
# WHEN TWO BECOME ONE:

# AGGREGATION OF CLAIMS IN

# PROFESSIONAL INDEMNITY INSURANCE

**by**

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## THE SPEAKER

**Mark Cannon QC** specialises in professional liability (particularly in a commercial context), insurance and reinsurance, construction and commercial disputes. In the area of professional liability he acts for claimants and defendants in claims against lawyers, accountants, insurance brokers, financial advisers, surveyors and construction professionals. He also advises and appears in coverage disputes.

Mark has been described in the Directories as "extremely solid and punchy", "prepared to roll up his sleeves and get into the facts and documents", "superb", "very good at recognising the commercial parameters within which his clients operate", "technically excellent", "scarily clever", "a real trooper who holds his corner in court well", "a great ideas man" and "second to none in terms of intellectual ability". He has been said to have "a velvet-gloved grasp of the law", "an eye for legal minutiae" and "very good judgment in all that he undertakes".

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The Amount of Cover Provided

1. It is usual for professional indemnity insurance policies to contain some financial limit of cover either per claim or in the aggregate:

   - e.g. ICAEW Minimum Approved Policy Wording (aggregate limit)
   - e.g. Minimum Terms and Conditions of Professional Indemnity Insurance for Solicitors and RICS Policy Wording (no aggregate limit; limit "any one Claim" and "any CLAIM or SERIES OF CLAIMS").

2. Aggregate policies enable insurers to know with certainty what their maximum exposure is. "Per claim" policies do not. It is usual for insurers to include some form of aggregation clause under which two or more claims are treated as a single claim for the purposes of the cover provided (including, possibly, the deductible or excess to be paid/borne by the insured for each claim). However, it is possible to have a policy of professional indemnity insurance without either an aggregate limit or an aggregation clause: *Mabey & Johnson Ltd v. Ecclesiastical Insurance Office Ltd* [2001] Lloyd's Rep IR 369.

3. Where there is more than one insured professional indemnity insurance will usually be composite insurance so that each insured will have his own separate interest: *General Accident Fire and Life Assurance Co Ltd v. Midland Bank Ltd* [1940] 2 K.B. 388. But any limit on cover will apply to the insureds collectively, on a "first come, first served" basis: *Cox v. Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep. 437.

4. The limit may apply not only to damages or other sums payable to third party claimants but also to the costs of third party claimants and the costs of defending claims. E.g. *Citibank NA v. Excess Insurance Company Ltd* [1999] Lloyd's Rep. IR 122 where the limit applied to "all damages and costs payable by the Insured… in respect of any one claim or series of claims arising out of any one original cause…". On the terms of the particular policy this did not include the costs of defending claims. That is the usual position.

A Single Claim?

5. Before considering aggregation clauses which deem two or more claims to be treated as a single claim, it is appropriate to address the question as to what is encompassed within a single claim.

6. The starting point is to consider what is meant by "claim" in this context.

- Claim means "a demand for something as due; an assertion of a right to something". It can also mean "right of claiming; right or title (to something or to have, be, or do something; also on, upon the person, etc., that the thing is claimed from)".
- Solicitors' Minimum Terms define "Claim" as "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 damages".
- Note that "claim" may sometimes be used in policy wordings to refer to claims by the insured under the insurance (e.g. *Haydon v. Lo & Lo (a firm)* [1997] 1 W.L.R. 198; see also *Australia & New Zealand Bank Ltd v. Colonial*

*& Eagle Wharves Ltd* [1960] 2 Lloyd's Rep. 241, at 255 and *Standard Chartered Life Assurance Ltd v. Oak Dedicated Ltd* [2008] EWHC 222 (Comm), [2008] Lloyd's Rep. IR 552 at [97])

- And some policies have definitions of "claim" which are concerned with aggregation rather than what is or is not a "claim" for the purposes of triggering cover and which provide little assistance as to what is meant by "claim". E.g.*Standard Chartered Life Assurance Ltd v. Oak Dedicated Ltd* [2008] EWHC 222 (Comm); [2008] Lloyd's Rep. IR 552where the policy provided that:

> "'Claim' shall mean each Claim or series of Claims (whether by one or more than one Claimant) arising from or in connection with or attributable to any one act, error, omission or originating cause or source or dishonesty of any one person or group of persons acting together and any such series of Claims shall be deemed to be one Claim for all purposes under this Policy."

7. Given that professional indemnity insurance is almost invariably written on a "claims made" basis (although now sometimes on a "claims made and notified" basis), definitions of "claim" which address the making of a claim against the insured are to expected. They include those in the Solicitors' Minimum Terms, the ICAEW Minimum Approved Policy Wording and the RICS Policy Wording.

8. What happens when a third party claimant serves a single Claim Form (or pre-action protocol letter) which claims damages for a number of different acts or omission relating to different subject matters? Are they to be treated as a single

claim because the demand for civil damages is made in a single document? Or are they to be treated as a number of claims and, if so, on what basis?

9. Take a pre-action protocol letter by a mortgage lender to a firm of surveyors. The lender claims that the valuations of 5 properties carried out by the firm over a period of 6 months were each negligent and that, as a result, it has suffered loss on each of the loans it made. The properties were in different locations and the valuations were carried out by different valuers. It would be odd if they were to be treated as a single claim because the mortgage lender sent a single pre-action protocol letter.

10. But under the RICS Policy Wording "claim" is defined as:

> ".1 any demand for damages or compensation from, or assertion of a right against the INSURED
> .2 any notice of intention, whether orally or in writing, to commence legal proceedings against the INSURED
> .3 any communication with the INSURED in whatsoever form invoking any Pre-Action Protocols as may be issued and approved from time to time."

The pre-action protocol letter would clearly be "any communication with the INSURED in whatsoever form invoking any Pre-Action Protocols". However, that would mean that insurers' exposure would depend upon whether the third party claimant chose to send one letter or five separate letters. That does not sound right.

11. It is not. This is because in the example, the mortgage lender is making five demands for damages or compensation against the insured, one in respect of each allegedly negligent valuation.

12. In deciding whether the third party is advancing one claim or a number of claims it is necessary to consider the underlying facts and to ask whether the third party is claiming only one object or a number of different objects. In *Haydon v. Lo & Lo (A Firm)*[1997] 1 W.L.R. 198the Privy Council applied the following passages from the judgment of Devlin J in *West Wake Price & Co v. Ching*[1957] 1 W.L.R. 45, at 55 and 57:

> "I think that the primary meaning of the word 'claim' - whether used in a popular sense or in a strict legal sense - is such as to attach it to the object that is claimed; and is not the same thing as the cause of action by which the claim may be supported or as the grounds on which it may be based."
>
> "If you say of a claim against a defendant that it is for £100, you have said all that is necessary to identify it as a claim; but if you say of it that it is for fraud or negligence, you have not distinguished it from a charge or allegation. In particular, if you identify a claim as something that has to be paid … it must be something that is capable of separate payment: you cannot pay a cause of action. Itfollows, I think, that if there is only one object claimed by one person, then there is only one claim, however many may be the grounds or the causes of action which can be raised in support of it: …"

And, it follows, that if there is more than one object claimed, then there is more than one claim.

13. The application of this in practice is illustrated by three decisions: *Haydon v. Lo & Lo (a firm)* [1997] 1 W.L.R. 198; *Citibank NA v. Excess Insurance Company Ltd*[1999] Lloyd's Rep. IR 122 and *Mabey & Johnson Ltd v. Ecclesiastical Insurance Office Ltd (No.2)* [2004] Lloyd's Rep IR 10.

14. In *Haydon v. Lo & Lo (A Firm)*[1997] 1 W.L.R. 198a rogue clerk in the insured solicitors' probate department stole on 51 occasions, 43 times from one estate and 8 times from another. Excess insurers argued that each theft was a separate claim so that the entire loss would fall on primary insurers. They argued that each theft gave rise to a new cause of action on the date it was committed. In relation to the thefts from the second estate, the insured was not sued directly by the estate, which claimed against others implicated in the fraud in 14 separate actions. The insured was then joined as third party by a number of defendants to those 14 actions. Excess insurers argued that, even if their argument that each theft gave rise to a separate claim, each third party proceeding was a separate claim.

15. The Privy Council disagreed with both arguments. "Claim" does not mean "cause of action". While not determinative, the way in which the person claiming against the insured formulates his complaint provides a useful starting point. That will often give a good indication as to whether he is making one claim or more than one claim for policy purposes. There was nothing to displace the impression which arose from the way that the first estate had claimed against the insured: there was a single claim for restitution, even though the loss was caused by a number of separate thefts. As for the second estate, it too had only one claim and

it did not become more than one claim because it was only made through a number of third party proceedings against the insured.

16. In *Citibank NA v. Excess Insurance Company Ltd*[1999] Lloyd's Rep. IR 122 the insured had been found to have been negligent in 1983 in the way in which they had laid some cables, in 1989 for fitting the wrong fuses to a switchboard and yet again in 1991 for failing to discovery their earlier error in fitting the wrong fuses. As a result of these breaches a fire had broken out, causing damage which cost over £2 million to rectify. The insured had cover of £2 million "in respect of any one claim or series of claims arising out of any one original cause". The third party argued that there were two "original causes" of the loss: the incorrectly laid cable and the incorrect fuses and so the policy limit should apply twice with total cover of £4 million.

17. Thomas J disagreed. Even if there were two originating causes, there was only one claim. The clause only applied where there was more than one claim. He held:

> "To suggest as [the third party claimant] has done that each separate cause of action which was the cause of a single claim gives rise to separate additional limits of liability for that claim stands the clause on its head; it is a contention contrary to its plain commercial purpose."

18. The third party claimant had another argument. The trial judge had held the insured solely liable for the cost of repairing the cabling which was damaged or destroyed in the fire. He had apportioned the balance of the cost of making good

the damage between the insured and two other defendants. The third party claimant argued that the damage to the cabling was a different claim to that for the rest of the damage. Again, Thomas J rejected the argument. Applying the approach set out in *Haydon v. Lo & Lo (A Firm)* he held:

> "In my view, looking at the demand in the letter before action, the formulation of the statement of claim and the annexed schedule of damages (where one single sum was claimed) and the reality of the position, I have no doubt but that there was one claim by [the third party claimant] for the damage caused by the fire. The division made by [the trial judge] was solely for the purpose of distinguishing between the sole liability of [the insured] for the damage to the cabling and the other damages for which all of the three defendants in that action were liable."

19. Finally *Mabey & Johnson Ltd v. Ecclesiastical Insurance Office Ltd (No.2)* [2004] Lloyd's Rep IR 10. The insured were a firm of engineers. They had entered two contracts to design and supply bridges in Ghana. The design of all the bridges was flawed. The later designs had adopted the earlier, flawed work. Insurers argued that there was only one claim in respect of the badly-designed bridges. Morison J disagreed. There were two separate contracts. Each required the insured to provide a reasonably competent design. There were different breaches of different contracts leading to different insured losses. The fact that the second negligent design adopted the earlier design without checking it did not mean that there was a single claim.

20. So a number of different wrongful acts can give rise to a single claim (*Haydon v. Lo & Lo (A Firm)* and *Citibank NA v. Excess Insurance Company Ltd*) or to a

number of claims (*Mabey & Johnson Ltd v. Ecclesiastical Insurance Office Ltd (No.2)*). Even where the separate acts can be shown to have resulted in separate losses, as in *Haydon v. Lo & Lo (A Firm)*, it may be that only one, composite claim is being made in respect of the overall loss. The answer to the question whether the third party has made a single claim or a number of separate claims will depend upon whether, in substance, he is claiming a single object or a number of different objects.

21. Thus in *Citibank NA v. Excess Insurance Company Ltd* there was only one fire, even though it was caused by three separate breaches of duty by the insured. The third party's "object" was compensation for the loss caused by that fire. But in *Mabey & Johnson Ltd v. Ecclesiastical Insurance Office Ltd (No.2*) the insured loss in respect of each defectively designed bridge was distinct as was the breach of duty which caused each bridge to be defectively designed.

22. In *Thorman v. New HampshireInsurance Co (UK) Ltd*[1988] 1 Lloyd's Rep 7 the issue before the Court of Appeal was whether a claim made during one policy year against a firm of architects was limited to allegations of failure to identify defective brickwork or extended to other complaints which were made in the Particulars of Claim as eventually served some years later. Holding that they were, Sir John Donaldson MR gave this guidance as to what might or might not be a single claim:

> "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 separate 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 that 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 his contract. It would, I think, very much depend upon the facts."

This passage needs to be read in the context of the issue before the Court, but is of some assistance, not least in its acknowledgement that the answer will lie in the particular facts.

Construing Aggregation Clauses

23. Like all terms in all contracts aggregation clauses have to be read as a whole and in context, i.e. against the other terms and the relevant background.

24. Depending upon the facts, aggregation clauses can work in favour of the insured or against him and in favour of primary layer insurers or excess layer insurers. It is therefore appropriate to construe them "in a balanced fashion giving effect to

the words used" rather than striving to find a meaning which, while it coincides with the perceived merits of the particular facts, may have a very different result in another context: *Lloyds TSB General Insurance Holdings Ltd v. Lloyds Bank Group Insurance Co Ltd* [2003] UKHL 48; [2003] 4 All E.R. 43, per Lord Hobhouse at [30]. Invitations to courts to assume that the parties to the contract were indifferent as to the precise words used in an aggregation clause have been rejected: they can be the subject of careful negotiation: *Axa Reinsurance (UK) Plc v. Field* [1996] 1 W.L.R 1026 at 1035 per Lord Mustill (considering excess of loss reinsurance). There a number of well established alternative terms and the parties' choice of term should be respected: *Lloyds TSB General Insurance Holdings Ltd v. Lloyds Bank Group Insurance Co Ltd* [2003] UKHL 48; [2003] 4 All E.R. 43, per Lord Hobhouse at [31]. In short, there is no reason to construe such clauses against insurers.

25. The overall effect of an aggregation clause depends upon the combined effect of its components. There will be a unifying factor (usually either one or both of happenings – events, occurrences etc. – or causes). There will be a degree of causal relationship between the unifying factor. Finally there will be the object with which the unifying factor has to have a causal relationship. So, while it is helpful to consider the effect of specific, individual words in aggregation clauses, it is the combined effect of all the words used which matters.

26. So, for example, a finding as to the meaning of "event" will require consideration of what causal relationship the parties have specified that event must have to

claims or losses under the particular policy. It does not follow that "event" would bear the identical meaning in the context of a different causal relationship. Evans LJ expressed the position in these terms in *Caudle v. Sharp*[1995] LRLR 433,when considering whether an insured's "blind spot" could be a relevant event for the purposes of the aggregation clause before the Court:

> "In my judgment, the three requirements of a relevant event are that there was a common factor which can properly be described as an event, which satisfied the test of causation and which was not too remote for the purposes of the clause."

The answers to those questions were interrelated.

Events, Occurrences and Causes

27. Having warned against looking at individual words in isolation, there is a clear distinction between aggregation clauses where the unifying factor is an event or occurrence (or non-event) on the one hand and a cause or originating cause on the other. As Lord Mustill explained in *Axa Reinsurance (UK) Plc v. Field* [1996] 1 W.L.R. 1026:

> "In ordinary speech, an event is something which happens at a particular time, at a particular place, in a particular way. … A cause is to my mind something altogether less constricted.It can be a continuing state of affairs; it can be the absence of something happening."

28. The difference between events and occurrences on the one side and causes on the other is not limited to the fact that the former have to have happened. As Morison

J explained in *Countrywide Assured Group Plc v. Marshall*[2002] EWHC 2082 (Comm); [2003] Lloyd's Rep. IR 195:

> "Whilst an event, occurrence or claim is 'something which happens at a particular time, at a particular place in a particular way' a 'cause' is not just 'something altogether less constricted' it is a word which is fulfilling a different function. The word event, occurrence or claim describes what has happened; the word 'cause' describes why something has happened."

29. The difference is illustrated by a comparison between the application of the different aggregation clauses in *Axa Reinsurance (UK) Plc v. Field* [1996] 1 W.L.R. 1026 and *Cox v. Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep. 437.Both cases concerned the same underlying facts, which were the subject matter of the decision of Phillips J in *Deeny v. Gouda Walker Ltd* [1996] LRLR 183, where Phillips J had found that three Lloyd's underwriters had been negligent in relation to underwriting in certain specific respects.

30. In *Cox v. Bankside Members Agency Ltd* the issue was the application of the following aggregation clause in the professional indemnity insurance of the members' and managing agents at Lloyd's who had been held liable for the underwriters' negligence:

> "Insurers' total liability under this Policy in respect of any Claim or Claims arising from one originating cause, or series of events or occurrences attributable to one originating cause or related causes, shall in no event exceed the sum stated in Item 3(a) of the Schedule."

Phillips J held that there were three "originating causes", namely the approach to underwriting of each of the negligent underwriters. He rejected the argument that

there was only one originating cause, namely a common error. Each underwriter's errors had been of a different and distinct nature. Moreover:

> "A culpable misappreciation by an individual which leads him to commit a number of negligent acts can arguably be said to constitute a single event or originating cause responsible for all the negligent acts and their consequences. The same is not true when a number of individuals each act under an individual misappreciation, even if the nature of that misappreciation is the same."

31. The issue in *Axa Reinsurance (UK) Plc v. Field*was whether this reasoning applied equally to the application of the following provision in the excess of loss reinsurance of the insurers in *Cox v. Bankside Members Agency Ltd*:

> "For the purpose of this reinsurance the term 'each and every loss' shall be understood to mean each and every loss and/or occurrence and/or catastrophe and/or disaster and/or calamity and/or series of losses and/or occurrences and/or disasters and/or calamities arising out of one event."

The House of Lords held that it did not: a misappreciation could be a cause, but it was not an event.

32. The same distinction between unifying factors which are expressed in terms of events (or acts or omissions) on the one hand and causes or sources on the other can be seen in two decisions concerning aggregation of claims for mis-selling of pensions.

33. The first is the decision of the House of Lords in *Lloyds TSB General Insurance Holdings Ltd v. Lloyds Bank Group Insurance Co Ltd*[2003] UKHL 48; [2003] 4

All E.R. 43. The insured had faced some 22,000 claims, mainly ranging between £15,000 and £35,000. The total paid to third party claimants was some £125 million. The insured sought to recover some of its outlay under its liability indemnity insurance, which formed part of its bankers' composite insurance policy. There was a deductible of £1 million for each and every claim, but the insured argued that the claims should be aggregated under the following clause:

> "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 purpose of the application of the deductible."

The insurance required that, to be covered, a third party claim had to:

> "be for financial loss caused by a breach on the part of the assured or an officer or employee of the assured of the provisions of the Financial Services Act 1986 (including without limitation any rules or Regulations made by any regulatory authority or any self regulatory organisation pursuant to the provisions of the Act)…in respect of which civil liability arises on the part of the assured."

34. The insured argued that its own failure to train and monitor its representatives was a single act or omission for the purposes of the aggregation clause. This argument failed: any such failure was not the cause, or proximate cause, of the third party claimants' financial loss. The relevant acts or omissions were the giving of bad advice to individual third party claimants by individual representatives leading to individual losses.

35. The insured also argued that the third party claims resulted from "a related series of acts and omissions", in that the various breaches of duty by its representatives were related by reason of their common cause: lack of adequate training and monitoring. Again, the argument failed. The relevant acts or omissions were those of the various representatives. The aggregation clause did not permit the identification of some common cause for those acts or omissions. Such a result might be achieved if the clause had deemed all claims arising from the same originating cause to be a single claim, but that was not what the clause in question said or meant.

36. By way of contrast, in *Countrywide Assured Group Plc v. Marshall*[2002] EWHC 2082 (Comm); [2003] Lloyd's Rep. IR 195the aggregation clause provided that "one claim" or "one loss" meant:

> "one occurrence or all occurrences of a series consequent upon or attributable to one source or original cause."

The background was the mis-selling of pensions and the unifying factor relied upon by the primary insurers was the failure to provide adequate training to the insured's representatives. Noting that the words "one source or original cause" were wide, Morison J held:

> "In my view, the lack of proper training of the selling agents and selling employees was behind the whole problem. It was this which, on the assumed facts, was a consistent and necessary factor which allowed the mis-selling to occur. Maybe, the activities of individual salesmen were also causative but the clause entitles one to move back and find a single source or original cause; and in this case, there is one."

37. This decision as reinforced by the use of the words "original cause". The use of "original cause" or "originating cause" as a unifying factor will usually result in a very wide aggregation clause.As Lord Mustill explained in *Axa Reinsurance (UK) Plc v. Field* [1996] 1 W.L.R. 1026, at 1035, when considering what was meant by "originating cause":

> "the word 'originating' was in my view consciously chosen to open up the widest possible search for a unifying factor in the history of the losses which it is sought to aggregate."

Series of events or occurrences

38. Some aggregation clauses deem that claims or losses arising from a series of related events are to be treated as a single claim. Guidance as to what is meant by "a related series of acts or omissions" was given by the House of Lords in *Lloyds TSB General Insurance Holdings Ltd v. Lloyds Bank Group Insurance Co Ltd*[2003] UKHL 48; [2003] 4 All E.R. 43.

39. In rejecting the insured's arguments, Lord Hoffmann and Lord Hobhouse gave examples of what would or might constitute a related series of acts and omissions in the particular context of the policy before them. Lord Hobhouse's example was of a representative who prepared a document which misrepresented the benefits of a particular pension scheme and then showed that document to a number of investors who were persuaded by it to switch to that scheme. While the provision of the document to each person would be a distinct act, together those acts could form a "related series of acts" from which a "series of third party

claims" resulted. Lord Hoffmann reserved his position as to whether this example was correct: claims were not related merely because they were very similar, although he could see that the production and distribution of a document could be an act or series of acts which were causally relevant to the claims. Lord Hoffmann gave his own example:

> "the distribution of a misleading document in identical terms by someone who was not himself negligent but 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."

40. What these examples and the decision in the *Lloyds TSB* caseshow is that phrases such as "related series of acts and omissions" are not to be read in isolation, but in the wider context of the aggregation clause and other related provisions. In the *Lloyds TSB* case the wider context showed the need for the acts and omissions to be the proximate cause of the third party claims. In other contexts, that might not be the case.

41. For example, the aggregation clause in *Hamptons Residential Ltd v. Field*[1997] 1 Lloyd's Rep. 302; [1998] 2 Lloyd's Rep. 248was as follows:

> "all claims or losses … arising out of or attributable to or consequent upon
> (a) the same or similar or related occurrences circumstances events acts errors or omissions of the Assured including an act or acts of dishonesty or
> (b) any series or multiplicity of similar or related occurrences circumstances events acts errors or omissions of the Assured including a series or multiplicity of acts of dishonesty
> and whether involving or committed or omitted by any person or

> persons or companies acting together or jointly or in concert or separately or independently shall constitute a single claim and only one excess shall apply to and be available for the total of those claims or losses."

This clause is much wider in scope than that in the *Lloyds TSB* case, not only because it provides for the aggregation of claims and losses arising from similar as well as related "occurrences circumstances events acts errors or omissions", but also because the causal link need not be so great: it is sufficient if the claims and losses are attributable to or consequent upon such matters.

42. Some aggregations clauses require that a "series of occurrences" should arise from the specified unifying factor or factors. In this context, it has been held that what is required is that there should be a number of occurrences which share "some connecting factor" (*Countrywide Assured Group Plc v. Marshall* [2002] EWHC 2082 (Comm); [2003] Lloyd's Rep. IR 195 at 200 per Morison J) or "a number of events of a sufficiently similar kind following one another in temporal succession" (*Distillers Co Bio-Chemicals (Australia) Pty Ltd v. Ajax Insurance Co Ltd* [1974] HCA 3; (1974) 130 C.L.R. 1, at 21 per Stephen J). So, in *Caudle v. Sharp* [1995] LRLR 433 the negligent underwriting of 32 similar reinsurance treaties by the same underwriter constituted a "series of occurrences" for the purposes of the aggregation clause.

43. Where the aggregation clause required that a "series of third party claims" should result from the unifying factor, this clearly carried with it the possibility of claims by a number of different third parties, each claiming for his own loss, but did not

import any more: *Lloyds TSB General Insurance Holdings Ltd v. Lloyds Bank Group Insurance Co Ltd* [2003] UKHL 48; [2003] 4 All E.R. 43, per Lord Hobhouse at [45].

44. The aggregation clause in the Solicitors' Minimum Terms prescribes a number of ways in which two or more claims are to be aggregated and provides, in part:

> "all Claims against any one or more Insured arising from:
>
> (i) ….
> (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…
>
> will be regarded as one Claim."

45. Sub-clause (ii), "one series of related acts or omissions" is likely to be construed in the same way as the clause in *Lloyds TSB General Insurance Holdings Ltd v. Lloyds Bank Group Insurance Co Ltd* [2003] UKHL 48; [2003] 4 All E.R. 43 because the wording is sufficiently close and, in retaining or adopting that wording after the decision in *Lloyds TSB* the parties will be taken to have intended it to apply. As Clarke LJ explained in*Sunport Shipping Ltd v. Tryg-Baltica International (UK) Ltd* [2003] EWCA Civ 12; [2003] 1 Lloyd's Rep. 138Clarke LJ, with whom the other members of the Court of Appeal agreed, said at [28]:

> "Where a contract has been professionally drawn… the draftsman is certain to have in mind decisions of the Courts on earlier editions of the clause. Such decisions are part of the context or background circumstances against which the particular contract

> falls to be construed. If the draftsman chooses to adopt the same words as previously construed by the Courts, it seems to me to be likely that, other things being equal, he intends that the words should continue to have the same meaning."

46. Sub-clauses (iii) and (iv) are not yet the subject of judicial ruling. In those sub-clauses "related" has an entirely different function, no longer requiring a link between the acts and omissions on the one hand and the claims on the other, but applying to two or more matters and transactions. It can be read as requiring the matters and transactions to be related to the claims or, more plausibly, as related to each other.

47. That in turn raises the question as to how the matters and transactions have to be related to each other in order for the aggregation provision to apply. "Related" does not mean "similar" but "connected". A contract to purchase land and the loan, secured by mortgage, of the money to fund the purchase could be said to be related matters or transactions. A number of matters or transactions which form part of some wider scheme (even a single conspiracy to defraud) might also be related for this purpose. However, mere similarity would not suffice.

48. For example, if, as in *Mabey & Johnson Ltd v. Ecclesiastical Insurance Office Ltd (No.2)* [2004] Lloyd's Rep IR 10, a firm of engineers had re-hashed the same flawed design for a number of different clients under different contracts, those contracts would not be "related matters or transactions" simply because the same flaw appeared in the design of each bridge. The various claims might have arisen

from the same cause, but not from the same or similar acts or omissions in a series of related matters or transactions.

Causation

49. As well as identifying the unifying factor or factors, an aggregation clause has to provide for a causal relationship between the factor or factors on the one hand and the losses or claims on the other. Phrases such as "arise from", "result from", "attributable to" and "consequent upon" are used. The need for there to be some causal relationship between the unifying factor and the claims also informs the meaning of the unifying factor.

50. So, in *Caudle v. Sharp*[1995] LRLR 433 the "event" relied upon for the purposes of the aggregation clause was a failure by Mr Outhwaite, a Lloyd's underwriter, to undertake the necessary research before underwriting 32 reinsurance contracts, which had resulted in vast losses. In the excess of loss reinsurance treaties before the Court of Appeal, cover was provided for losses in excess of £1.25 million "each and every loss". "Each and every loss" was defined as:

> "each and every loss and/or occurrence and/or catastrophe and/or disaster and/or calamity and/or series of losses and/or occurrences and/or catastrophes and/or disasters and/or calamities arising out of one event"

Rejecting the reinsured's argument, Evans LJ observed that Mr Outhwaite's disastrous underwriting was "an event in the history of Lloyd's", but it was not an event for the purposes of the aggregation clause. He explained:

> "The losses or series of losses envisaged by the clause must have 'arisen out of' one event, which in this context straightaway implies some causative element and some degree of remoteness, or lack of remoteness, which must be established in the circumstances of the particular case."

51. Evans LJ went on to consider what degree of causative potency was required by the words "arisen out of" required in the context of the excess of loss reinsurance treaty at issue. In that context, the words did not require that the event was the proximate cause of the losses or claims, but, while the test was wider than that, there was still some restriction.

52. The aggregation clause in *Lloyds TSB General Insurance Holdings Ltd v. Lloyds Bank Group Insurance Co Ltd*[2003] UKHL 48; [2003] 4 All E.R. 43had a stricter requirement for causation: the relevant acts or omission had to be the proximate cause of the liability to the third party claimants. The liability of the insured to third party claimants did not result from its failure to have a proper training and monitoring system, but from the bad advice given to each third party claimant by various of the insured's representatives. As Lord Hoffmann explained:

> "The language of the aggregation clause, read with the definition of 'act or omission', shows that the insurers were not willing to accept as a unifying factor a common cause more remote than the act or omission which actually constituted the cause of action. An act or omission could qualify as a unifying factor in respect of more than one loss only if it gave rise to civil liability in respect of both losses."

53. By way of contrast, in the recent decision in *Standard Life Assurance Ltd v. Ace European Ltd* [2012] EWHC 104 (Comm) the aggregation clause provided that:

> "All claims or series of claims (whether by one or more than one claimant) arising from or in connection with or attributable to any one act, error, omission or originating cause or source, or the dishonesty of any one person or group of persons acting together, shall be considered to be a single third party claim for the purposes of the application of the Deductible."

54. Having noted the width of "originating cause or source" as established by the decisions in*Axa Reinsurance (UK) Plc v. Field* [1996] 1 W.L.R 1026,*Municipal Mutual Insurance Ltd v. Sea Insurance Co Ltd* [1998] Lloyd's Rep. IR421 and *Countrywide Assured Group Plc v. Marshall* [2002] EWHC 2082 (Comm); [2003] Lloyd's Rep. IR 195, Eder J observed at [262]:

> "In one respect, the language of the aggregation clause in the present Policy is even wider than that of the clauses considered in the *Axa*, *Municipal Mutual* and *Countrywide* cases. Not only does the clause in the Policy use the expression 'originating cause or source', but the description of the link required between the'originating cause or source' and the claims which it is sought to aggregate is worded in the broadest possible terms. Whereas in *Axa* the words used were 'arising from', and in *Municipal Mutual* and *Countrywide* the words used were 'consequent on or attributable to', the Policy here uses the words 'arising from or in connection with or attributable to' (emphasis added). The phrase 'in connection with' is extremely broad and indicates that it is not even necessary to show a direct causal relationship between the claims and the state of affairs identified as their 'originating cause or source', and that some form of connection between the claims and the unifying factor is all that is required."

55. It followed that all claims by investors in a fund over a period of years were in connection with the same originating cause or source, namely the insured's

continuing representation that the fund was a safer investment than it in fact was and so fell to be treated as a single claim.

Causally Linked to What?

56. Finally, it is important to bear in mind what it is that the unifying factor has to be causally linked to. In *Lloyds TSB General Insurance Holdings Ltd v. Lloyds Bank Group Insurance Co Ltd*[2003] UKHL 48; [2003] 4 All E.R. 43 to be an insured a claim had to be:

> "for financial loss caused by a breach on the part of the assured or an officer or employee of the assured of the provisions of the Financial Services Act 1986 (including without limitation any rules or Regulations made by any regulatory authority or any self regulatory organisation pursuant to the provisions of the Act)…in respect of which civil liability arises on the part of the assured."

57. The specific nature of the insured claims informed the meaning of the causal requirement: the series of related acts and omissions had to have caused claims falling within the stated terms. Which serves as a useful reminder that aggregation clauses should be read as a whole and not word by word.

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