeal, the question whether the claims made against the respondents in consequence of the defalcations of Mr Gordon fall within the terms of General Condition 1 so as to confine the appellant's liability to the sum of £1 million for the aggregate of those claims. It is clear that those defalcations cannot be described as "arising out of one occurrence". An occurrence, like an event, is something which happens "at a particular time, in a particular place, in a particular way": *Axa Reinsurance (UK) Plc v Field* [1996] 3 All ER 517 at 526, per Lord Mustill. The question for decision therefore is whether the defalcations can properly be described, as the appellant contends, as "any claim or loss or losses … consequent upon or attributable wholly or substantially to the same original cause or source." It is not clear why the word "claim" is used in the singular, whereas it is followed by the phrase "loss or losses". It does appear necessary in order to make grammatical sense of the phrase, however, to construe it as meaning that it includes more than one claim.

The appellant's contention was that the claims or losses are consequent on or attributable wholly or substantially to the same original cause or source, the fraudulent acts of Mr Gordon. Mr Thompson submitted that the unifying factor was the course of wrongdoing upon which Gordon embarked of making away with money which was the property of the firm's clients. This approach, he argued, was consonant with the conclusion which we have reached on the operation of General Condition 4, that the circumstances disclosed in the renewal proposal gave rise to the claims.

The respondents, on the other hand, pointed to the disparate nature of the fraudulent acts, contending that there was no common factor or link between the frauds, save that they were committed by the same man. They argued strenuously that just because one person commits a series of varying types of fraud, that does not mean that those frauds are to be attributed to the same original cause or source.

The cases of *South Staffordshire Tramways Co Ltd v Sickness and Accident Assurance Association Ltd* [1891] 1 QB 402 and *Haydon v Lo & Lo* [1997] 1 WLR 198 were cited to the learned judge, as they were in this court, but he held, we think rightly, they were of limited assistance, for variations in the type of cover, the wording of individual clauses and the facts relating to the acts giving rise to the claims tend to make each decided case authority only on its own particular facts. In the *South Staffordshire Tramways* case the court concluded that each "accident" in respect of which the company was insured against claims was intended to refer to individual accidents occurring to individual passengers. This was in our view in accordance with commercial sense and undoubtedly reflected the intention of those

who negotiated the terms of the policy. The contest in *Haydon v Lo & Lo* concerned a policy of professional indemnity insurance and was a dispute between the primary insurer and a reinsurer. An employee of the insured had committed a series of frauds against one client the Tang estate by using four different methods on 43 separate occasions. He committed frauds on another estate, the Tso estate, by adopting a single means, the use of a forged power of attorney, on eight separate occasions. It was in the reinsurer's interest to break the claim into small parcels, while the primary insurer sought to aggregate them. It was not suggested that the fact that the frauds were committed by one employee meant that the losses sustained in consequence by his employers constituted only one claim. The Privy Council held that the demands for restitution made by each client constituted one claim, so limiting the loss of the primary insurer and increasing that thrown on to the reinsurer. It is to be observed that there was no question in that case of the protection of the clients, who were not at risk of loss if one interpretation were to prevail, a factor which seems to us significant in seeking to ascertain the intention of the framers of the present policy.

We consider that on the true construction of General Condition 1 the claims brought against the respondents in consequence of fraudulent acts perpetrated by Mr Gordon against clients of the practice are not to be regarded as consequent upon or attributable wholly or mainly to the same original cause or source. Whether claims are to be so regarded may depend on the facts of each case, as the judge pointed out at page 15 of his judgment. We do not think that a single rule can be laid down for the application of General Condition 1. The claims of a client who has

suffered a series of losses in consequence of the fraudulent acts of the same person are more likely to be attributable to the same cause or source, as in *Haydon v Lo & Lo* each of the clients was held to have one single claim. On the other hand, the claims made by a number of clients who have been defrauded by one partner or employee are less likely to be so attributable. In some, perhaps exceptional, cases a client's claims may on differing facts be regarded as not attributable to the same cause or source even though his losses may have resulted from the wrongful acts of one person in variety of differing ways.

The fraudulent acts of Mr Gordon extended over a period of several years. They were committed against several separate clients, in a variety of different ways. In these circumstances we do not consider that they are to be treated under General Condition 1 as being claims arising out of one occurrence or consequent upon or attributable wholly or substantially to the same original cause or source. In so holding we agree with the observation of the judge at page 15 of his judgment, when he said:

> "I do not believe that the parties made this contract on the understanding that a single limit of indemnity would apply in the circumstances now arising. It would be unlikely that the ICA would have negotiated such a policy when its clear commercial purpose must have been to secure the protection not just of practitioners but of the public also. The element of protection of the public is established clearly by the extensive cover against fraudulent activity which the policy provides."

We accordingly agree with the conclusion reached by the judge, affirm the answers which he gave to the questions posed in the originating summons and dismiss the appeal.

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

———

BETWEEN

RESOURCE UNDERWRITING LIMITED

(Plaintiff) Appellant

and

EAMON McHUGH and MARIE LYNCH

(Defendants) Respondents

———

JUDGMENT

OF

CARSWELL LCJ

———