

**Aggregation in Insurance  
and Reinsurance Contracts**  
*Claims arising out of one event or occurrence*

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## 1. The relevance of aggregation clauses

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The maximum cover available under a contract of insurance or reinsurance is commonly expressed in terms of:

- (a) the amount of a claim; and
- (b) the 'aggregation' of the amount of the claims arising from any one occurrence

subject always to the policy or treaty limit.

'Aggregation' is the term used to describe the mechanism whereby several losses are added together for the purposes of making a single claim on an insurance or reinsurance policy. As a relatively discrete aspect of insurance law, recent cases have reinforced the extent to which outcomes for (re)insureds and (re)insurers can turn on the interpretation of 'aggregation clauses'. One such example is the Madoff ponzi scheme whereby some financial advisers of affected investors are being advised to aggregate their clients' claims in order to avoid paying several deductibles. The types of policies which could be exposed to claims arising from the Madoff scheme commonly allow losses arising from an 'event' or 'occurrence' to be grouped together as a single claim.<sup>1</sup>

The amount of indemnity available, both in relation to the limit on the cover and as to the application of each deductible, is often affected by aggregation clauses which aim to group the claims of several occurrences that originate from the same cause. Recent cases in Australia and the UK continue to illustrate the point that careful wording of aggregation clauses can make the difference in adequately protecting insurers and reinsurers from many small claims arising from similar or related circumstances.

## 2. Overview of aggregation clauses

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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, poor workmanship, misleading advertising, or breaches of obligations imposed under various consumer protection legislation, such as that contained in the *Trade Practices Act 1974* (Cth) and the Financial Services Reform legislation, are examples. Given the Federal Government's intention to introduce new legislation with the aim of protecting consumers against unfair contracts<sup>2</sup> and in relation to credit,<sup>3</sup> there is considerable potential for aggregation-related issues to increasingly be examined by the Courts in Australia.

The availability of effective insurance cover for potentially large-scale claims may depend on whether the claims can be aggregated to form a single claim for the purposes of the insurance

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<sup>1</sup> Berwin Leighton Paisner LLP, *Reinsurance Law Articles*, March 2009.

<sup>2</sup> See Treasury, *The Australian Consumer Law – Consultation on Draft Provisions on Unfair Contract Terms* (2009) <<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1537>> at 22 May 2009.

<sup>3</sup> See Treasury, *Exposure Draft Bill 1 – National Consumer Credit Protection Bill 2009* (2009) <<http://www.treasury.gov.au/consumercredit/content/legislation.asp>> at 22 May 2009.

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.

Insurers and reinsurers under liability insurance policies often seek to limit their liability for either the total amount payable during the period of insurance or in respect of the total claims arising from the **event** or **occurrence**.

Subtle differences in the wording of aggregation clauses can affect the availability of cover, should the insurer or reinsurer face multiple claims arising from the same or similar circumstances. As with any contract, the parties should ask themselves beforehand: "What do I want the policy to cover?" However, with aggregation clauses it is so often the case that parties look at the wording after the loss and try to straight jacket the claims into the wording depending on the most favourable interpretation from a financial perspective. The decision of the House of Lords in *Lloyds TSB General Insurance Holdings and Others v Lloyds Bank Group Insurance Company Limited*<sup>4</sup> went in favour of the insurer, overturning a prior English Court of Appeal decision permitting aggregation, and is now considered the leading authority in this area.

Aggregation clauses must be express, and cannot be implied. Interestingly, the following terms have been held by the Courts to not necessarily have the same meaning for the purposes of aggregation:

- (a) 'Act or omission',<sup>5</sup>
- (b) 'accident'<sup>6</sup>
- (c) 'event' and
- (d) 'occurrence'.<sup>7</sup>

In some cases, claims are aggregated on the basis that they arise from **occurrences** that are part of a series 'consequent on or attributable to one source or original cause'.<sup>8</sup>

Issues considered in further detail in this paper include the fact that temporal succession, that is, a series of events that are connected over time, has been suggested as the test of whether there is an identifiable 'series' of occurrences.<sup>9</sup> Additionally, this paper will address the matter of 'cause', 'event' and 'occurrence' not necessarily having the same meaning,<sup>10</sup> and the central issue concerning aggregation disputes being whether a particular loss or claim arose from a single act or

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<sup>4</sup> *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2003] 4 All ER 43.

<sup>5</sup> Note 4.

<sup>6</sup> *South Staffordshire Tramways Co Ltd v Sickness and Accident Assurance Assn Ltd* [1891] 1 QB 402.

<sup>7</sup> Note 4; *Distillers Co Bio-Chemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1; 2 ALR 321; 48 ALJR 136; *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664; *Midland Mainline Ltd v Commercial Union Assurance* [2004] Lloyd's Rep IR 22 at 38; [2003] EWHC 1771 (Comm).

<sup>8</sup> *AXA Reinsurance (UK) Plc v Field* [1996] 3 All ER 517.

<sup>9</sup> *Distillers Co Bio-Chemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1 at 10, 21 per Gibbs J and Stephen J respectively.

<sup>10</sup> *Lloyds TSB General Insurance Holdings Ltd v Lloyd's Bank Group Insurance Co Ltd* [2001] 1 All ER (Comm) 13.

multiple ones.<sup>11</sup> We will also consider the uncertainty surrounding the test of causation between the defined act and the loss.<sup>12</sup>

In the Madoff example referred to above, it would appear unlikely that reinsureds will be able to aggregate all losses which are related to Madoff's activities because of the general requirement for the 'event' or 'occurrence' to be causative. Additionally, losses which have arisen from different actions by Madoff (for example, separate investments in Madoff Securities) are not likely to be successfully aggregated under an 'event' or 'occurrence' worded clause. Conversely, an aggregation clause based on 'cause' may allow aggregation of Madoff-related claims. In particular, the 'soft' market conditions in recent years have encouraged some reinsurers to offer wider cover in order for their reinsurance services to remain competitive and may therefore find themselves more exposed in the event of a Madoff-related claim. The background and nature of these issues relating to terminology and causation will be considered in this paper.

The issue of aggregation in insurance and reinsurance policies is more frequently addressed by Courts in England rather than in Australia. Accordingly, this paper draws heavily on guiding principles which have emerged from English cases in addition to those Australian cases where the issues have been considered.

### 3. Meaning of aggregation clauses

The meaning of an aggregation clause was considered in 2003 in *Lloyds TSB*.<sup>13</sup> In this case, the House of Lords considered whether certain Lloyds TSB companies were entitled to recover amounts of compensation payable to policyholders as a result of a pensions misselling review. The House of Lords found that the words of the particular policy (which referred to a 'related series of acts or omissions') required that a single act or omission be the proximate cause of every claim, and therefore a general failure to ensure compliance with a code of conduct was not sufficient to make the acts a 'related series'. Importantly, however, the Court found that alternate words could have the effect of aggregating the claims where there had been a common failure to take requisite steps. The Court held that if the words of the policy referred to claims arising from one originating cause, then a common mistake resulting in different losses would justify aggregating the losses. It cited with approval this statement in an earlier judgment of the House of Lords, *AXA Reinsurance (UK) Plc v Field*<sup>14</sup> in which the Court considered the meaning of the words 'claims arising from one originating cause':

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.

If an insured is subject to a number of claims by third parties in respect of one 'occurrence,' it is important to determine:

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<sup>11</sup> *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664.

<sup>12</sup> *Midland Mainline Ltd v Commercial Union Assurance* [2004] Lloyd's Rep IR 22

<sup>13</sup> Note 5.

<sup>14</sup> Note 8.

- whether each claim is a **distinct** and **individual claim** for the purposes of the liability policy; or
- whether, as a group, all claims against the insured represent **just one claim** for the purposes of the policy.

The issues arising from making such a determination are compounded by the varying legal meanings given to the key words often found in aggregation clauses, as outlined below.<sup>15</sup> Essentially, the words 'originating cause' have been found to have a much stronger aggregating effect than the terms 'occurrence' or 'event'.

### 3.1 The words 'accident' and 'occurrence'

The term 'occurrence' has been held by the Courts to cover a wide range of insurance-related events, such as:

- a child's nightdress catching fire (*South Australian Housing Trust v State Government Insurance Commission (SA)*);<sup>16</sup> and
- the collapse of a tower crane (*Marr Contracting Pty Ltd v FAI Insurances Ltd & Ors*).<sup>17</sup>

In *Prentice Builders Pty Ltd v Carlingford Australia General Insurance Ltd*,<sup>18</sup> O'Bryan J found that 'occurrence' was defined, in a Construction Risks and Third Party Liability policy, as "an event or continuous or repeated exposure to conditions which ... unexpectedly or unintentionally causes ... loss of or damage to or destruction of property".

In this case, the insured had contracted to manufacture explosives. The construction of earthen mounds, which were intended to reduce the effects of an explosion, was sub-contracted to another company. When it had almost completed the work, the sub-contractor mistakenly believed that earthen mounds were faulty and proceeded to 'bench' the face of the mounds so that they could be re-filled. That rectification work was in fact unnecessary and it caused substantial damage to the mounds. It was held that there had been an 'occurrence,' and that an event intentionally performed caused the loss or damage was covered by the policy.

In *South Staffordshire Tramways Co v Sickness & Accident Assurance Association*,<sup>19</sup> one of the insured's tramcars overturned injuring 40 people. Its liability policy provided cover for "£250 in respect of any one **accident**." The English Court of Appeal held that where the expression "accidents caused by vehicles" was used, it meant "injuries accidentally caused by vehicles to person or property". Since each person injured claimed for injuries in respect

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<sup>15</sup> The cases featured in the following discussion are as identified in CCH, *Australian and New Zealand Insurance Commentary*, ¶33-170.

<sup>16</sup> (1988) 5 ANZ Insurance Cases 60-865.

<sup>17</sup> (1988) 5 ANZ Insurance Cases 60-854.

<sup>18</sup> unreported, Supreme Court of Victoria, 29 April 1988.

<sup>19</sup> Note 6.

of an accident to their person caused by a vehicle, and the fact that there were several accidents, each injured person was entitled to the limit of cover.

The words 'accident' and 'occurrence' were considered together in *Allen v London Guarantee & Accident Co Ltd*,<sup>20</sup> the insured's cart struck one person, causing him to crash into a second person, and both were injured. The policy provided that the insurer's maximum liability was limited to £300 for all claims "in respect of or arising out of any one **accident or occurrence**." Justice Phillimore held that although there were two accidents there was only one occurrence and therefore the insurer's total liability was limited to £300.

In *Forney v Dominion Insurance Co Ltd*,<sup>21</sup> an employee of a solicitor negligently advised three survivors of a motor vehicle accident:

- the deceased driver's widow, Mrs Bailey;
- their infant son; and
- his mother-in-law, Mrs Perry.

on their entitlement to claim against the estate of Mr Bailey (the deceased driver). The employee firstly arranged for Mrs Bailey to become the administrator of Mr Bailey's estate, which meant that she would have been unable to sue the estate if litigation proved necessary. In addition, the survivors' claims became statute barred. Consequently, the survivors sued the solicitor in negligence. He admitted liability and damages were awarded against him as follows: £2,262 to Mrs Bailey for her injuries; £150 to the infant son; £2,533 to Mrs Perry for her injuries; and £2,330 to Mrs Perry as administrator of Mr Perry's estate.

The solicitor's professional insurance policy provided that the limit of liability was "in respect of any one claim or number of claims arising out of the same occurrence, the sum of £3,000." The insurer argued that the occurrence out of which all claims arose was the same, namely a failure to issue an effective writ or writs before the expiration of the statutory time limit. Consequently, its obligation to indemnify the solicitor was limited to £3,000 in total.

Justice Donaldson held that:

'Occurrences', like accidents, can be looked at from the point of view of the tortfeasor or of the victim. [The loss by one survivor] of his right to claim damages from [the estate] was from his point of view a different occurrence from the similar loss by [the second survivor]. However, the provision of the policy which limits the indemnity contemplates the possibility that a number of claims may arise out of one occurrence. This seems to me to indicate that a number of persons may be injured by a single act of negligence by the insured — in other words that 'occurrence' in this context is looked at from the point of view of the insured."

The Court concluded that the employee's negligence occurred twice:

- First, when she allowed Mrs Bailey to become administrator of Mr Bailey's estate; and
- Second, when she failed to issue writs within the relevant limitation period.

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<sup>20</sup> (1912) 28 TLR 254.

<sup>21</sup> (1969) 3 All ER 831.

As the employee was negligent on two occasions, the insurer was liable to indemnify the solicitor in respect of the whole amount of Mrs Bailey's claim and up to a maximum of £3,000 in respect of the total claims of Mrs Perry (both for her own injuries and as administrator of Mr Perry's estate) and the son.

### 3.2 The words 'original cause' and 'series'

This following provision was considered by the High Court in *Distillers Company Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd*<sup>22</sup> where the policy provided for the total liability of the insurer for all compensation payable to any claimant or number of claimants for one occurrence or series of occurrences:

"[claims] in respect of or arising out of any one occurrence or in respect of or arising out of all occurrences of a series consequent on or attributable to one source or **original cause**."

The insured was a wholesale chemist which supplied New South Wales customers with Distaval tablets containing thalidomide which, when taken by some pregnant woman, had harmful effects upon their unborn babies. There were a number of actions pending against the insured for damages for negligence brought by or on behalf of children born with deformities alleged to have been brought about by the mother's ingestion of the Distaval tablets while pregnant. Under the insurance policy, the insurer agreed to indemnify the insured up to a maximum of \$100,000. The insured argued that it was entitled to the maximum limit of indemnity under the policy in respect of each claimant who succeeded in an action against the insured arising out of the use of Distaval, whereas the insurer contended that the maximum limit applied to the event as a whole and therefore, to all claims resulting from it.

Justice Stephen held that:

- the relevant limitation of liability clause referred to 'occurrence' and not to 'accident', the latter being more likely to operate favourably to the interests of an insured;
- that the word 'occurrence' referred to the mishaps in which victims suffered death, injury or illness and not to the actual death, illness or injury of those victims; and
- that all the occurrences were attributable to the **one source** or the **original cause**, whether it was a remote cause such as the distribution of the drug or a more proximate cause.

Justice Stephen also defined the term 'series' as being that of a number of events which:

- are of a sufficiently similar kind following one another in temporal succession; and
- are similar in nature.

Justice Gibbs agreed that any compensation payable to the claimants would be in respect of, or would arise out of, a number of occurrences of the one kind, which followed one another in temporal succession, and which constituted 'occurrences of a series' within the meaning of the policy notwithstanding that they did not take place in any progressive order.

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<sup>22</sup> (1973) 130 CLR 1.

In *Pacific Dunlop Ltd v Swinbank*,<sup>23</sup> the Supreme Court of Victoria was required to determine the meaning of 'occurrence' in the context of a 'series of occurrences.' Justice Mandie held that the purpose of the extension to the definition of 'occurrence' was to provide a benefit for the insured by limiting the potential application of the deductibles provisions, which specified the first \$25,000 of any amount otherwise payable in respect of each and every occurrence to be met by the insured. Hence, if one occurrence injured a number of persons, it was deemed to be one occurrence and only one deductible amount was applicable to the total of claims. Similarly, if a series of occurrences injured a number of persons took place, then that would also be deemed to be one occurrence. This extended definition was also in the interests of the insurer by its interaction with the limit of liability provisions. Under the primary policy there was a limit of \$3,500,000 for any one occurrence, and by deeming a series of occurrences to be one occurrence, regardless of the number of persons injured, a limit of \$3,500,000 was applicable rather than a series of separate limits for each occurrence or resulting claim in the series.

Justice Mandie adopted the *Distillers* position when interpreting of the word 'series' in 'series of occurrences,' noting that the phrase lent itself more readily to the interpretation than the phrase 'all occurrences of a series' in the *Distillers* case. He considered that it was sufficient to constitute a series of occurrences to find a number of events of a sufficiently similar nature following one another in temporal succession. He added that under the policy those occurrences must also arise **directly from a common cause or condition to constitute a relevant series.**

Notably, Mandie J held that he did not:

... consider that the phrase 'series of occurrences' should be taken to include occurrences happening after expiry of the period of insurance but rather should be taken to refer to occurrences within the meaning of the first paragraph of the definition which have happened within the period of insurance ... In other words one first identifies *all* occurrences, as defined by the first paragraph of the definition, which have resulted in injury or damage and have happened in the period of insurance and otherwise fall within [the insuring clause]. Then, and only then, for the purpose of applying the deductibles provisions and any relevant limits of liability, one looks to see whether *those* occurrences form a series.

The decision of Mandie J was affirmed on appeal in the Victorian Court of Appeal. Insurers and reinsurers should keep in mind Justice Mandie's explanation on the implications of the word 'series' when considering the enforceability of deductibles and limits of cover in policies containing aggregation clauses.

### 3.3 The United States position on 'occurrence'

In the United States, the term 'occurrence' has been interpreted to mean 'unfortunate event' in which the harm is inflicted, though not the harm itself. When there is a chain of causation, such as the manufacture and distribution of defective products, each of which causes harm, the 'occurrence' is the last, or immediate, link causing the harm. For example, under the United States interpretation, the harmful operation of a defective product, and not the insured's activity leading up to it, would be the relevant 'occurrence.'

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<sup>23</sup> (1999) 10 ANZ Insurance Cases 61.

Or, in the case of a claimant's ingestion of asbestos fibres that caused asbestosis, it was the occasion of the inhalation of the harmful material that was the 'occurrence', and not the insured's prior conduct in failing to take appropriate steps to avoid the exposure.<sup>24</sup>

Although not strictly binding on Australian Courts, the approach taken by the United States described above was important to the outcome of the 11 September 2001 litigation, now widely referenced as a landmark property insurance case addressing aggregation-related issues by many jurisdictions, as explained below.

#### 4. Aggregation clauses and property – World Trade Centre attacks

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The terrorist attacks on the World Trade Centre on 11 September 2001 demonstrated the need for (re)insurers and (re)insureds to ensure that 'event' or 'occurrence' word based aggregation clauses provide adequate cover. Estimates of the total loss resulting from the attacks have been between US\$40 billion and US\$50 billion, the magnitude of which has caused the aggregation-related issues described above to be vigorously borne out in insurance litigation.

The World Trade Center towers complex was transferred to private ownership in mid-2001, having been built and managed by the Port Authority as a public resource. The complex was then leased to a partnership of Silverstein Properties and Westfield America, which obtained property insurance soon thereafter to become the subject of intense dispute.

A United States District Court in the *Silverstein* litigation<sup>25</sup> held that term 'occurrence' in the relevant insurance policies<sup>26</sup> could only reasonably be interpreted as being destruction resulting from the intentional collision of aircraft into the World Trade Centre buildings resulting from a single co-ordinated plan of terror. The Court further held that the attacks were, at a minimum, a "series of similar causes." The Court found that the co-ordinated terrorist plot was the essential cause of the damage, and not the subsequent aircraft collisions and fires. The Court therefore held that the terrorist attacks constituted one occurrence and therefore the insurers were only required to provide one sub-limit of indemnity.

The World Trade Center litigation has demonstrated the impact which drafting and choice of words can have on the outcome of property-related insurance disputes, which in this case, meant that the insureds were not able to claim up to US\$3.5 billion in indemnity. The case also demonstrated that insurers and reinsurers should specifically include aggregation clauses, as the Courts (albeit in the United States in this case) will not imply them into policies. In Australia, the Courts have assumed that parties to an insurance or reinsurance contract gave any aggregation clause close and careful consideration.<sup>27</sup>

Additionally, it appears that a significant error of judgement resulted from over-attention by the insurers to some factors to the exclusion of others. The insurers may have focused more closely on

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<sup>24</sup> Note 15.

<sup>25</sup> *World Trade Center Properties LLC; Silverstein Properties, Inc.; Silverstein WTC Mgmt. Co. LLC, 1 World Trade Center LLC; 2 World Trade Center LLC; 4 World Trade Center LLC; 5 World Trade Center LLC v Travelers Indemnity Company.*

<sup>26</sup> Insurers were split into two groups for separate trials on the question of whether their policies were subject to the 'one occurrence' interpretation or the 'two occurrence' interpretation, depending on the nature of the wording in the policies.

<sup>27</sup> Note 4.

deductibles and on the probability of smaller claims than on the inclusion of large policy limits and the possibility of catastrophically large claims,<sup>28</sup> a lesson which should be heeded by Australian property insurers and reinsurers today.

## 5. Aggregation clauses in property construction contracts

### 5.1 The Australian position – defective construction work and deductibles

The judgment of Stephen J in the *Distillers* case was relied upon by Ambrose J of the Supreme Court of Queensland in *QBE Insurance Ltd v MGM Plumbing Pty Ltd*<sup>29</sup> which involved a broad form policy covering a variety of risks. MGM entered into subcontract with a construction firm to install waterproof membranes in the bathrooms of a large number of houses being built or renovated by MGM. The installation proved to be defective and water escaped into other areas of the houses causing damage in excess of \$77,000. The construction firm, alleging negligence on the part of MGM in carrying out the work, sued to recover the cost of rectifying the damage, and MGM sought an indemnity from QBE under the insurance policy.

Under the terms of the policy, MGM was required to pay a deductible of \$300 for every occurrence for which a claim was lodged, and the question which arose for decision was whether MGM was called upon to pay a deductible of \$300 in respect of each defective installation, or whether its obligation was limited to one payment only of the \$300 (assuming it was liable for the defects). The liability section of the policy defined 'occurrence' in very similar terms to those in *Pacific Dunlop* (above), in particular, "an event including continuous or repeated exposure to substantially the same general conditions, which results in ... property damage neither expected nor intended to happen."

Justice Ambrose regarded the provisions in the policy which referred to "continuous or repeated exposure to substantially the same general conditions" as being in relation to cases such as where a building operation conducted over a period of time caused damage to separate properties or different persons, for example, from vibrations or poisonous gases emanating from the site. The Court did not categorise the un-workmanlike method of membrane installation as a 'condition' exposure which caused all the deficient installations to arise.

In the opinion of Ambrose J, the occurrence or event in respect of which MGM was entitled to be indemnified was the un-workmanlike and unacceptable installation of each waterproof membrane when it was installed by the construction firm.

Accordingly, MGM was obliged to pay the \$300 excess on each, since each occurrence of property damage to an individual house was a separate 'occurrence.' Additionally, this case demonstrated that in the context of a claims-based policy, the Courts may look more closely at the form and nature of the claim, as distinct from the number of events or losses evident from the underlying facts.

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<sup>28</sup> M. A. Pembroke and L. P. Menzies, 'One event and aggregation: does it all add up?' (Paper presented at the AILA Twilight Seminar, 21 July 2004).

<sup>29</sup> (2003) 12 ANZ Insurance Cases 61-555.

## 5.2 Combined Contract Works policies – liability for remedy of defective work

Previous English cases had held that a negligent state of affairs is not an 'event.' *Seele Austria v Tokio Marine Europe Insurance Ltd*<sup>30</sup> involved an appeal from a decision that costs incurred by a sub-contractor insured under a Combined Contract Works and Third Party Liability policy in gaining access to remedy defective windows which it had manufactured and installed were not covered under the policy. The policy provided that "the Insurers will additionally indemnify the Insured in respect of intentional damage necessarily caused to the Insured Property ... to enable the ... rectification of Insured Property ... which is in a defective condition."

The Court of Appeal considered the effect of the deductible, which was "the first £10,000 of the costs of each and every occurrence or series of occurrences arising out of any one event." The 'occurrences' of damage were said to have common characteristics. However, the aggregation clause required that the separate instances of damage should arise out of one event. This contrasts with the decision in *Midland Mainline*<sup>31</sup> in which the words 'occurrence' and 'event' were found to be synonymous. In this case, there had been no common defect in design, rather poor workmanship, and the same mistakes being made repeatedly, were to blame.

However, ambiguity remains as to the distinction between 'events' and a 'continuing state of affairs' because it could be argued that the workmen would have been continually carrying out the defective orders.<sup>32</sup>

## 5.3 An alternate English view

A different conclusion was reached by the English Court of Appeal in the earlier *Trollope & Colls Ltd v Haydon*.<sup>33</sup> In this case, the insured contracted to build a number of houses for a local corporation as part of a housing project. It had insured itself against losses arising out of faulty workmanship by a policy which provided that "the [insured] shall bear the first £25 of each and every claim."

The insured was required to give a Deed of Warranty with respect to each house. Upon completion of the project, many houses were found to contain numerous defects and the insurer sought to contend that each defect constituted a separate claim. The Court of Appeal, however, held that all claims upon the insured in respect of each house constituted a single claim.

## 6. Aggregation clauses and weather events

The Australian position in relation to weather events is reflected in the High Court decision of *Government Insurance Office of NSW v Atkinson-Leighton Joint Venture*.<sup>34</sup> In this case, the deductible clause in a contractors' all risks policy required the insured to pay the first \$100,000 in respect of "each and every occurrence arising out of" certain events, including storm, tempest and

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<sup>30</sup> [2008] EWCA Civ 441.

<sup>31</sup> Note 12.

<sup>32</sup> Clyde & Co, *Weekly Update 10/08*, 13 May 2008.

<sup>33</sup> (1977) 1 Lloyd's Rep 244.

<sup>34</sup> (1981) 1 ANZ Insurance Cases 60-424.

loss or damage by water. The High Court held that the deductibles clause became operative in respect of each and every storm (or other relevant event) causing loss to the insured.

Accordingly, in order to assess the indemnity payable to the respondent an assessment had to be made of the pre-storm state of the works as compared with their post-storm state. This assessment was in respect of each storm, regardless of whether repairs necessitated by a particular storm had been fully executed prior to the occurrence of another storm. Once this assessment was made the amount deductible was to be subtracted from the cost of the repairs.

## 7. Professional Indemnity policies – aggregation of related claims<sup>35</sup>

The English High Court was called on to decide in *Standard Life Assurance Ltd v Oak Dedicated Ltd & Ors*<sup>36</sup> whether a professional indemnity policy incorporated a 'per claimant' excess in addition to the more usual 'per claim' excess, which had the effect of leaving the insured without cover.

The key issue for the Court to determine was whether Standard Life's professional indemnity policy permitted the aggregation of 97,000 individual claims that had a collective value of more than £100 million. Underwriters denied that it did and, in addition, argued that a separate excess of £25 million applied to each claimant.

The excess provision of the policy wording was stated as being "In respect of each and every Claim and/or Loss ... £25 million each and every claim **and/or claimant** including costs and expenses."

Interestingly, commentary on this case has indicated that none of the witnesses could recall ever seeing a financial institutions policy that adopted the 'and/or claimant' wording in order to impose a per claimant excess, whereas the words 'each and every claimant' would normally be used. However, none could give a plausible meaning to these words other than to impose a per claimant excess and the evidence indicated that these words had featured prominently on the placement slip issued by the underwriters. On this basis, the Court concluded that the policy did not permit the aggregation of related claims made by separate claimants.

Standard Life was left in a position where the Court's construction of the policy gave it a meaning that completely undermined its commercial objective to provide protection from a catastrophic event that generated large numbers of related claims for compensation. No individual claimant's claim came anywhere near to the extremely high excess, and Standard Life was not able to provide any evidence that would have allowed it to rectify the policy wording because of a mistake or to suggest that the underwriters had conducted themselves on the basis that there was no per claimant excess.

This case is a reminder that the Courts in England and Australia, when interpreting the meaning of a policy, will strive to give meaning to the words used, even though this may lead to a highly uncommercial result for one party.

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<sup>35</sup> A form of the commentary on this case was first published in Allens Arthur Robinson, *Annual Review of Insurance and Reinsurance Law 2008*, March 2009.

<sup>36</sup> [2008] EWHC 222 (Comm).

## **8. Concluding remarks**

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The particular drafting and use of the aggregation-related terms described in this paper can significantly impact on the level of cover for (re)insureds and the extent of exposure for (re)insurers. The now well-established principles from United Kingdom and Australian cases sets out guidance for writers of insurance policies in relation to achieving maximum certainty as to the operation of aggregation clauses. Other cases in this paper also demonstrate the recent application of those principles to practical scenarios with which Australian insurers and reinsurers would be familiar. When designing policies and crafting aggregation clauses, the need to forensically predict the range of scenarios and magnitude of loss which could potentially be covered by an insurance or reinsurance policy cannot be underestimated.

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**3 June 2009**