

AGGREGATION OF CLAIMS AGAINST
SOLICITORS AND SURVEYORS

INTRODUCTION

1. In common with other professional indemnity risks, solicitors and surveyors professional indemnity insurance cover is written on a 'claims made' basis, providing cover against (i) claims made against the firm during the period of insurance and (ii) claims made after the expiry of the period of insurance arising out of circumstances notified during the period of insurance.
2. Both solicitors and surveyors are required by their professional bodies to have professional indemnity insurance. Solicitors are required to have at least £2 million of cover on terms which are no less favourable than the specified Minimum Terms. Surveyors are required to have adequate and appropriate professional indemnity insurance cover which is also subject to a Minimum Policy Wording. Solicitors and surveyors insurance covers invariably reflect the terms of the minimum terms (insurers rarely grant anything more favourable) and so it is the minimum terms that will be addressed below.
3. The excess and limit of indemnity in a claims made policy will operate by reference to the claim that is made and therefore the issue of aggregation will often be critical to the application of the excess and indemnity. This issue has again come into focus with the increase in claims against solicitors and valuers consequent upon the fall in the property market and in particular the effect that the recession has had in exposing mortgage fraud.
4. There are, however, two aspects to the question of aggregation:
 - (a) How many claims are being against the firm?
 - (b) If more than one claim is being made against the firm, do the claims fall to be treated for the purposes of the policy as being one claim?

HOW MANY CLAIMS?

5. This first requires an understanding of what a 'claim' is in the context of a professional indemnity insurance policy.
6. In Thorman v. New Hampshire Insurance Company [1988] 1 Lloyd's Rep 7, Sir John Donaldson MR gave some consideration to the question of when there would be one claim or more than one claim in the context of claims against architects. He stated as follows (p.11 col. 2 – p.12 col. 1) :

“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 different 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 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 the contract. It would, I think, very much depend upon the facts.”

7. In Haydon v. Lo & Lo [1997] 1 WLR 198 (Privy Council), it was held that a separate claim is not necessarily made whenever a separate cause of action arises creating a liability on the part of the insured to a third party. Although regard can be had to the manner in which the third party's claim is formulated, it is the underlying facts that determine the number of claims against the insured. That case involved a series of thefts of shares by a senior clerk employed in the probate department of Lo & Lo, a firm of solicitors, by using a forged Power of Attorney, which gave rise to losses being suffered

by two estates. One of the estates made a direct claim against the solicitors but in relation to the second estate the claim against the solicitors was not made directly by the estate but was made at the end of a chain of proceedings which had initially been commenced by the estate. The decision of the Privy Council was that there was only one claim in respect of each estate from which the clerk stole even though the thefts were effected in relation to each estate by a series of transactions and even though, in the case of the second estate the claim reached the solicitors indirectly through a chain of proceedings.

8. In Mabey & Johnson Limited v. Ecclesiastical Insurance Office plc (No. 2) [2004] Lloyd's Rep IR 10, Morrison J held that where the design work in relation to bridges constructed in Ghana was carried out pursuant to two separate contracts by the engineering company that was facing allegations of negligent design, there was a separate claim in relation to each contract for the purposes of the engineer's professional indemnity insurance.
9. The policy definitions of what is a 'claim' also have to be borne in mind. The Minimum Terms for solicitors define the word as follows:

“CLAIM means a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damage. ...”

10. The Minimum Policy Wording for surveyors uses the following definition:

“4. CLAIM

Shall mean:

4.1. any demand for damages or compensation from, or the assertion of a right against, the INSURED

4.2. any notice of intention, whether orally or in writing, to commence legal proceedings against the INSURED

4.3. any communication with the INSURED in whatsoever form invoking any Pre-Action Protocols as may be issued and approved from time to time.”

11. Whilst the solicitors' definition might be broader than the ordinary meaning of the word 'claim', it will not have any impact on the question of the number of claims. By contrast, sub-paragraphs 4.2 and 4.3 of the surveyors' definition could result in a number of claims set out in the same document falling to be treated as one claim for the purposes of the policy. Even on the ordinary meaning of the word 'claim', it could be said, by analogy with Haydon v Lo & Lo, that where a lender was seeking to recover its losses arising from a mortgage fraud in which a solicitor or valuer was involved, it would have only one claim for its losses from that fraud, notwithstanding that it had separate causes of action in respect of each of the particular transactions or valuations which were the subject of the fraud and may have pursued those causes of action individually

AGGREGATION

12. This arises if and to the extent that there is more than one claim.

(a) SOLICITORS

13. The Minimum Terms provide as follows:

2 Limit of insurance cover

2.1 Any one Claim

The Sum Insured for any one Claim (exclusive of Defence Costs) must be, where the Firm is a Relevant Recognised Body, at least £3 million, and in all other cases, at least £2 million.

2.5 One Claim

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.

3 Excesses

3.1 The Excess

The insurance may be subject to an Excess of such monetary amount and on such terms as the Insurer and the Firm agree. Subject to clause 3.4, the Excess may be 'self-insured' or partly or wholly insured without regard to these minimum terms and conditions.

3.5 One Claim

The insurance may provide for multiple Claims to be treated as one Claim for the purposes of an Excess contemplated by clause 3.1 on such terms as the Firm and the Insurer agree.

14. It will be noted that the insurers have the freedom to make whatever provision for aggregation for the purpose of the excess that they choose. This means that insurers are at liberty to impose terms which cause the insured to bear an excess for each claim even though the claims may be aggregated for the purposes of the limit of indemnity. In the case of firms with limited resources though, this may be of little practical benefit to the insurers because the Minimum Terms also provide as follows:

3.4 Funding of the Excess

The insurance must provide that, if an Insured fails to pay to a Claimant any amount which is within the Excess within 30 days of it becoming due for payment, the Claimant may give notice of the Insured's default to the Insurer, whereupon the Insurer is liable to remedy the default on the Insured's behalf. The insurance may provide that any amount paid by the Insurer to remedy such a default erodes the Sum Insured.

15. The aggregation provisions for the limit of indemnity merit some attention.

(1) Sub-paragraphs (a)(i) and (ii):

(a) Under the Minimum Terms and conditions applicable from 1 September 2000 onwards, clause 2.5 provided that:

‘The insurance may provide that all claims against any one or more insured arising from the same act or omission or from one series of related acts or omissions will be regarded as one claim for the purposes of the limits contemplated by clauses 2.1 and 2.3.’

(b) This was changed with effect from 1st October 2005 to the wording quoted above following the decision of the House of Lords in Lloyds TSB General Insurance Holdings v. Lloyds Bank Group Insurance Co. Limited [2003] Lloyd’s Rep IR 623. In that case, the House of Lords had to consider an aggregation clause in the context of coverage for the mis-selling of financial products which was in the following terms:

“If a series of third party claims shall result from any single act or omission (or related series of acts or omissions) then, irrespective of the total number of claims, all such third party claims shall be considered to be a single third party claim for the purposes of the application of the deductible.”

(c) The essential element of the reasoning of the House of Lords was that if, as the Court of Appeal had held, the words “any single act or omission” mean an act or omission which constituted the cause of action, when the plural form of the same words was then used in the clause, the draftsman must have been contemplating acts or omissions which had the same causal relationship as the singular form. It was on that basis that Lord Hoffman construed the words “related series of acts or omissions” as being intended to encompass a situation where there is a combination of more than one act or omission which gives rise to the loss suffered by one or more claimants. The example of such a combination that he gave was of the distribution of a misleading document in identical terms by someone who is not himself negligent but which ought to have been corrected by someone else

who was. The two acts or omissions would be a series which together caused each of the losses suffered by the distribution of the document.

- (d) There was some difference between Lord Hoffman and Lord Hobhouse as to the ambit of the clause. Lord Hobhouse considered that it would extend to a situation where a consultant prepared a document which misrepresented the merits of a pension scheme which he was endeavouring to sell and gave copies of that same document to a succession of people who bought into the scheme as a result of having been given the misleading document by him. Whilst each act of giving the misleading document to a person would be a distinct act, he considered that they could together form a related series of acts. Lord Hoffman reserved his opinion on that example given by Lord Hobhouse on the basis that he would not be inclined to accept that such acts were a series just because they were very similar although he recognised that it could be said that in such a case the relevant single act or series of acts could be described as the distribution of the document, with the method of distribution, i.e. whether it was shown simultaneously to a number of people or shown to them in succession or read to them at a meeting, being causally irrelevant. The important point is, though, that the example given by Lord Hobhouse would represent the furthest that a clause such as that in the Lloyds TSB case could be pushed.
- (e) Whilst Lord Hoffman emphasized the fact that there were brackets around the words ‘or related series of acts or omissions’, Lord Hobhouse did not and relied on the language used, in its context, and on the fact that if the parties had wanted to aggregate by reference to an event or an originating cause, they could have chosen to use one of the market forms of clause using such terms.
- (f) It is therefore likely that sub-paragraphs (a)(i) and (ii) in the current version of the Minimum Terms will be construed to have the same effect as the clause considered in Lloyds TSB.

(2) Sub-paragraphs (a)(iii) and (iv)

(a) In order to be the “same”, the relevant acts or omissions must be identical in all material respects. In order to be “similar”, the acts or omissions must bear a sufficient resemblance to each other, being of the same kind or character, without being identical.

(b) In Countrywide Assured Group PLC v Marshall [2003] Lloyds’ Rep. IR 195, Morison J had to consider the meaning of the word “series”. He stated as follows:

“When is an occurrence part of a series of occurrences? To form part of a series there must be some connecting factor which links occurrences which would otherwise be separate. In the Australian case the majority considered that the occurrences must be of a sufficiently similar kind to qualify for forming part of a series. In this case the claims might properly all be described as occurrences of mis-selling of pensions. On the assumed facts the claims are sufficiently related to form part of a series; and that would be so, I think, whether or not they were attributable to one source or original cause.”

(c) The Australian case to which Morison J. was referring was the decision of the High Court of Australia in Distillers v Ajax [1974] HCA 3. In that case, Stephen J. (with whom Gibbs J. agreed) stated as follows:

“The characteristic of the similarity of events which may form a series I take from those dictionary meanings of series which refer to the concept of being “of one kind” or of having some “characteristics in common” – Shorter Oxford English Dictionary (para 27).”

(d) In Municipal Mutual v Sea Insurance Company Limited [1998] Lloyds’ Rep. IR 421 a succession of individual acts of pilferage and vandalism by a number of individuals, probably acting independently of one another, over a period of 18 months was held by the Court of Appeal to form ‘a series of occurrences’.

(e) The ordinary meaning of the word ‘related’ would require there to be some degree of connection between the matters and transactions.

- (f) Putting together such assistance as can be gleaned from the authorities and (importantly) the context in which the words are used, the words “series of related matters or transactions” can be said to contemplate a number of matters or transactions which can properly be regarded as related to each other (in the sense of there being some connection between them) and coming one after another with some connecting factor linking their occurrence.
- (g) It must also be borne in mind that when aggregation clauses are being applied, it is from the perspective of the insured that one must approach an analysis of the facts.
- (h) If it had been intended for these sub-paragraphs to apply merely because there was some common originating cause or the work was all done for the same client, they could have said so but they did not. Rather the clause is looking for a situation in which there is a repetition of the same or similar causative acts or omissions on two or more matters or transactions and for those matters or transactions to satisfy the criteria at (f) above. In, for example, a mortgage fraud case, that latter aspect might be satisfied by the transactions forming part of a scheme from the perspective of the solicitor.

(3) Sub-paragraph (b):

This is self-explanatory.

(b) SURVEYORS

16. The Minimum Policy Wording provides as follows:

THE EXCESS

CLAIMS:each and every CLAIM or SERIES OF CLAIMS

THE INDEMNITY LIMIT

CLAIMS:each and every CLAIM or SERIES OF CLAIMS

7. Dishonesty or Fraud

Any CLAIM arising out of any dishonesty or fraud of any INSURED save to the extent that the CLAIM arises by reason of and was solely and directly caused by the (actual or allegedly) dishonest and/or fraudulent act(s) of any past or present partner, director, member, consultant or employee of the PRACTICE (whether committed alone or in collusion with others) which cause any client of the INSURED to suffer loss and provided always that:

7.1. no indemnity shall be afforded in respect of any CLAIM arising out of such dishonesty or fraud on the part of any person after discovery by the INSURED, in relation to that person, of reasonable cause for suspicion of fraud or dishonesty

7.2. any dishonesty and/or fraud committed by a person or persons acting in concert shall for the purposes of this policy be treated as one CLAIM

20. SERIES OF CLAIMS

Shall mean a number of CLAIMS (whether made against or involving one or more persons or entities comprising the INSURED and whether made by the same or different claimants and whether falling under one or more insuring clauses of this policy) that arise directly or indirectly from the same originating cause.

17. It can be seen that the surveyors' wording uses at clause 20, the widest possible aggregation wording. The use of the words "originating cause" opens up the widest possible search for a unifying factor in the history of the claims (Axa Reinsurance (UK) plc v. Field [1996] 1 WLR 1026 at 1035G per Lord Mustill). The use of the word 'indirectly' also signifies that one is looking at causes more remote from the proximate cause (although it is difficult to see what it adds in the context of the use of the words 'originating cause').

18. The search, it must be emphasized, is for a common causative factor and the mere fact that one or more individuals make the same or a very similar mistake or are guilty of the same or very similar conduct does not, of itself, prove the existence of any common causative factor. If a particular individual repeats the same mistake it may well be the case that there is some underlying misappreciation or misunderstanding on his part which

provides the causative link. If two individuals commit the same sort of mistake it may be that the source of their respective mistakes was the same (e.g. a misleading document) but alternatively, they may each, independently, have reached the same erroneous conclusion. In the former case, there would be a common originating cause but in the latter case there would not.

19. In American Centennial Insurance Co. v. INSCO Limited [1996] LRLR 407, Moore-Bick J. at p.414, accepted that if several people reached a common culpable misunderstanding as the result of discussions between them on which they all subsequently acted, it might be possible, depending on the facts of the case, to find in their discussions a single originating cause of all their negligent acts but the position would be otherwise if the several individuals each acted under their own separate individual misappreciations, even if in fact those misappreciations all happened to be the same (see also Cox v. Bankside Members Agency Limited [1995] 2 Lloyd's Rep. 437 at 455).

20. In a mortgage fraud case, clause 20 could be used to aggregate claims in a case where the appropriate conclusion was that the valuer had decided to embark on a course of dishonest conduct for a client or particular clients – the originating cause being his decision to abandon honest valuation for that client/those clients.

21. It will also be seen that there is specific provision for aggregation in the case of dishonesty, although it is not entirely clear whether its effect is to enable there to be aggregation of all claims arising from:
 - (a) A particular dishonest act or omission; or
 - (b) A particular course of dishonesty; or
 - (c) The dishonest conduct of the individual(s), regardless of whether the dishonest acts or omissions giving rise to the claims are connected in any way.

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