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Aggregation – what is the meaning of 'similar' and 'related'?

On Friday 14 August Mr Justice Teare handed down his judgment in AIG Europe Limited v OC320301 LLP and others [2015] EWHC 2398 (Comm), which is the first case to consider aggregation under the SRA Minimum Terms and Conditions for solicitors' professional indemnity insurance ("the MTC"). Whilst this case relates to the MTC and solicitors, it is also applicable to barristers.
Aggregation is a concept where a number of claims are considered to be one claim for the purposes of an insurance policy excess or an insured's limit of indemnity. This means that several small claims may be aggregated with the result that total combined value of each individual claim may be above the insured's excess threshold. As a result, the insurers would be obliged to indemnify them on the basis that all those small claims were treated as one claim for the purposes of insurance. However, if the insured faces a number of large claims which may be aggregated to a value exceeding the limit of indemnity, the insured may face a shortfall in the cover. Therefore, aggregation sometimes works in the insured's favour and sometimes in the insurance company's favour. This means that there is some tension between the insured and the insurer and that each aggregation clause may be subject to litigation and significant and/or different degrees of interpretation.

The case involved a large number of claims against The International Law Partnership LLP, by investors and prospective buyers of properties in Marrakech and Turkey.

The International Law Partnership was an English law firm which undertook international cases involving international legal, tax, property, property investment and property development issues. The firm's clients included the Midas group of companies which was, through two separate subsidiaries, developing two residential property sites, one named Peninsula Village in Turkey and another named Al Johara in Marrakech. Investors and purchases of these schemes made their investments and paid their deposits to the International Law Partnership whose partners were trustees and escrow agents in relation to two similar trusts, one for each development. In both cases monies were released before the trustees had secured the security promised to the buyers/purchasers. When the developments failed to proceed, a number of claims against the International Law Partnership were brought by the investors/purchasers.

The claimants in the underlying claims numbered 214, and AIG, the firm's insurer declined to indemnify the International Law Partnership for any cover above £3m on the basis that all the claims were alleged to be one claim for the purposes of the policy "similar acts and omissions in a series of related matters or transactions". In these, separate, proceedings AIG sought declaratory relief in the form of a broadly drafted declaration "that the underlying claims are to be considered a single "Claim" for the purposes of the Run-off Cover".

Teare J declined to make this declaration in, what is now, the leading case in relation to aggregation of claims against solicitors. This is a particularly important Judgment both for the solicitors' profession and for insurers in that it considers the concept of 'related matters or transactions' for the first time. The judgment also provides helpful guidance on a number of other issues within the MTC.

The MTC takes priority over bespoke aggregation clauses
The first of these principles is that the MTC takes precedence over any bespoke aggregation clause. There was common ground between the parties that the aggregation wording in the policy written by AIG was not the same as the wording in the MTC. As a consequence Teare J found that the governing clause was clause 2.5 of the MTC.

Clause 2.5 of the MTC states that "The insurance may provide…". The permissive wording of the MTC also allows the possibility of no aggregation clause and it remains arguable that the MTC is only the minimum extent of cover allowable; accordingly it is possible that a clause which is less advantageous to insurers may be permissible. This issue was not considered by the court and is unlikely to occur in practice. However, the result of this Judgment is that insurers are not able to modify or alter the aggregation clause to their advantage or to provide less cover than that afforded by the wording in the MTC.

What is the requisite degree of similarity?

The second important aspect of the judgment relates to the appropriate interpretation of the word "similar" in the context of "similar acts and omissions". Teare J considered the level of similarity required: "…the requisite degree of similarity must be a real or substantial degree of similarity as opposed to a fanciful or insubstantial degree of similarity." Unfortunately, this does not appear to be determinative of the issue and leaves the issue open to further argument on interpretation, there will still need to be consideration of what this sentence means and the extent of the similarity required. Whilst Teare J asks himself at what level should one judge similarity, he does not directly answer the question. A better analysis may have been to state that the requisite level of similarity must neither be at the high level or low level of abstraction/analysis but at the level of the act or omission which proximately caused the loss. Even at the level of proximate cause of the loss, the insurers may face some difficulty in establishing that facts are all 'similar'. However, in this case insurers had sought to aggregate all the claims in an all or nothing approach rather than focussing on specific instances of aggregation.

What are related matters or transactions?

The third aspect of the Judgment which provides useful guidance is the concept of 'related matters or transactions'.
Clause 2.5 of the MTC incorporates two words 'matter' and 'transaction' which are distinctive concepts relating to solicitors. Whist the Judgment does not define the words 'matter' and 'transaction' in this context, the word 'matter' arguably refers to the content and scope of the instructions given to the solicitor by the client. Similarly, the word 'transaction', refers to a deal between two parties, one of whom is instructing the insured.

Teare J found that transactions are related if they are dependent on each other. He did not seem to have distinguished matters but the principle may be extended in the same way. Importantly, dependence must be mutual. It is not enough that one transaction is dependent upon another; both must be "conditional or dependent upon each other." However, dependence may not be easy to apply in all contexts.
Rather than dependence, an alternative interpretation would have been that a relationship arises in matters through a common element of work upon which the solicitor is instructed. For transactions a relationship may arise through the terms of the deals between the parties (which may include dependence, but dependence is not necessary).

What is clear, in the Judgment is that a relationship should be one arising from the specific characteristics of the matters or transactions rather than a unifying factor arising from an external common characteristic such as identity of the fee earner, similarity of background facts, similarities in the acts or omissions or some other originating cause such as dishonesty.

As mentioned above, whilst this case relates to the MTC and solicitors, it is also applicable to barristers. The Bar Mutual Terms of Cover 2014 ("The Bar Mutual Terms") provide for one limit of cover applying to all claims which "arise from or are attributable to … a series or a group of related acts or omissions; or a series or group of similar acts or omissions…". Therefore, the guidance provided by Teare J, in relation to the meaning of the words 'series', 'related' and 'similar' may be applied to the Bar Mutual Terms (and any top-up cover which a barrister has obtained over and above the maximum cover available from Bar Mutual if similar aggregation wording is used).

An important point arises from the Bar Mutual Terms and Teare J's judgment at paragraph 38. Teare J records that AIG favoured an argument that matters or transactions were related if they were "sufficiently similar and/or connected to one another". Teare J rejected this submission. The Bar Mutual Terms have distinguished between "related acts or omissions" and "similar acts or omissions". This suggests, in the case of the Bar Mutual Terms, that similarity is not enough to relate acts or omissions (and by analogy matters and transactions in the MTC). It is therefore arguable that AIG's interpretation would not be consistent with the Bar Mutual Terms and, additionally, Teare J would have come to the same conclusion if he had been considering the Bar Mutual Terms

Conclusion

Prior to the trial of the underlying claims, AIG sought declaratory relief in relation to their declinature on the basis of aggregation. This claim was heard before any of the underlying claims in relation to liability which are due to be heard in the summer of 2016.
However, in a great many cases insurers will decline cover and withdraw from the defence of claims in relation to liability even where there are good arguments to be run against liability (such as lender prudence and contributory negligence). These defences may not be advanced because the partners in a law firm may be impecunious or disinterested (in the case of a company or limited liability partnership). This case readdresses the balance and highlights the importance that insurers address the issue of aggregation before abandoning the defence of claims. Even claims which are likely to succeed may include scope for argument on quantum either in relation to contribution to the loss or a lack of mitigation, and this opportunity may be lost if claimants are allowed to enter judgment in the absence of a defence.

Teare J says at paragraph 38 of his judgment: “A reasonable man would expect an aggregation clause to be reasonably certain in its scope.” No statement could be more sensibly put than that. Both the insured and the insured’s clients should have sufficient comfort in the meaning of an aggregation clause so as to avoid litigation where at all possible.

Nevertheless it would be a mistake to consider that this Judgment was favourable only to claimants and law firms. Many law firms benefit from top-up cover and whilst the secondary level insurer may negotiate terms beyond the MTC, they will be concerned to see that primary layer insurers do not avoid cover by taking a broad brush approach to aggregation.

The story is not quite complete, as Teare J gave AIG received permission to appeal on the basis that many higher decisions on the meaning of ‘series’ involved dissenting judgments accordingly, whilst he had confidence in his decision, he could not say that an appeal would have no prospect of success.

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