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Inside:

We examine an English case that could be a persuasive authority before an Australian court

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Allens Arthur Robinson



## Many claims or a single claim – the importance of aggregation clauses

Careful wording of aggregation clauses can make the difference in adequately protecting large corporations from many small claims arising from similar or related circumstances. Partner Andrea Martignoni looks at an English case that has relevance in Australia.

### Is your business adequately covered?

Many activities of large corporations expose them to the risk of a large number of relatively small claims arising from similar or related circumstances. Claims relating to defective product, misleading advertising, or breaches of obligations imposed under various consumer protection legislation, such as that contained in the *Trade Practices Act 1974* and the Financial Services Reform legislation, are examples.

The availability of effective insurance cover for such claims may depend largely upon whether the claims can be aggregated to form a single claim for the purposes of the insurance policy, or whether they must each be regarded as separate claims. If each must be treated as a separate claim, then the deductible applicable under the relevant policy will apply to each claim. In the current market, it is common for large corporate insureds to accept relatively high deductibles.

Subtle differences in the wording of aggregation clauses can affect the availability of cover, should the company face multiple claims arising from the same or similar circumstances. The recent decision of the House of Lords in *Lloyds TSB General Insurance Holdings and Others v Lloyds Bank Group Insurance Company Limited* went in favour of the insurer, overturning a prior Court of Appeal decision permitting aggregation.

## The facts

Following an investigation in 1994 by the UK Securities and Investments Board, the insured (Lloyds Bank Group Insurance Company Limited) was found to have committed widespread breaches of the UK Financial Services Act 1986 (*the Act*) in marketing and selling personal pension schemes.

The investigation revealed that many individuals had been persuaded to transfer to personal schemes without adequate advice about the risks, advantages and disadvantages. Consequently, the insured had committed various breaches of relevant statutory rules, including failure to 'ensure' that its sales representatives complied with the Code of Conduct referred to in the rules.

*The decision highlights the need for insureds to pay careful attention to the wording of aggregation clauses in relevant insurance policies, particularly (but not only) in any form of liability policy.*

The Act gave investors a cause of action in respect of these breaches of statutory duty. The insured, then members of the TSB Group, received about 22,000 claims. Most of the claims were for relatively small amounts. None exceeded £35,000. However, the total amount of the claims was very large. The insured paid out more than £125 million in compensation.

The insured then sought to recover under its insurance policy.

## The policy

The insured had a banker's composite insurance policy that covered it, and other members of its group of companies, against a variety of risks. This included liability to third parties arising from breaches of common law or statutory duties by employees.

The policy provided for a deductible of £1 million 'for each and every claim'.

The insured sought to rely upon an 'aggregation clause' in the following terms:

If a series of third party claims shall result from any single act or omission (or related series of acts or omissions) then, irrespective of the total

number of claims, all such third party claims shall be considered to be a single third party claim for the purposes of the application of the deductible.

## The decision

Lord Hoffman (with whom each of the other members of the court broadly agreed) accepted that the purpose of an aggregation clause was 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 of some kind.

He went on to observe that there is a distinction between an 'event' and a 'cause'. An event is something that happens at a particular time, at a particular place, in a particular way. A cause, on the other hand, is less constricted. He noted:

The choice of language by which the parties designate the unifying factor in an aggregation clause is of critical importance and can be expected to be the subject of careful negotiation.

Lord Hoffman observed that, on the wording before him, the unifying factor was a common cause, but that cause must be a 'single act or omission', or 'a related series of acts and omissions'.

The policy defined the term 'act or omission' to (relevantly) mean a breach 'in respect of which civil liability arises on the part of the insured'. It followed that the relevant act or omission had to be one that would be sufficient to give rise to liability on the part of the insured.

*The nature of the business should be taken into account when negotiating the wording of aggregation clauses.*

One of the insured's arguments was that the absence of a training or monitoring system was a relevant omission that was the common cause of many of the claims. However, Lord Hoffman observed that, even though this breached the rules, no civil liability would arise unless and until the insured's sales representatives had contravened the Act. Likewise, if such a contravention was to occur, then the insured would be liable, whether or not there was an adequate training and monitoring system. It followed that the absence of training and monitoring was not an act or omission from which the liability arose.



In spite of this, the Court of Appeal had held that the claims arose from a 'related series of acts or omissions'. It therefore found in favour of the insured.

The House of Lords disagreed, allowing the appeal and finding in favour of the insurer. The House of Lords considered that the wording of the clause required that a related series of acts or omissions would only be relevant if they operated together to result in each of the claims. It was not sufficient that one act should have resulted in one claim and another act in another claim.

***The choice of language by which the parties designate the unifying factor in an aggregation clause is of critical importance and can be expected to be the subject of careful negotiation.***

The House of Lords read the expression 'related series of acts or omissions' far more narrowly than the Court of Appeal. It regarded the expression as playing a subordinate role of covering a situation in which liability could be attributed to a number of particular acts or omissions acting in combination, but could not be properly described as arising from a single act or omission. That was not the case for the insured. The relevant acts or omissions were contraventions by the salesmen employed by the insured. There were different and separate acts or omissions applicable to each claim.

## **Implications of the decision**

The decision is not binding authority in Australia. However, no Australian authority runs contrary to this decision, so it is likely to constitute a persuasive authority before an Australian court. In the past, Australian courts have derived considerable assistance from UK authorities when considering the construction of aggregation clauses.

The decision highlights the need for insureds to pay careful attention to the wording of aggregation clauses in relevant insurance policies, particularly (but not only) in any form of liability policy.

Of course, there are some situations in which an insured would prefer an aggregation clause not to apply. Ultimately, it depends upon the number of claims and the amount of each claim. In proceedings

following the terrorist attacks on the World Trade Centre in September 2001, the United States Federal District Court held that each attack on each building was a series of related events for the purposes of an aggregation clause in the relevant insurance policy. Consequently, only one claim for the limit of cover was able to be made.

The nature of the insured's business may influence the kinds of claims that are likely to arise. A corporation which owns several office buildings is probably less susceptible to many small claims than a corporation that manufactures (and/or sells) household appliances. The nature of the business should be taken into account when negotiating the wording of aggregation clauses.

One inference that may be drawn from the reasoning of the House of Lords is that, if the aggregation clause had used the expression 'arising from a common originating cause' instead of requiring an act or omission which gave rise to liability, then the aggregation clause would have applied on the facts.

***No Australian authority runs contrary to this decision, so it is likely to constitute a persuasive authority before an Australian court.***

An example of a broader aggregation clause is that considered by the Victorian Court of Appeal in *Pacific Dunlop Limited v Swinbank (2001)* 11 ANZ Insurance Cases 61-496, where a clause provided that a 'series of occurrences arising directly from a common cause' was deemed to be one occurrence that happened on the day of the first occurrence.

In those circumstances, personal injury claims arising from defective coronary pacemakers made before the expiry of the policy period were able to be aggregated.



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