

Breaking down the law of Aggregation Clauses



The Supreme Court decision of *AIG Europe Limited v Woodman and others*.

In March 2017, the Supreme Court overturned the Court of Appeal's judgment in [AIG Europe Limited v Woodman and others](#), ruling on how claims arising from similar acts or omissions in a series of related matters or transactions should be aggregated. The Court held that whilst there must be some real connection between the matters or transactions in order for claims to be aggregated, each case will turn on its specific facts.

Facts

The case concerned the development of two holiday resorts in Turkey and Morocco funded by private investors. The developments failed when the local developers were unable to complete the land purchases.

The investors brought two claims against the developers' solicitors (one in relation to each site), alleging that they had wrongly released monies from an escrow account in breach of a "cover test" set out in a Deed of Trust designed to protect their investment. The investors, through the Trustees of the Trusts, claim to have lost in excess of £10 million.

The solicitors were insured by AIG Europe subject to a limit of indemnity of £3 million any one claim. AIG brought proceedings seeking a declaration that the underlying claims should be treated as "one claim" as they all arose from "similar acts or omissions in a series of related matters or transactions" (clause 2.5(a) (iv) Law Society's Minimum Terms and Conditions ("MTC")).

Parties' positions

AIG argued that as the underlying claims should be treated as "one claim" there should be one overall limit of indemnity of £3m available for all claims on both developments.

The Trustees' primary case was that none of the claims should be aggregated, but if that argument was rejected then in any event the claims by the Turkish investors and Moroccan investors claims should be separate claims and not aggregated with the result that there would be two available pots of indemnity.

It was also AIG's alternative case that the claims could be aggregated by reference to the two developments.

The decision of the Supreme Court

Lord Toulson in handing down the judgment of the Supreme Court criticised the approach adopted by the Court of Appeal and in particular the introduction of the requirement that transactions/matters must be intrinsically linked in order to be aggregated.

He considered such a requirement to be neither necessary nor satisfactory, describing it as an elusive term when used to characterise a relationship between two transactions.

The Court held that when analysing aggregation clauses the starting point should be neutral and objective, rather than being viewed from the perspective of either the solicitors or investors. Further, Courts should not consider the wording with a bias towards either a broad or narrow construction bearing in mind that they can work in favour of the insurer (by capping the total sum insured) or the insured (by capping the amount deductible per claim).

Adopting a “neutral” approach in the interpretation of the MTC was all the more appropriate given that the Law Society is not an insurer offering cover. The Law Society’s role is one of regulator prescribing the minimum terms of cover which firms of solicitors must obtain and in doing must balance the need for reasonable protection of the public with the cost and availability of professional indemnity insurance.

Lord Toulson held that the word “related” (in clause 2.5 (a) (iv)) implies some inter-connection between the matters or transactions, in other words that they must in some way fit together. This will necessarily be an acutely fact sensitive exercise, with the exercise of judgment, not a reformulation of the clause.

Against that background Lord Toulson identified the transactions in question and rejected the Court of Appeal’s analysis of a relevant transaction, namely “the payment out of money from an escrow account”, as being too narrow: that was a description of an act giving rise to a claim rather than the transaction itself.

On the facts, the Court held that the transactions entered into by the Turkish investors were connected in significant ways, as were the transactions entered into by the Moroccan investors. The members of each group were investing in a common development to provide funding for the developers. Further they were co-beneficiaries under a common trust. These connecting factors dictated that the claims of each group of investors arise from acts or omissions in a series of related transactions. The transactions fitted together both factually and legally through the trusts under which the investors were co-beneficiaries.

By contrast, whilst the claims of the Turkish investors bear a striking similarity with those of the Moroccan investors that is not enough to treat them as related transactions. Although the development companies were related (being members of the same group) and the legal structure of the projects was similar, the projects were separate and unconnected. They related to different sites, and the different groups of investors were protected by different deeds of trust secured over different assets.

Comment

Back to where most practitioners and insurance professionals thought we were.

The judgment has understandably been welcomed by both Insurers and Insureds in overruling the Court of Appeal’s narrow interpretation. It will almost certainly assist Insurers when dealing with multiple claims and in particular those involving mortgage frauds which have plagued the profession.

However, as the Supreme Court was at pains to emphasise, aggregation cases are inherently fact sensitive. It is not therefore practicable or indeed useful for the Court to try to provide definitive guidance. Indeed, the Judgment is clear encouragement to the lower Courts that, when construing such clauses, Judges should interpret the plain wording of the clause in question and not rewrite the clause as the Court considers it ought to have been drafted. Interpretation should not involve reformulating the clause to make further sense of it.

The Judgment is to be welcomed firstly in that it has removed the notion of “an intrinsic relationship” introduced by the Court of Appeal, a test which would have been difficult to apply in practice, and secondly for the common sense approach adopted by the Court to the facts.

Lord Toulson’s application of the clause to the facts is of real assistance in interpreting such clauses.

Practitioners and insurance professionals should:

- Identify and analyse the relevant matters or transactions (as opposed to the acts giving rise to the claim) and then,
- Identify any relevant connections between them. Do they point to the transaction being connected in significant ways? Do they fit together in some real way?

In this case in each of the two actions the key relationship between the investors was that they were co-beneficiaries under a trust. However, for the same reason the claims in both actions could not be aggregated together; they were protected by different deeds of trust over different assets.

The Supreme Court has stripped away the judicial clarifications of both the Commercial Court and the Court of Appeal and instead applied a common-sense interpretation of the clause. The insurance market will feel that the status quo has now been preserved, back to where we were before this claim, with interpretation demanding an essentially fact sensitive analysis.

Finally, the Judgment is a timely reminder for policyholders and their brokers to consider carefully the aggregation wording, and not simply to rely on the “standard wording”, and to do so at the time of placement, rather than after the event when the claims have been made.



Mark Aizlewood
Partner

T: 0203 697 1908
M: 07469 852355
E: mark.aizlewood@cpblaw.com

“This information has been prepared by Carter Perry Bailey LLP as a general guide only and does not constitute advice on any specific matter. We recommend that you seek professional advice before taking action. No liability can be accepted by us for any action taken or not as a result of this information, Carter Perry Bailey LLP is a limited liability partnership registered in England and Wales, registered number OC344698 and is authorised and regulated by the Solicitors Regulation Authority. A list of members is available for inspection at the registered office 10 Lloyd’s Avenue, London, EC3N 3AJ.”