Aggregation: When two or more claims become one

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David has been rated for many years in the legal directories as a leader in the fields of property litigation and professional liability claims. He has been described *as "a highly experienced silk whose broad commercial chancery experience feeds into his sophisticated professional negligence practice. He handles a broad range of claims arising from business and property disputes, and also takes on cases involving insurance elements. He's a first-rate analyst of the facts, and an impressive authority in chancery law. He provides excellent, clear delivery to clients".* David's insurance work focuses particularly on issues relating to professional indemnity insurance but also extends to general commercial insurance. He has advised a major mutual indemnity insurer on its mutual status. Recent cases include the significant Court of Appeal decisions in *Baines v Dixon Coles & Gill [2021] EWCA Civ 1211* in which David Halpern QC acted for the successful Respondent.

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AGGREGATION: WHEN TWO OR MORE CLAIMS BECOME ONE.

David Halpern QC and Ben Elkington QC

Aggregation Clauses – An Introduction.

1. The purpose of an aggregation clause is "to enable 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."[1]

2. In his seminal book, our late and much missed colleague, Mark Cannon QC, gave a characteristically lucid exposition of the usual structure of aggregation clauses. He said that such clauses usually specify a unifying factor, such as an event or a cause, and also specify the degree of causal relationship which is required between the relevant unifying factor and the claim.

3. Aggregation clauses are to be construed using the same principles as apply to the construction of other clauses in insurance policies, and indeed of other contracts in general. The court construes the relevant words in the context of the document as a whole and in the factual, commercial and regulatory context which was known to both parties at the date of the contract[2].

4. In the case of solicitors' professional indemnity insurance, the regulatory context is particularly important. The terms of such insurance are regulated by the Law Society pursuant to s 37 of the Solicitors' Act 1974. Since 2000, when the Solicitors' Indemnity Fund ceased to provide ongoing cover and insurance returned to the market, the Law Society has discharged its function under s 37 by setting the MTC with which any policy must comply.

5. In 1983 the House of Lords in *Swain v Law Society*[3] emphasised that the Law Society was performing a public duty in regulating such insurance. Lord

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[1] *Lloyds TSB General Insurance v Lloyds Bank Group Insurance* [2003] Lloyd's Rep 623 in which Lord Hoffmann (at [14]) approved the statement of Moore-Bick J. in the same case ([2001] Lloyd's Rep IR 207 at 245).

[2] *Impact Funding Solutions Ltd v. Barrington Support Services Ltd* [2017] AC 73.

[3] [1983] 1 AC 598 at 618B-E.

Brightman said: "*I think it is clear that the principal purpose of section 37 was to confer on The Law Society the power to safeguard the lay public and not professional practitioners, since the latter can look after themselves*".

6. Although the regulatory context remains important, the Supreme Court has now made it clear that this does not mean that the policy should be construed in favour of the insured. On the contrary there should be a neutral interpretation. This is because the MTC are the product of negotiations between the Law Society and the insurance market. As Lord Toulson explained in *AIG v Woodman*[4], the Law Society "*has to balance the need for reasonable protection of the public with considerations of the cost and availability of obtaining professional indemnity insurance*".

7. There is a further reason for giving aggregation clauses a neutral interpretation. The same clause might in some cases benefit the insurer, by capping the total sum insured, and in other cases benefit the insured, by limiting the number of deductibles.

What is a Claim?

8. Before considering aggregation, clauses which deem two or more claims to be treated as a single claim, it is appropriate to consider what is encompassed within a single claim. If on a proper analysis there is only one 'claim', then there is no need to consider the issue of aggregation. Additionally, the number of claims may be important in determining the issue of attachment to a particular policy year (e.g. *Thorman v New Hampshire Insurance Co (UK) Ltd* [1988] 1 Lloyd's Rep 7).

9. Some policies have definitions of a 'claim' such 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.' However, the definition of 'claim' in some policies is concerned with aggregation rather than with what is or is not a 'claim' for the purposes of trigging cover.

[4] [2017] 1 WLR 1168 at [14].

10. In order to decide 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 (*West Wake Price v Ching* [1957] 1 WLR 45 at 55 & 57 (Devlin J.)). The following are illustrations.

11. In *Haydon v Lo & Lo (A Firm)* [1997] 1 WLR 198 a rogue clerk in the insured's probate department stole on 51 occasions, 43 times from one estate and 8 times from another. The first estate sued the insured directly. The second estate commenced 14 actions against other parties, and the insured was joined as a third party to those 14 actions. Excess insurers argued that each theft was a separate claim, so that the entire loss would fall on primary insurers. The Privy Council held that there were 2 claims: there was a single claim for restitution by the first estate; and a single claim by the second estate (despite the insured becoming involved in 14 different actions).

12. The Privy Council held that the formulation of the claim by the third party is a good starting point for determining whether there is one claim or more than one claim, but it cannot be decisive.

13. In *Citibank NA v Excess Insurance Company Ltd* [1999] Lloyd's Rep IR 122 the insured was an electrical contractor who had been found to have been negligent (i) in 1983 in the way in which they had laid some cables, (ii) in 1989 for fitting the wrong fuses to a switchboard, and (iii) in 1991 for failing to discover their earlier error in fitting the wrong fuses. As a result of those breaches a fire broke out, causing damage. It was argued that there were separate causes of the loss, and therefore separate claims. Thomas J. disagreed. There was only 1 claim because there was only 1 object claimed (namely compensation for the damage caused by the fire), therefore the aggregation clause was irrelevant. The fact that there were multiple causes of action did not mean there were multiple claims.

14. In *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 into 2 contracts to design and supply bridges in Ghana. The design of all bridges was flawed. The later designs had adopted the earlier, flawed work. Insurers argued that

there was only 1 claim in respect of the badly designed bridges. Morison J. disagreed. There were 2 separate contracts, and 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.

15. Thus a number of different wrongful acts can give rise to a single claim (*Haydon; Citibank*); but a number of different wrongful acts can give rise to a number of claims (*Mabey*).

16. The difficulty there can be in deciding how many claims are advanced is illustrated by the examples given by Sir John Donaldson MR in *Thorman v New Hampshire Insurance Co (UK) Ltd* [1988] 1 Lloyd's Rep 7 and the views he expressed in relation to those examples:

    16.1 An architect has separate contracts with separate building owners. The architect makes the same negligent mistake in relation to each. The claims by the building owners would be separate claims, despite having a factor in common (viz the same negligent mistake).

    16.2 An architect has a single contract in relation to 2 separate houses to be built on separate sites. If one claim is in respect of a failure to specify windows of the requisite quality and the other is in respect of the failure to supervise the laying of foundations, then the claims would be separate. However, if the complaint was the same in respect of both houses, there would be only 1 claim (so the Judge said).

    16.3 An architect has a single contract in relation to a number of houses in a development. A single complaint that they suffered from a wide range of unrelated defects and a demand for compensation for those defects would be a single claim. However, if the defects manifested themselves seriatim and each gave rise to a separate complaint, then they might be separate claims, or they could be regarded as enlargements of the original claim.

The Minimum Terms and Conditions for solicitors' indemnity insurance ("MTC").

17. Solicitors' PI policies tend to stick very closely to the MTC for obvious reasons. The MTC provide that any policy which fails to comply with the MTC must be severed or rectified so as to make it comply. This has the advantage for lawyers who advise on aggregation issues that decisions on one PI policy are often directly applicable to another insurer's policy.

18. The latest incarnation of the MTC is in Appendix 1 to the Solicitors' Indemnity Insurance Rule 2013. Clause 2.1 requires that the sum insured for any one Claim must be at least £2m, exclusive of defence costs (or £3m for LLPs and limited companies). Clause 3.2 deals with deductibles and does not prohibit the inclusion of a deductible, provided that this does not reduce the overall amount received by the client. The mechanism for aggregation is contained in clause 2.5 of the MTC, which gives an extended definition to "claim". This applies both to the limit of indemnity and to the deductible.

> "*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*."

19. It will be seen that clause 2.5 contains two separate bases for aggregation, subclause (a) which comprises four alternative limbs and subclause (b). Each subclause uses the phrase "*arising from*". This phrase is usually construed as requiring proximate causation. In other words, in order to be aggregated under subclause (a), one or more of its four limbs must be the dominant or effective cause of the losses which are sought to be aggregated[5]. Alternatively, in order

[5] *Sutherland Professional Funding Ltd v Bakewell* [2013] 1 LRIR 93 at [94], HHJ Hegarty QC (a solicitors PI claim).

to be aggregated under subclause (b), there must be a single "*matter or transaction*" which is the dominant or effective cause of the losses which are sought to be aggregated.

Breach of the SRA Accounts Rules

20. Terms used in the MTC are given the meaning accorded to them in the SRA Glossary. This defines "claim" 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 damages. For these purposes, an obligation on an insured firm and/or any insured to remedy a breach of the SRA Accounts Rules … shall be treated as a claim, and the obligation to remedy such breach shall be treated as a civil liability for the purposes of clause 1 of the MTC, whether or not any person makes 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 as a result of such breach ...*"

21. The first sentence of the definition accords with the usual meaning of "claim." The second sentence is more problematic because it is potentially at variance with the usual meaning of "claim". For example, it may lead to a claim on the PI policy which arises in an earlier year than the year in which the client actually makes a claim against the firm. As far as we are aware, the effect of this extended definition of claim has never been considered by the courts until the recent case of *Baines v Dixon Coles & Gill*, in which David appeared for the Bishop of Leeds, the Right Rev Nick Baines. One of the arguments which the insurer ran in favour of aggregation was that the various thefts from client account all gave rise to a single obligation on the firm to reconstitute the client account. In other words, the insurer sought to use this extended definition of claim as an aggregation provision. The Court of Appeal was not impressed by this contention and rejected it on the simple ground that the insurer did not in fact reconstitute the client account but paid individual victims of Mrs Box's theft until the insurer claimed that the limit of indemnity had been reached.

22. David suggested other reasons for rejecting the insurer's contention, but the court did not rule on these. In particular, he had a textual argument and a purposive argument. The textual argument is that the Glossary definition is entirely in the singular ("*an obligation … to remedy a breach of the SRA Accounts*

Rules … shall be treated as a claim"). Hence each theft from client account is a separate breach.

23. The purposive argument is that this extended definition was included in the Glossary for the purpose of enabling solicitors to comply with their obligations under the SRA Accounts Rules. Rule 1 makes it clear that the purpose of the Accounts Rules is to keep client money safe, whilst Rule 7 requires the solicitor to remedy the breach promptly upon discovery. If one partner has been raiding the client account, as happened in the Bishop of Leeds's case, the innocent partners will not necessarily have enough money of their own to comply with this obligation to remedy the breach. Hence it is necessary for the PI policy to respond promptly upon breach, without waiting for individual clients to bring claims. Looked at in this light, the purpose of the extended definition in the Glossary is not aggregation but acceleration of payment. It would be a cruel irony if this extended definition, which was designed to protect the public, could be used against claimants as an aggregation provision.

Limbs (i) and (ii) of subclause (a): "one act or omission" and "one series of related acts or omissions"

24. This formulation is substantially the same as the one which was construed in *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2003] 4 All ER 43. In that case some 22,000 claims were made against the Bank for pensions mis-selling. In each case the basis of the claim was breach of the Bank's duty to ensure that salesmen complied with the LAUTRO Code of Conduct. Each individual claim was small, but the combined claims totalled £125m.

25. Lloyds TSB had insurance against financial loss caused by its breach of the Financial Services Act 1986 giving rise to civil liability. There was a deductible of £1m per claim. The issue was whether there was 1 deductible or 22,000. If each claim gave rise to a separate deductible, then the Bank would recover nothing under the policy.

26. The aggregation clause stated that: "*If a series of claims shall result from a single act or omission (or related series of acts or omissions), all such third party claims shall be*

considered to be a single third party claim for the purposes of the application of the Deductible." This clause is almost identical to limbs (i) and (ii). The main difference is that the equivalent of limb (ii) is in brackets; we shall need to consider whether the brackets make any real difference.

27. The case went up to the House of Lords on a preliminary issue. The Bank argued that the losses were to be aggregated for the purpose of the deductible because they all flowed from the same act or omission, which was lack of proper training of each of the salesmen.

28. At first instance Moore-Bick J held that the lack of proper training for salesmen was a single act or omission which gave rise to all the claims; hence there was only one claim by virtue of the aggregation clause.

29. The Court of Appeal disagreed, saying that "*a single act or omission*" had to mean something which constituted the customer's cause of action; it could not refer to anything more remote. However, they reached the same conclusion as the judge in reliance on the second limb. They treated the words in brackets as a provision for aggregating a series of acts and omission which were related in the sense of having a common underlying cause.

30. The House of Lords reversed the Court of Appeal. There were two reasoned speeches, one by Lord Hoffmann and the other by Lord Hobhouse. They agreed with one another in many respects but disagreed on one important issue that has never been resolved. It could have been resolved if the other three Law Lords had agreed with either Lord Hoffmann or Lord Hobhouse. Instead they agreed with both.

31. Lord Hoffmann began with the first limb: "*a single act or omission*". He agreed with the Court of Appeal who had reversed Moore-Bick J on this point. The first limb specified a very narrow unifying factor. It allowed claims to be aggregated only if they all arose from a single act or omission. The unifying factor was said to be the Bank's failure to train the salesmen properly. But the customers were not suing the Bank for failing to train its salesmen properly. They were suing for individual breaches of the LAUTRO Code of Conduct by different salesmen on different occasions.

32. Lord Hoffmann said that the Court of Appeal had gone wrong in failing to apply the same logic to the second limb. Just as all losses had to result from a single act or omission in order to fall within the first limb, so all losses had to result from a "*related series of acts or omissions*" in order to fall within the second limb. This meant that the entirety of the series of acts or omissions had to be the cause of each loss which it was sought to aggregate. Lord Hoffmann drew attention to the fact that the second limb in *Lloyds TSB* was in brackets and said that the Court of Appeal's construction would allow the tail to wag the dog. He said that the Court of Appeal were wrong to look for a unifying factor outside the clause itself, i.e. the failure to train salesmen.

33. Lord Hobhouse agreed that the first limb required the single act or omission to be the proximate cause of all the loss. He agreed that in the case before him the single act or omission was the failure of each salesman to give best advice to each customer. However, he added that there might be a "*single act or omission*" if a salesman made a presentation to a room full of people, all of whom were persuaded to sign up to the Bank's pension scheme. In the case of the second limb, he said that there might be a "*related series of acts or omissions*" if the salesman prepared a misleading document and gave the same document to a succession of customers.

34. Lord Hoffmann expressly reserved his position on Lord Hobhouse's example. He said that the fact of showing the document to a succession of customers was enough to constitute a series of acts, but the totality of the acts could not be said to be the cause of each loss. Instead Lord Hoffmann gave an example of what he understood to be meant by the second limb. The person who distributed the misleading document might not have been negligent, but the document ought to have been corrected by someone else who was negligent. In that situation there were two acts or omissions which together caused the loss suffered by the customer.

Limbs (a)(iii) and (a)(iv): "the same act or omission in a series of related matters or transactions" and "similar acts or omissions in a series of related matters or transactions"

35. The original version of the MTC, formulated in 2000, was limited to the first two limbs. It appears that the insurers negotiated this formulation with the Law Society in the belief that it would enable them to treat as one claim multiple claims arising from similar acts or omissions, and not merely multiple claims arising from the entirety of the series of related acts or omissions[6]. However, the decision in *Lloyds TSB* showed the insurers that their belief had been wrong. This led to further negotiations between the insurers and the Law Society which resulted in the addition of limbs (iii) and (iv) as well as subclause (b). It is probable that the purpose behind (iii) and (iv) is to make provision for Lord Hobhouse's hypothetical examples, thus rendering it unnecessary to say whether or not Lord Hobhouse was correct in reaching his conclusion on the basis of limb (ii).

36. *AIG Europe Ltd v Woodman* [2017] 1 WLR 1168 is the leading authority on limb (iv). In that case a property developer was developing two holiday resorts, one in Turkey and one in Morocco. The developer instructed a firm of solicitors to devise a scheme to enable private investors to invest in either or both developments. The firm drafted a trust for each development, under which the solicitors were the trustees and the investors were the beneficiaries. Each investor paid money to the firm, who held the sums in an escrow account until the developer had entered into agreements to buy the Turkish property and the share capital of the company that owned the Moroccan property respectively. The money was then released to the developer, who became insolvent before completing either development. The investors sued the firm who had PI insurance with AIG. AIG sought to aggregate the claims under limb (iv).

37. The court directed a preliminary issue to be heard on assumed facts. At first instance Teare J held that all the claims arose out of similar acts or omissions but that they could not be aggregated because the transactions were not conditional or dependent on one another and hence were not "*related*".

38. The Court of Appeal disagreed, saying that there was nothing in limb (iv) which required the transactions to be dependent on one another. But the Court of

[6] See *Law Society Gazette* for 27 January 2005, quoted by Longmore LJ in *AIG* [2017] 1 All ER 143 at [29] and by Nugee LJ in *Baines* at [64].

Appeal went on to hold that there had to be an "*intrinsic*" relationship between the transactions. In doing so, the Court of Appeal fell into the same heresy as Teare J, in reading non-existent words into the aggregation clause.

39. On the appeal to the Supreme Court Lord Toulson gave the only judgment. Running to a mere 30 paragraphs, it is a model of brevity and lucidity. He referred to the decision in *Lloyds TSB* which he plainly regarded as applicable to limbs (i) and (ii), even though it was not a decision on the MTC and notwithstanding the brackets. He noted the difference between Lord Hoffmann and Lord Hobhouse but did not come down in favour of one or the other. As we have already suggested, this may be because it was unnecessary to resolve this difference in the case of the MTC, given the addition of limbs (iii) and (iv) which now cater for Lord Hobhouse's hypothetical examples.

40. There was no appeal from the trial judge's conclusion that all the claims arose from "*similar acts or omissions*". However, as Lord Toulson pointed out, this phrase alone would lead to almost limitless aggregation, because of the width of the word "*similar*". Hence the requirement, not only that the claims should arise from similar acts or omissions, but also that they should be "*in a series of related matters or transactions*".

41. Lord Toulson noted that limb (iv) does not elaborate on what is meant by "*related*", but he found this unsurprising, given that the clause may apply in a wide range of different situations. All that can be said is that the word "*related*" means that the matters or transactions "*must in some way fit together*". Determining whether they fit together is "*an acutely fact-sensitive exercise*"[7]. What he meant by this is that one should not seek to reformulate the clause or put a gloss on it, as the lowers courts had done, but should instead simply apply the words used in the aggregation clause to the facts of the case in question, in order to form a judgment as to whether or not the matters or transactions fitted together.

42. The transaction in which each investor participated involved an investment in a development, either in Turkey or in Morocco. Each investor entered into a

[7] *AIG* at [22].

bilateral agreement with the solicitors, which was intended to give the investor security by means of the escrow account and the trust deed. However, there was also an important multilateral element, in that all investors in the Turkish developments were co-beneficiaries under the same trust deed, and the same was true of the Moroccan development.

43. Lord Toulson held that all the transactions relating to the development in Turkey fitted together in two respects. Firstly, all the investors shared the common objective of completing the development project. Secondly, they were all co-beneficiaries under the same trust which was intended to give them security over the development site.

44. On the same reasoning, all the transactions relating to the development in Morocco also fitted together. However, Lord Toulson declined to aggregate the Turkish claims with the Moroccan claims. Although the two sets of claims bore a striking similarity with one another, they were not "*related*" to one another. To the contrary, each concerned a different development with different investors who were protected by different trusts over different assets.

45. There were some investors who had switched from the Turkish development to the Moroccan one. These crossover investors would not be allowed to muddy the waters. Any claim by a crossover investor in relation to Turkey would be aggregated with all the other Turkish claims, and similarly with any claim in relation to Morocco.

46. One aspect of the decision which is perhaps less satisfactory is the statement that the application of the aggregation clause is not to be judged exclusively from the viewpoint of the investor or the solicitor, but objectively taking the transactions in the round. This made no difference on the facts of *AIG*, because each investor knew or should have known that he was investing in the same development as his co-investors and that he was a beneficiary under the same trust deed. But it might matter on different facts. It seems odd that events which are unknown and unknowable to the claimant who sues a solicitor should be capable of resulting in cover being denied because of aggregation.

Subclause (b)

47. The alternative aggregation provision is in subclause (b). As far as we are aware, there is no authority in relation to this subclause. Applying Lord Toulson's reasoning, it will presumably be a fact-sensitive exercise to determine whether or not the relevant facts amount to a single matter or transaction which is the proximate cause of all the losses sought to be aggregated.

The Bishop of Leeds's case

48. The latest word from the Court of Appeal on the aggregation provisions of the MTC is *Baines v Dixon Coles & Gill*[8], decided on 6 August 2021.

49. The firm of Dixon Coles & Gill had acted for the Church in the north-east of England for over 100 years. The senior partner, Mrs Linda Box, was head of the firm's probate department and was also highly respected within the Church of England. She had been Registrar of one diocese and then became Chancellor of another. But unbeknown to the Church and to her two partners, she was also a thief who stole large sums over a period of at least 13 years, both from the Church and from various estates of deceased clients which the firm was administering. It is a measure of the seriousness of her crimes that, despite being 67 years old and having no previous convictions, and despite pleading guilty at the first opportunity, she was sentenced to seven years in prison.

50. The firm had PI insurance at the minimum level of £2m with HDI Global Specialty. The insurer sought to aggregate all the thefts on the ground that they all arose from her dishonesty. The insurer relied on the fact that there was a certain amount of "teeming and lading", i.e. raiding one client's money in order to pay a different client whose money had previously been stolen and who was calling for his money.

51. Although the Bishop of Leeds and the Leeds Diocesan Board of Finance were by far the largest claimants, the insurer disputed how much was owed to them. Whilst this dispute was ongoing, the insurer was paying those claimants whose claims it accepted. It did not take long before the total payments reached the indemnity limit of £2m. The Bishop was powerless to stop this, because it is well

[8] [2022] PNLR 5.

established that insurers pay on a "first come, first served" basis, and that there is no concept of payment pro rata as would apply under the Insolvency Act 1986[9].

52. So, the Bishop brought proceedings against the firm and also joined the insurer under the Third Parties (Rights Against Insurers) Act[10]. The Bishop applied for summary judgment. This was itself unusual, because previous cases, such as *Lloyds TSB* and *AIG*, had been decided by way of preliminary issues on assumed facts. However, the parties were unable to agree the facts in relation to teeming and lading. The Bishop's solicitors then learnt that another group of claimants were also suing the insurer. These claimants were various charities who were residuary beneficiaries under the will of the late Ernest Scholefield, whose money had been stolen by Mrs Box. They, too, had not received a penny from the insurer.

53. The Scholefield claimants also applied for summary judgment and an order was made for the two applications to be heard together. The existence of two sets of facts was helpful in that it enabled the court to consider whether the claims of the Bishop should be aggregated with those of the Scholefield beneficiaries.

54. The insurer opposed these applications relying on limbs (i), (ii) and (iv). The applications were heard by HHJ Saffman in Leeds. At the hearing the insurer abandoned reliance on limb (iv), which meant that the only live issues were limbs (i) and (ii). The Judge gave summary judgment in favour of both sets of claimants and declared that neither claim should be aggregated with the other claim, nor with any other claims that had already been paid by the insurer. The Judge gave the insurer permission to appeal on the ground that the issue of aggregation was of general importance. The Court of Appeal granted the SRA permission to intervene in the appeal, which it did in support of the claimants.

[9] *Cox v Bankside* [1995] 2 Lloyds Rep 437; see also *Baines* at [21].

[10] The claim was made under the 2010 Act or alternatively the 1930 Act, but at the hearing it was accepted that the 1930 Act applied. Although the 1930 Act requires the loss to be established by judgment or agreement before any claim may be brought directly against the insurer, HHJ Saffman held that the court could exercise its jurisdiction to grant a declaration before the loss had been established: *Guide Dogs for the Blind Association v. Box* [2020] EWHC 1948 (Ch).

55. In the Court of Appeal the insurer confined its submissions to limb (ii). It sought to escape from Lord Hoffmann's analysis in *Lloyds TSB* by saying that this did not apply to the MTC because the brackets around the second limb made all the difference. However, Nugee LJ, who gave the only judgment, rejected that argument. The emphasis on the brackets in Lord Hoffmann's speech was simply a graphic way of showing the absurdity of the conclusion reached by the Court of Appeal in *Lloyds TSB*, but the analysis was the same without the brackets. As Nugee LJ said: "*What is the point of selecting 'one act or omission' rather than 'one original cause' for Limb 1 if one is then going in effect to allow an underlying cause to be a unifying factor for a series of acts in Limb 2?*"[11] Nor did it matter that the insuring clause in the *Lloyds TSB* policy was much narrower than the insuring clause in the MTC.

56. Nugee LJ also placed weight on the fact that Lord Toulson clearly regarded the speeches in *Lloyds TSB* as determinative of Limb (ii). He noted the difference of opinion between Lord Hoffmann and Lord Hobhouse. It would appear that Lord Hobhouse thought that the second limb might apply if each loss flowed from one act in the series of acts, whereas Lord Hoffmann thought that each loss had to flow from the totality of the acts. However, that difference of opinion did not affect the conclusion in *Lloyds TSB* and it also did not affect the conclusion in the Bishop of Leeds's case. As Nugee LJ put it: "*Even on Lord Hobhouse's view, what might make the series a related one is that the very same act (giving the client a document) is repeated with more than one client. I do not see that Mrs Box's thefts are analogous. They are not the same act, repeated a number of times. They are no doubt similar acts, all flowing from her dishonesty; but that is not enough to make them a series of related acts for the purposes of aggregation.*"[12]

57. Nugee LJ held that there was nothing in *AIG* which affected this conclusion. After all, *AIG* concerned limb (iv), whilst the insurer in the Bishop's case was relying only on limb (ii). But he noted that Lord Toulson's reticence to accept limitless aggregation in relation to limb (iv) accorded with his own construction of limb (ii). The thefts from different clients were not related to one another, just

[11] *Baines* at [58].
[12] *Baines* at [72].

as the participation in the Turkish development was not related to the participation in the Moroccan development.

58. There is one loose end which was not tied up by the Court of Appeal. In the course of the hearing Phillips LJ considered what would happen if all the money was stolen from a mixed client account which held the funds of all clients. He suggested that it would be odd if the dishonest solicitor could decide which client should bear the loss. Because the point had never previously been raised by the insurer, the Court of Appeal did not decide it but left it open for a future occasion. In our view the answer to it may be as follows. The starting-point is always the client account ledger maintained by the solicitor. If money is wrongly debited to client A's ledger, that is a breach of trust in relation to A. If the solicitor then debits B's ledger in order to pay A, that is a breach of trust in relation to B which supersedes the breach of trust in relation to A. The fact that this has been achieved by teeming and lading is no more relevant than was the presence of the crossover investors in *AIG*.

59. The insurer has applied for permission to appeal to the Supreme Court and that application is still pending. However, subject to any appeal, the Bishop's case has established the important principle that dishonesty is a state of mind which may be a cause of loss, but it is not an act or omission, nor is it a series of acts or omissions. It is therefore not a basis for aggregation, and it makes no difference whether there has been teeming and lading.

Aggregation Clauses in other forms of professional indemnity insurance.

60. Outside the field of solicitors' PI policies, aggregation clauses come in a wide variety of different forms. Some are narrow, some are wide. The narrow clauses focus on events or occurrences. The wide clauses focus on causes or sources. This difference was addressed by Lord Mustill in *AXA Reinsurance (UK) Ltd v Field* [1996] 1 WLR 1026 (at 1035F-H). He contrasted the use of the words '*originating event*' and '*originating cause*.' He said:

> "In my opinion these expressions are not all the same, for two reasons. In ordinary speech, an event is something is [sic] which happens at a particular time, at a particular place, in a particular way. I believe that this is how the Court of Appeal understood the word. 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. Equally 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. To my mind the one expression has a much wider connotation than the other."

61. The decision in *AXA Reinsurance (UK) Ltd v Field* was considered by the House of Lords in *Lloyds TSB General Insurance v Lloyds Bank Group Insurance* [2003] Lloyd's Rep 623. The House of Lords again emphasised the width of an aggregation clause which includes "*original cause*" or "*originating cause*" wording. Lord Hoffmann stated as follows (at [15]-[16]):

> "The unifying factor is often a common origin in some act or event specified by the clause. But much will turn upon the precise nature of the act or event which, for the purposes of aggregation, the clause treats as a unifying factor. The more general the description of that act or event, the wider the scope of the clause. For example, in *Municipal Mutual Insurance Ltd v Sea Insurance Co Ltd* [1998] Lloyd's Rep IR 421 the unifying cause was expressed in very general terms:
>
> > all occurrences of a series consequent on or attributable to one source or original cause ...
>
> This meant that as long as one could find any act, event or state of affairs which could properly be described as a cause of more than one loss, they formed part of a series for the purposes of the aggregation clause."

62. Lord Hoffmann went on to refer to the decision of Lord Mustill in *Axa v Field* and that of Phillips J in *Cox v Bankside* [1995] 2 Lloyd's Rep 437, and stated (at [16]):

> "An "event", [Lord Mustill] said, was "something which happens at a particular time, at a particular place, in a particular way". A "cause" on the other hand, was less constricted: it could be a continuing state of affairs or the absence of something happening. The word "originating" was also in his opinion chosen to "open up the widest possible search for a unifying factor". This meant that in the *Axa* case the incompetence

> of a Lloyds 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, whereas in *Cox v Bankside Members Agency Ltd* it had been held to be the "originating cause" of such losses."

63. In the same case Lord Hobhouse contrasted the wording of the aggregation clause under consideration in *Lloyds TSB* with the wider wording of an "*originating cause*" clause. He then held (at [51]):

> "Returning to the aggregation clause in the present policy, there are no words of equivalent strength to those found in the *Axa* and *Municipal* cases – "attributable to" – "a single source" – "originating cause".

64. More recently in *AIG Europe Limited v OC320301 LLP* [2016] EWCA Civ 367[13], Longmore LJ made the following obiter observation about the width of an aggregation clause drafted using the phrase "*one source or original cause*" (at [21]):

> "The traditional and well-known way in which to formulate an extremely wide aggregation clause is to use words such as "any claim or claims arising out of all occurrences … consequent on or attributable to one source or original cause" or "arising out of one originating cause or series or events or occurrences attributable to one originating cause (or related causes)" [emphasis added].

65. In this context there is no difference between the words 'occurrence' and 'event.' In the Supreme Court in FCA Test Case (*FCA v Arch & Others* [2021] UKSC 1) Lords Hamblen and Leggatt said (at para. 67):

> "The word 'occurrence', on the other hand, like its synonym 'event', has a widely recognised meaning in insurance law which accords with its ordinary meaning as 'something which happens at a particular time, at a particular place, in a particular way.'

Spire Healthcare Limited v RSA [2022] EWCA Civ 17.

[13] While the decision of the Court of Appeal was overturned by the Supreme Court in *AIG Europe Ltd v Woodman* [2017] UKSC 18; [2017] 1 WLR 1168, these observations were not disapproved.

The Facts.

66. The proceedings arose out of the conduct of a Mr Ian Paterson, who was formerly a consultant breast surgeon. Over a period of at least 14 years Mr Paterson inappropriately performed surgical procedures on patients without their informed consent. Most of those patients were women. His conduct was both dishonest and negligent (i.e. a breach of the duty of care he owed to his patients).

67. Spire was responsible for the operation of two private hospitals where Mr Paterson carried out his unlawful acts, namely Spire Little Aston Hospital and Spire Parkway Hospital.

68. Mr Paterson was convicted of offences under sections 18 and 20 of the Offences Against the Person Act 1861. Initially he was sentenced to 15 years imprisonment, but that sentence was increased to 20 years by the Criminal Division of the Court of Appeal.

69. About 750 former patients of Mr Paterson brought claims against Mr Paterson, Spire and another defendant (whether by way of proceedings, letters before action or notification of an intention to bring a claim).

70. All the Patients' Claims alleged that Mr Paterson had acted negligently and in breach of duty. Mr Paterson filed a Defence in which he stated that he did not require the Patients to prove his breach of duty, and did not require them to prove that his breach of duty had caused the Patients' injuries.

71. The Patients' Claims were settled by way of an agreement to set up a settlement fund for distribution amongst the Patients. Spire's total outlay was about £37m.

72. Spire had the benefit of a combined liability insurance policy with RSA. Spire made a claim on that Policy. RSA accepted that Spire was entitled to an indemnity under section 4 of the Policy in respect of its legal liabilities for the Patients' Claims, and its defence costs.

73. However, a dispute arose between Spire and RSA as to the applicable limit of indemnity. The overall limit of indemnity was £20m, and there as a limit of

indemnity of £10m any one claim. Spire contended that the Patients' Claims did not aggregate together as a single claim, but instead fell into 2 groups, with all the claims in each of the 2 groups aggregating as a single claim. The 2 groups were as follows:

73.1 First, those Patients who needed breast surgery including a total mastectomy, but whose surgery was carried out improperly (because they received only a sub-total mastectomy) ("Group 1 cases").

73.2 Second, those Patients who did not need surgery at all, and who had been persuaded to have unnecessary surgery by Mr Paterson by the provision of false pathology results ("Group 2 cases").

74. On this basis Spire contended that there were 2 aggregated claims, each of which attracted a £10m limit of liability, so that it was entitled to recover the full amount of the overall limit of indemnity of £20m.

75. RSA's position was that all the Patients' Claims against Spire aggregated as one claim, so that only one £10m limit of indemnity was available. It paid Spire £10m.

The aggregation clause.

76. The aggregation clause provided as follows:

> "*The total amount payable by the Company in respect of all damages costs and expenses arising out of* ***all claims*** *during any Period of Insurance* ***consequent on or attributable to one source or original cause*** *irrespective of the number of Persons Entitled to Indemnity having a claim under this Policy consequent on or attributable to that one source or original cause shall not exceed the Limit of Indemnity stated in the Schedule*" [emphasis added].

The Judge's Decision.

77. The trial took place before HHJ Pelling QC. He accepted Spire's argument, and ordered RSA to pay a further £10m (plus interest and costs), over and above the £10m that it had already paid. The Judge's key reasoning was as follows:

78. It was decided in *Cox v Bankside* [1995] 2 Lloyd's Rep 437 that identical misapprehensions by different individuals could be treated as separate originating causes.

79. It followed that, where a single individual operates under two separate mis-appreciations or decisions, each resulting in negligent acts or omissions leading to multiple claims, there could be separate originating causes (being each of the separate mis-appreciations or decisions) even though only one individual was involved.

80. There were clear causative differences between the 2 groups of cases. Mr Paterson's propensity to dishonestly misrepresent tests results was the cause of the Group 2 cases, but not the Group 1 cases. His propensity to carry out sub-total mastectomies without first obtaining the informed consent of his patients was the cause of the Group 1 cases, but not the Group 2 cases. While both Groups strongly arguably involved dishonesty, Mr Paterson's dishonesty in relation to the two Groups was of a different kind.

The Court of Appeal Decision.

81. In its decision the Court of Appeal confirmed some now well established principles:

81.1 Aggregation clauses are to be construed in a balanced fashion without a predisposition towards a narrow or broad interpretation;

81.2 It is appropriate to follow the construction of identical or materially similar provisions in earlier cases, unless there is a clear contextual distinction or other strong reason that suggests it would be inappropriate to do so;

81.3 Aggregation clauses which refer to claims or occurrences "consequent on or attributable to one source or original cause" use a traditional and well-known formula to achieve the widest possible effect;

81.4 There is no distinction to be drawn between "originating cause" and an "original cause."

81.5 The word "event, occurrence or claim" describes what has happened; the word "cause" describes why something has happened.

81.6 "Original cause" does not mean "proximate cause" but instead connotes a 'considerably looser causal connection.' However, it is still necessary for there to be some causative link between the originating cause and the loss, and there must be some degree of remoteness that is acceptable. Not every 'but for' cause is sufficient to amount to an "original cause."

81.7 Thus in searching for the unifying factor, one must not go back so far in the causal chain that one enters the realm of remote or coincidental causes which provide no meaningful explanation for what has happened.

82. The Court of Appeal also considered an issue which had not previously been decided at appellate level, namely whether there is a distinction to be drawn between "source" on the one hand and "original cause" on the other. It held that there was no distinction to be drawn, and that the two expressions are interchangeable.

83. The Court of Appeal reversed the Judge's decision, reasoning as follows:

83.1 Mr Paterson was an independent contractor who was not a named insured. He had his own insurance. Thus Spire only had cover for legal liability for damages arising out of its own negligence, or the negligence of persons other than Mr Paterson.

83.2 Spire had asserted that it was liable to the Patients on 4 different bases. It was no part of Spire's case that the fact or nature of its liability depended on whether the patient making the claim fell within Group 1 or Group 2.

83.3 The negligence of one individual can be an originating cause for the purposes of this type of aggregation clause, even though his negligence may take different or multiple forms.

83.4 The Judge had found that all Mr Paterson's conduct was dishonest. Such dishonesty was a unifying factor. The Judge had been wrong to distinguish between different types of dishonesty.

83.5 The Judge's focus on Mr Paterson's motivation introduced unnecessary complication into what should have been a relatively simple and straightforward exercise.

83.6 There may be cases in which, on the facts, the behaviour of one individual will be too remote or too vague a concept to provide a meaningful explanation for the claims, but this was not one of them.

84. Lady Justice Andrews concluded:

> "As a matter of ordinary language, and applying the principles applicable to aggregation clauses expressed in these wide terms, it seems to me to be plain that any or all of (i) Mr Paterson, (ii) his dishonesty, (iii) his practice of operating on patients without their informed consent, and (iv) his disregard for his patients' welfare can be identified either singly or collectively as a unifying factor in the history of the claims for which Spire were liable in negligence, irrespective of whether the patients concerned fell into Group 1 or Group 2 (or both). None of the factors which I have identified could be described as falling within the realm of remote or coincidental causes which provided no meaningful explanation for what happened."

85. Spire has sought permission to appeal to the Supreme Court, and its application is currently outstanding. Subject to any appeal, *Spire* is authority for the proposition that the dishonesty or incompetence of an individual may be an "original cause" or "source" of multiple claims, even if the dishonest or negligent conduct in question takes different forms.

David Halpern QC and Ben Elkington QC

Disclaimer: *this handout is not to be relied upon as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.*