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Aggregation

Is the Court narrowing the possibilities for insured parties through its current analysis of aggregation? How do you argue the difference between an "intrinsic" and "extrinsic" relationship?

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AIG Europe Ltd v OC320301 LLP [2016] EWCA

- 214 investors in property schemes sued solicitors, the International Law Partnership, for releasing investment funds from an escrow account.
- The investors said that the solicitors had breached the terms on which the funds were held – they alleged breach of the "Cover Test."
- Insurers, AIG, alleged that there was "one claim" for the purpose of the Solicitors Minimum Terms aggregation clause.

The MTC aggregation clause

"The insurance may provide that, when considering what may be regarded as one Claim for the purposes of the limits contemplated by clauses 2.1 and 2.3:

(a) **All claims** against any one or more insured **arising from**

(i) one act or omission;

(ii) one series of related acts or omissions;

(iii) the same act or omission in a series of related matters or transactions;

(iv) similar acts or omissions in a series of related matters or transactions

and

(b) all Claims against one or more Insured arising from one matter or transaction.

will be regarded as One Claim."

1st Instance judgment

Teare J:

"… the most natural meaning of the phrase "a series of related matters or transactions" in the context of a solicitors' insurance policy is, in my judgment, a series of matters or transactions that are ***in some way dependent*** *on each other. It is difficult to talk of transactions being related* ***unless their terms are in some way inter-connected****."*

Submissions before the Court of Appeal

- **For AIG:** There is no justification for reading a *"series of related matters or transactions"* as meaning that they must be dependent upon one or other. This is clearly one claim.
- **For Trustees:** *"series"* means *"something of which it can be said that there is some integral relationship between its parts"*.
- **For the SRA:** the clause requires a relationship between the matters of transactions. This could be inter-dependence or something wider but there has to be *"some intrinsic connection"* between the matters or transactions, not just something external.

The Court of Appeal Judgment

There must be a connection between the transactions in order for them to be *"related"*. This means an intrinsic rather than a remote relationship.

"That means that there must be a relationship of some kind between the transactions relied on rather than a relationship with some outside connecting factor, even if that extrinsic relationship is common to the transactions. Thus transactions which all take place with reference to one large area of land in a particular country might be related transactions if they refer to or (perhaps) envisage one another, but if the relevant transaction is the payment of money out of an escrow account which should not have been paid out of that account, the fact of geography is too remote; what will be intrinsic will depend on the circumstances of that payment" [19].

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So what does this actually mean?

- Saying that *"any degree of relatedness will do"* is not good enough to establish *"a series of … related transactions"* [21]. When drafting submissions, we as lawyers must be precise in identifying exactly what the unifying factor is.

- There are, always have been, and always will be difficult factual questions to be answered in this area. Would the contracts of insurance underwritten by Mr. Outhwaite as a result of his *"blind spot"* have been regarded as having an *"intrinsic"* connecting factor? (***Caudle v. Sharp*** [1995] LRLR 433; ***Cox v. Bankside*** [1995] 2 Ll.R. 437***; Axa v. Field*** [1996] 1 WLR 1026]). Attempts to identify where the line is to be drawn are difficult.

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What does it tell us that is useful?

Point 1: If you want to be sure that you have a wide aggregating clause, you must use the *"any one originating clause"* language. See:

- ***Axa Reinsurance (UK) v. Field*** [1996] 1 WLR 1026 *per* Lord Mustill at 1035: *"the widest posssible search for a unifying factor in the history of the losses which it is sought to aggregate."*
- ***Lloyds TSB General Holdings Ltd v. Lloyds Bank Group Insurance*** [2003] 4 All ER 43 *per* Lord Hobhouse at [51], the parties chose not to use this wording and no doubt the cost of insurance was reduced as a result: *"Their choice should be respected."*

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Point 2: When drafting aggregation clauses, if you know what you want to achieve you should say it.

- Fine distinctions arise from policy wordings, e.g. the Court of Appeal held (at [27]) that *"related"* meant something different in a claim resulting from *"any single act or omission (or **related** series of acts or omissions)" than in "a series of **related** matters or transactions"* (the former requires a causal relationship, the latter does not).
- The bespoke clause for pensions misselling considered in ***Countrywide Assured Group v. Marshall*** [2003] LIRR 195 worked.

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Point 3: Remember that you are dealing with an issue of construction. This means that context matters.

- What risks does the policy cover?
- How might claims arise?
- Does the premium reflect a particular approach to aggregation?

See also: ***KAC v. KIC*** [1996] 1 LlR 664; ***Mann v. Lexington*** [2001] LIRR 179

Is the Court narrowing the possibilities for insured parties?

No:

- All aggregation clauses have to be construed in context. The same words may have different effects in different contexts.
- There may be bespoke drafting.
- The disputes in this area are, and always will be, highly fact sensitive. There is scope for argument even under an *"any one originating clause"* wording.
- An appeal to the Supreme Court in ***AIG*** is imminent.