

## **Watch your Words: Aggregation of Insurance Claims**

Insurance and reinsurance contracts often make provision for the aggregation of claims if there is more than one claim under the same policy. The concept of aggregation is simply where a term of the contract enables two or more separate losses covered by the policy to be treated as a single loss for deductible or other purposes when they are linked by a unifying factor of some kind. It is the nature of the unifying factor which causes the most debate. In each case the legal test depends on the precise wording of the clause which defines that unifying factor. The factor is often a common origin – some act or event - which links the claims. Where the description of the crucial act or event is narrow and specific it will be more difficult to aggregate the claims, but where wide and general words are used to describe the unifying act or event, the courts can be quick to find that the claims ought to be aggregated.

### *The purpose of aggregation*

Aggregation applies for the benefit of both parties to the contract. It is advantageous to the insured or reinsured that he can aggregate in order to show that his loss has exceeded the limit of the retention or excess in the policy. Where the act or event described in the aggregation clause is widely defined, an insured with thousands of linked claims may be able to make an insurance claim, whereas a narrow aggregation clause would mean that every individual claim fell within the deductible and the insurer pays nothing. Conversely, the aggregation clause is advantageous to the insurer or reinsurer because he can rely upon the relevant limit of his liability in relation to the aggregation of the various losses. For this reason it will not often be a clause that has to be construed against the insurer (*contra proferentum*), but will generally be construed neutrally.

### *Pensions Mis-selling Cases*

The pensions mis-selling problems of the 1990s have been a fruitful source of litigation over the construction of aggregation clauses. Financial institutions and advisers often failed to ensure that 'Best Advice' was given to clients in accordance with the rules laid down by the regulators. In the rush to obtain the commission on new sales of personal pension plans, it was sometimes overlooked that it would have been more advantageous to the investor for him or her to remain with the existing occupational pension scheme. These non-compliant files caused many investors to be paid relatively modest amounts

of compensation. This added up to substantial sums if aggregated, which could then be claimed from professional indemnity insurers. The resulting aggregation arguments have wide application across the insurance and reinsurance markets.

The House of Lords have recently reached a decision in *Lloyds TSB General Insurance Holdings v Lloyds Bank Group Ins Co* [2003] UKHL 48, a claim arising from about £100m of pensions mis-selling claims. The £1m deductible meant that each small claim would not be covered unless a series of third party claims 'resulting from any single act or omission (or related series of acts or omissions)' was aggregated to a single claim. The bank asserted that the losses resulted from a systemic failure on the part of the Bank, which failed to institute a proper scheme of training and instruction. However, the policy defined the acts or omissions as those regulatory breaches in respect of which civil liability arose. The Lords agreed with the Court of Appeal in part holding that the expression 'result from' in this policy meant the proximate cause. The underlying general failure of management to ensure compliance or to train was not the cause of the losses; it was the individual mis-selling of the advisers and their breaches of rules which caused the losses. A state of affairs or underlying reason was not a 'single act or omission'. However the Lords (differing from the decision below) rejected the argument that the claims could be aggregated as they were the result of a *related series*. The alleged series relationship was a single underlying cause or common origin, or because the acts or omissions were of an identical or very similar nature. The House of Lords decided that the 'related series' words could not be intended to open out the widest possible search for a common underlying origin when the main words were narrowly defined to only those acts or omissions which constituted the cause of action. That would be to allow the tail to wag the dog, said Lord Hoffmann.

It is not uncommon for an aggregation clause to refer to a 'series' as well as a single unifying factor. The importance of the *Lloyds TSB* decision should not be overstated as it is based on one particular form of wording. However, where commercial parties have chosen narrow wording for the aggregation clause, it is now clear that it is impermissible to open up the aggregation by reference to a series later in the clause. The connecting factor for a series will be judged by the standard of the main clause itself and not by the ordinary dictionary meaning of 'relationships' or 'series'.

### *Wide wording*

A recent example of wider wording also made mention of a series. In *Countrywide Assured Group v DJ Marshall & ors* [2003] 1 All ER (Comm) 237 the policy defined 'any claim' as 'all occurrences of a series consequent upon or attributable to one source or original cause'. The limit of the indemnity was £1m for any one claim. Morison J said that to form part of a series there need to be some connecting factor such as the occurrences being of a sufficiently similar kind. He said that the words 'event, occurrence or claim' describe what has happened, whereas the word 'cause' describes why something has happened. 'Originating cause' therefore entitles one to see if there is a unifying factor in the history of the claims: on the assumed facts in *Countrywide* it was a lack of proper training. The distinction drawn upon was that made by Lord Mustill in *Axa Reinsurance (UK) Plc v Field* [1996] 3 All ER 517 who said 'a cause is to my mind something altogether less constricted [than an event]. It can be a continuing state of affairs; it can be the absence of something happening'. Therefore the meaning of 'series' in the *Countrywide* case is wider than the meaning of 'series' in the *Lloyds TSB* wording as the first (because of its wide wording) can be a series linked by an 'originating cause' whereas the second (because of its narrow definition) must be a series linked by a common cause of action.

The construction of 'originating cause' also applies in the same way to 'one source or original cause' (*Municipal Mutual Insurance v Sea Insurance* [1998] Lloyd's Rep IR 421). In that case the wording allowed for a search for some any act, event or state of affairs which could properly be described as a cause of more than one loss. Hobhouse LJ held that a series of losses caused by theft and vandalism from the Port of Sunderland over a period of time were attributable to one original cause, namely the inadequacy of the port's system for protecting the goods of which it was bailee. The wording did not require the proximate cause as in *Lloyds TSB* but allowed a wider enquiry into the causes underlying the proximate cause. The similar wording a 'series of events or occurrences originating from one cause' also allows a reinsurer to point to a unifying factor of a remote kind to justify aggregation (*American Centennial Ins v Insko* [1996] LRLR 407).

### *Narrow wording*

The narrower wording of aggregation clauses often requires a common event or occurrence for the losses. The wording in *Caudle v Sharp* [1995] LRLR 433 was for 'each and every loss' to be aggregated if arising out of one *event*. It was held that the negligent writing of 32 separate contracts could not be an 'event'. An event was a more definite

happening of something at some time. The clause in the *Axa Re* case was narrow, as it required aggregation depending on one event. The negligence of a Lloyd's underwriter was not an *event* giving rise to the losses under a number of separate policies which he had written on behalf of various syndicates.

*Scott v Copenhagen Reinsurance* [2003] EWCA Civ 688 was the recent case concerning aggregation of losses resulting from Kuwaiti aircraft lost in the 1991 Gulf War, the wording 'arising from one event' was examined by the Court of Appeal. It held that 'arising from' requires more than simply a 'weak causal connection'; a significant causal link is needed. The inevitability of war was a state of affairs and not an event, but the outbreak of war was an event and was a cause of the losses. The Court of Appeal approved the use of the unities of cause, place, time and intention as an appropriate test for determining event-based aggregation. These unities, which were taken from the *Dawson's Field* arbitration award, provide only a template and not the answer. The main test is one of intuition and common sense.

A similar interpretation can be given to one 'occurrence' as to one 'event'. Widespread losses flowed from the destruction of 67 Indonesian supermarkets by rioting following the resignation of President Suharto. There was evidence that the riots were separate, but were centrally co-ordinated. Waller LJ held in *Mann and Ors v Lexington Insurance* [2001] LRLR 179 that what has caused the losses were the acts of rioters over a wide area, at different locations, and over two days. The only unifying factor was the central orchestration, but that was not sufficient to constitute one 'occurrence'. The result would probably have been different if there had been a wide 'originating cause' wording in the policy.

#### *Aggregation on the facts*

Even after a preliminary ruling of law on the construction of the aggregation provision made on assumed facts, it is still open to a party to contest aggregation on the facts. The subsequent enquiry might not provide evidence to support the assumed facts. The party seeking aggregation must show at trial that pension mis-sales (for example) can be traced to a common omission to advise or instruct or train employees in the correct guidelines as to what constituted an appropriate pension sale. It could well be very difficult to aggregate on the facts in cases where the selling was carried out by independent financial advisers or employees of subsidiaries with their own training regime.

An essential distinction appears to be that where individual representatives commit similar acts of negligence, but were exercising their own judgment and formulating their own policies in doing so, there is no originating cause on the facts. However, if they do so after reaching a common misunderstanding as a result of a joint discussion, there can be a single originating cause. This is reflected in the approach of Philips J in *Cox v Bankside Members Agency* [1995] 2 Lloyd's Rep 437 who rejected the aggregation argument on the facts despite the existence of the wide words 'originating cause'. He found that each of the Gooda Walker underwriters took his own underwriting decisions independently. Their shortcomings were similar, but not identical, and did not arise from one originating cause. The conclusion from these cases must be that similarity does not of itself make a series and does not make an originating or underlying cause, although it may be evidence suggestive of a common originating cause.

Andrew Burns is a barrister at Devereux Chambers, who appeared for the excess layer reinsurers in *Countrywide*.