IS "THE GLOBAL FINANCIAL CRISIS" AN "ORIGINATING CAUSE"?

By Stuart Hill*

For the purposes of reaching their decision in *Standard Life Assurance Limited v ACE European Group & Others*,[1] the Court of Appeal was not invited to review the conclusions reached by the first instance judge in respect of aggregation. Consequently, we are left with the decision of Eder J,[2] which may not only take a wholly novel approach to aggregation, but also be inconsistent with previous guidance issued by the House of Lords (as was).

The Facts of the Case

This concerned the operation of the Standard Life Pension Sterling Fund ("the Fund") by Standard Life Assurance Limited ("SLAL"). In broad terms, the Fund had been marketed to investors as the equivalent of putting money on deposit. Despite this, the Fund had itself invested in Asset Backed Securities ("ABS") which, with the onset of the financial crisis, became increasingly difficult to value. To resolve this, SLAL used a new valuation methodology for ABS which produced a one-off fall in the value of the Fund.

In the face of complaints from customers, financial advisers and the FSA, SLAL took remedial action. They then turned to their professional indemnity insurers to recover the cost of that action. Because of the large number of individual investors affected by the revaluation, and compensated via SLAL's remedial scheme, the question naturally arose as to whether, for policy purposes, the remedial action had disposed of one "claim" subject to a single deductible, or numerous claims, each of which was subject to a deductible.

The Aggregation Provision

Clause 2 of the relevant policy provided as follows:

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

Aggregation by reference to "originating cause" language had, of course, been subject to prior judicial scrutiny. Despite the focus on the phrase "originating cause" those words fall to be considered in their context and so do not necessarily produce the same result on each occasion. What was said to be novel about the present case was that the aggregation provision permitted the amalgamation of claims arising "in connection with" an originating cause.

The Meaning of the Aggregation Provision

Eder J concluded that the words "in connection with" allowed an even wider search for an aggregating factor than those "originating cause" provisions which had previously been judicially considered with the result that:

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[1] [2012] EWCA Civ 1713.

[2] [2012] EWHC 104 (Comm).

> "The phrase "*in connection with*" is extremely broad and indicates that it is not even necessary to show a direct causal relationship between the claims and the state of affairs identified as their "*originating cause or source*", and that some form of connection between the claims and the unifying factor is all that is required."[3]

The Application of the Aggregation Provision to the Facts

Having reached his conclusion on the meaning of the Aggregation Provision, Eder J saw no difficulty in applying it to effect aggregation. He did so as follows:

> "In every case the originating cause of the complaint has been that Standard Life marketed the Fund as a safer investment than was in fact the case. It does not matter that, as the Insurers emphasise, the Fund was marketed over a period of years to many thousands of customers through numerous different channels using many different forms of marketing literature. The representation of the Fund by Standard Life as a safer investment than was in fact the case was a continuing state of affairs which persisted from the time when the Fund was established in 1996… until 14 January 2009… It is a factor which unifies both the claims which Standard Life was seeking to avoid or to reduce… and all the claims which have subsequently resulted in further payments of compensation".[4]

Analysis of the Conclusion as to the Meaning of the Aggregation Provision

Three related questions arise:

A. Has Eder J removed any causal element from the relationship required between the claims and their originating cause?
B. If the answer to question one is "yes", then where does one look for the connecting factor?
C. Was Eder J's conclusion dependent upon the use of "in connection with", and so confined to the wording in question in the case and its direct equivalents?

The answer to question 1 involves analysing the words which Eder J used against the background of the existing case law. In saying that "it is not even necessary to show a direct causal relationship" between the claims and their originating cause, he left open the possibility that an indirect causal relationship was nevertheless required. However, he continued in a manner which suggests that he rejected that possibility by saying that "some form of connection between the claims and the unifying factor is all that is required". Notably, the word "connection" is not preceded by the word "causal" and the implication of that word is ruled out by the definitive assertion that "some form of connection" is "all that is required". Consequently, on the face of the language which Eder J used, aggregation did not require a causal link of any kind whatsoever between the claims and their unifying factor.

Against the possibility that this represents too close a reading of Eder J's analysis, it is worth remembering that he himself stated that the words "in connection with" introduced a new

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[3] Paragraph 262.

[4] Paragraph 263.

element not considered in previous cases. It is also worth noting that the previous cases had all regarded the necessary link as being causal.

As far back as the Court of Appeal decision in *Caudle v Sharp*,[5] Evans L J made clear that:

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

Caudle v Sharp was a case where the aggregating factor was an "event" and so the requirement of a causal link needed to be supplied by additional language; in that case, the words "arisen out of". There is no need for additional language in the case of the phrase "originating cause" because, on the face of it, the very use of the word "cause" imports causation. The full aggregation wording may mean that the concept of cause is somewhat attenuated, but even in the case of *AXA Reinsurance (UK) PLC v Field* [1996] 1 WLR 1026, there is no warrant for the suggestion that, in authorising "the widest possible search for a unifying factor in the history of the losses which it is sought to aggregate", Lord Mustill was abandoning the requirement of a causal link. Clearly, Eder J did not think that Lord Mustill had done so, or Eder J would not have attached such significance to the novelty of "in connection with". The stress placed on that language surely also demonstrates that Eder J felt that the word, "source", the specified alternative to "originating cause" would, also without modification, impose causation requirements.

In essence, what Eder J tells us is that, where suitably qualified, the use of the phrase "originating cause" opens up a search for "some form of connection" between claims and a "unifying factor" which requires no element of causation for the purposes of achieving aggregation. The difficulty is that, prior to Eder J's analysis, one was guided in the search for the unifying factor by the knowledge that some thread of causation needed to link it and the claims. Without that guidance where does one go? Is it simply a case of being able to identify that the claims have something, indeed anything, in common?

In trying to answer question 2, it is necessary to recognise that Eder J's analysis could be used to justify a further radical departure from the traditional approach to aggregation. All of the prior cases proceed on the assumption that the unifying factor linking the claims would be something within the conduct of the underlying insured who was subject to the claims. In *Caudle v Sharp* this was alleged to be a "blind spot" of Mr Outhwaite, the active underwriter of the insured. In *Municipal Mutual Insurance Limited v Sea Insurance Company Ltd & Others*,[6] the unifying factor was the underlying insured's inadequate regard to their responsibilities as baillee. In *Countrywide Assured Group Plc v Marshall*[7] the unifying factor was sought in a lack of proper training of sales staff. No-one sought to find a unifying factor outside the conduct or circumstances of the insured who had been subject to the relevant claims. But once any question of causation disappears, why should the search be so confined? Obviously, this gives rise to the question posed in the heading of this article.

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[5] [1995] LRLR 433.

[6] [1998] Lloyds Rep IR 421.

[7] [2002] EWHC 2082 (Comm).

One perfectly respectable reading of "in connection with" is "in the context of". The concept of "The Global Financial Crisis" is a well-recognised description of the key economic fact of the last five years. The claims by investors in the Fund were brought during the period of The Global Financial Crisis, in the context of The Global Financial Crisis, and had a connection with The Global Financial Crisis in that the relevant revaluation was the consequence of the difficulty of attributing a value to ABS in the circumstances of The Global Financial Crisis. The third of these alternatives probably goes much further than Eder J's analysis requires, in that it comes perilously close to suggesting a causal link. But once causation has been done away with entirely, why isn't the general context in which the claims were brought sufficient to satisfy the requirement of "some form of connection" between the claims, and therefore adequate to operate as an "originating cause" for the purposes of aggregation?

We have been here before. It is worth quoting at length from Evans LJ in *Caudle v Sharp* which began with some observations at page 438 on the subject of the impact of the "blind spot" of Mr Outhwaite:

> "There is no difficulty in identifying "the Outhwaite incident" as an event in the history of Lloyd's. From the historical perspective, the "distinct and new phenomenon", leading as it did to major litigation and the Outhwaite settlement, was as much an event as were the examples suggested by the respondents in argument. The Second World War, the One Hundred Years War and even the Ice Age were all "events"."

His Lordship returned to this theme:[8]

> "Can the series of contracts itself be described as a single event? From the historical perspective, the answer is "yes"… either in the context of Mr Outhwaite's Syndicates or of Lloyd's as a whole. But in my judgment the clause gives rise to considerations not only of causation but also of remoteness. The Second World War was in that sense an event and in a similar sense each individual battle and every sinking at sea formed part of, or even arose out of, that event. The declaration of war could be said, in that sense, to have been one event out of which all such incidents arose. But neither the War itself nor the declaration could be said to be the relevant "one event" for the purposes of the clause (though a distinction might be drawn e.g. in the case of the Gulf War or the Falklands Invasion, which need not concern us here). The reason is that some degree of remoteness, or lack of remoteness, is implied in this insurance context. The test, however, is less stringent than the normal insurance requirement of direct and proximate cause."

From the above, it is clear that theories similar to The Global Financial Crisis representing an originating cause have been rejected in the past. However, *Caudle v Sharp* was considering the word "event", which we subsequently learned is a rather more constrained concept than that of "originating cause". Furthermore, Evans LJ relied upon the requirement of the causal link in the language he was construing in order to reject historical constructs as aggregating factors. Eder J has now told us that, on certain wordings at least, causation is no longer a relevant factor. On this basis, the distinction between "the Outhwaite Incident" and "The Global Financial Crisis" may only be a question of scale, and that distinction may be of no

[8] At page 440.

consequence. The search for a unifying factor may be no more than an exercise in arriving at a form of words which encapsulates what the claims have in common.

Question 3 is really concerned with the potential scale of the impact of this novel approach. Will it only affect aggregation provisions which are the same or materially the same as that under consideration by Eder J?

The potential for a wider application is founded in the use of "or attributable to" as one of the connecting factors between the originating cause and the claims. It is a more commonly used form of words than "in connection with". Eder J acknowledged that "or attributable to" had formed part of the aggregation wordings in consideration in both Municipal Mutual and Countrywide Assured. The courts in neither case came to the conclusion that this phrase had the same effect which Eder J ascribed to "in connection with".

It is far from self-evident that "or attributable to" is materially different in effect from "in connection with" as interpreted by Eder J. While words such as "arising from" clearly connote a causal relationship, "attribution" is not necessarily a function of causation. "Attributable to" can invoke considerations of context just as much as "in connection with". A historical artefact can be attributed to a particular century by virtue of the characteristics it displays. A painting can be attributed a particular period of an artist's work because of its stylistic characteristics. Because previous cases, such as Municipal Mutual, had proceeded on the basis that the link between claims and the unifying factor must be causal, there is no authority in the way of a High Court Judge determining that "attributable to" has the same impact on an originating cause wording as Eder J found "in connection with" to have.

Analysis of the Conclusion as to the Application of the Aggregation Provision to the Facts

In the traditional causation-based analysis of aggregation, the search for an originating cause involves considering factors which are one or more removes from the proximate cause of the claims sought to be aggregated. As Morison J put it in *Countrywide*:[9]

> "It is, I think, the force of the word "original" or "originating" in the AXA Reinsurance case, that entitles one to see if there is a unifying factor in the history of the claims with which the claimants were faced. In my view, the lack of proper training of the selling agents and selling employees was behind the whole problem. It was this which, on the assumed facts, was a consistent and necessary factor which allowed the mis-selling to occur. Maybe, the activities of individual salesmen were also causative but the clause entitles one to move back and find a single source or original cause; and in this case, there is one."

Conversely, aggregation can prove difficult, if not impossible, if the relevant provision is drafted in a way which confines the search for a linking factor to a consideration of the proximate cause of each of the claims.[10]

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[9] At page 201.

[10] See *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Ltd* [2003] UKHL 48.

Given the latitude which Eder J had given himself by way of his interpretation of the aggregation provision, it is interesting that he found the originating cause at the point of contact between SLAL and its customers when he concluded that:

> "In every case the originating cause of the complaint has been that Standard Life marketed the Fund as a safer investment than was in fact the case."[11]

This is a peculiar statement. The essence of the customer complaints was that SLAL missold the Fund to investors. The usual search for an originating cause would require the identification of something within SLAL's activities which caused or allowed the misselling to come about. However, in the above-quoted sentence, Eder J did no such thing. What he did was produce a generic description of the proximate cause of the claims. But this could not be further from the rigour of the search for a unifying factor within the proximate cause of each of the claims. The statement is pitched at such a generic level that there is nothing, or next to nothing, between it and accepting, as aggregating factors, "Standard Life breached its duty to customers" or "it was a Standard Life product". In the previous section of this article, at the end of my consideration of question 1, I posed the following question:

> "Is it simply a case of being able to identify that the claims have something, indeed anything, in common?"

On Eder J's approach, the answer to that question is almost certainly "yes".

The validity of such an approach must be regarded as in severe doubt by way of certain observations of Lord Hobhouse in the Lloyds TSB case. Having identified that one of the factual scenarios postulated by the insured was that "the 'consultants' failures to give best advice…. "were of an identical or very similar nature"" and concluded that this:

> "…would lead to the aggregation of individual acts of negligence by individual employees which were independent of each other but merely could be described as having a very similar character e.g. bad advice by bank managers."

Eder J's approach permits aggregation in the manner of which Lord Hobhouse disapproved. Eder J applied his analysis to reach a justification for aggregation which is all-but indistinguishable from "bad advice by bank managers".

The approach of Eder J takes aggregation from being an issue requiring careful analysis to being a result which is nearly unavoidable. Whether that is an outcome which either insurers or insureds will regard as desirable in all circumstances is open to question. Whether another judge will adopt Eder J's approach remains to be seen.

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[11] Paragraph 263.