Claims Aggregation in the Light of Recent Authorities

By Graham Eklund

Is it possible to find a common thread through the recent authorities on claims aggregation? Is "unity" the conceptual hook on which to hang consideration of these claims? If so, "unity" may require a broad definition.

It is possible to discern a thread, based around the search for a unifying relationship among disparate losses, suffered by different people, in different locations and at different times. However as soon as it seems right to come to that conclusion and to find that unifying thread, one is reminded that the starting point and the end point, is always careful consideration and construction of the policy wording. The thread of unity may be an illusion.

That this is so may be demonstrated by the recently decided *Lloyds TSB* case (*Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Company Ltd and Abbey National PLC v Lee* – Court of Appeal 8 November 2001). After detailed submissions by some of the best commercial minds at the Bar, after consideration by a highly respected judge in the Commercial Court (Moore-Bick J) and after consideration by very experienced commercial minds in the Court of Appeal, Hale LJ, describing herself as a family lawyer, observed:

> *"This is a very short point of construction on which a very large sum of money depends. The relevant wording is different from that in any of the other cases to which we have been referred. "*

The modern starting point is the judgment of Rix J in *Kuwait Airways Corporation v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664.

On 2 August 1990 Kuwait airport was seized by the Iraqis. Fifteen aircraft and a substantial quantity of aircraft spares were taken from the airport. Although four aircraft were flown out on 2 August 1990, others were not taken until some days later, including one which was not flown away until after the insurance cover ceased.

Each aircraft was insured for US$80m. There was a maximum ground limit of US$300m. The sum insured in respect of spares and equipment was not exceeding US$10m any one item/US$30m any one sending and US$150m any one location.

The Claimants claimed US$692 in respect of aircraft and over US$300m in respect of spares. Underwriters argued that maximum ground limit of US$300m was to be

regarded as an overall and absolute limit without any qualification such as "any one occurrence, any one location" and that it also embraced the spares.

Rix J found that in fact there was a qualification such that overall ground limit was in respect of "any one occurrence, any one location". Any one location was not relevant in this case.

The question became, whether the loss of the aircraft and spares, which had been removed from Kuwait over a series of days, could be regarded as "any one occurrence". An occurrence was not to be regarded as the same thing as a loss, since one occurrence could embrace many losses. However, the losses had to be examined to identify whether they involved such a degree of *unity* as to justify being described as or arising out of "one occurrence". And how should that question be approached? Rix J directed himself that it should be from the perspective of an informed observer.

What were the unifying factors, if any? It could properly be argued that the losses (the aircraft) had occurred on different days when they were flown beyond the control of the Claimants. But that would be to overlook the fact that in reality, control of those aircraft had been lost when control of the airport had been seized by the invading forces.

In finding there was one occurrence Rix J stated at p 689:

> "There is unity of time. There is also unity of location... There is unity of cause, for, whichever of the insured perils is the appropriate one, it operates alike in respect of all aircraft. There is unity of intent... the occurrence is the successful invasion of Kuwait, incorporating the capture of the airport and with it KAC's aircraft on the ground"

In short, Rix J seems to have asked himself the type of question ("Was there one loss of control") which Timothy Walker J came to ask in *Mann v Lexington* ("Was there one riot?"). Notwithstanding that the aircraft and the spares were not all moved away from the airport at the same time and the losses did not all therefore occur at the same time, he concluded there was one loss of control.

The critical finding was that there was unity (in the occurrence) of time, of location, of cause, of intent – namely the successful invasion of Kuwait incorporating the seizure of the airport (looking at the question broadly) or the capture of the Kuwait fleet at the airport (looking at the question more narrowly). Accordingly, KAC was only entitled to the maximum ground limit of $300m.

Would the result would have been the same if instead of the capture of 15 aircraft at one airport, five aircraft at each of three nearby Kuwait airports had been captured, as a result of the same Iraqi decision and intent, but on 2nd, 3rd and 4th of August 1990. The answer might have been the same, since they were so closely related in time and possibly in location. However, if the Court of Appeal approach in *Mann v Lexington* had to be followed (riot damage to 22 supermarkets as a result of orchestrated rioting, over two days was not one occurrence), the result might have been quite different and the Kuwait Airline's indemnity from insurers might not have been limited to $300m.

A further episode of civil unrest in foreign shores reached the Courts and Law Reports of England, as a result (at least indirectly) of the activities of another somewhat undemocratic leader, President Suharto. In *Mann v Lexington* [2000] 2 Lloyd's Rep 250, Timothy Walker J. had to consider the application of the word "occurrence" in circumstances less civil than the mis-selling of pensions. Damage had been caused by riots, which preceded the resignation of President Suharto in Indonesia.

A retrocessionaire's contract provided for reinsurance in the same terms as the underlying insurance which covered 67 supermarkets against damage from the risk of riot and malicious damage and several other perils, including tsunami (not a Japanese lunch dish!). The sum insured was

> "US$5m per occurrence but in the annual aggregate separately for flood and earthquake."

There was a deductible of:

> "2.5% of adjusted claim subject to minimum $4000 each location any one cause"

As a result of the riots, 22 locations were damaged over two days. The Court had to determine how many limits of liability of $5m applied. Timothy Walker J decided that in the context of this contract, an occurrence was capable of affecting more than one location and enduring over a period of two days. The question could be asked rather broadly: "Was this all one riot?".

He concluded that there might be multiple locations affected by any one occurrence and concluded that the occurrence was one which was capable of enduring for a period of time and of covering a wide area. Therefore, although 22 locations were involved, there was only one occurrence operating on the those

locations. Accordingly, the underwriters' liability was limited to the aggregated limit of $5m. Having regard to Rix J's approach in *Kuwait,* his conclusion seemed perfectly understandable and correct.

However, the Court of Appeal ([2001] 1 Lloyd's Rep 1), disagreed. It sought to ascertain whether there was sufficient unity surrounding the losses, to draw the losses at different locations into the one occurrence, i.e. the riot. It observed that the case was about different stores at different locations and that the losses had been caused by the acts of rioters over a wide area, in different locations and over two days. Underwriters were unable to point to any unity of time or of place – in fact the only unity they could point to was the fact that there was one riot, orchestrated by the government, present at each of the locations where the damage had occurred. Therefore, it was said (by underwriters) that there was only one occurrence.

Waller LJ, in delivering the leading judgment was unable to find the indices of unity, in particular, unity of time or unity of place. Thus there was more than one occurrence. Although the losses occurred as a result of a *related* peril, each was to be treated separately and the aggregate limit could not be applied to all the losses. In addition the Court of Appeal had in mind that the deductible clause provided for the deductible to be $4,000 any one location, lending force to the argument that occurrence was likely to be limited to one location, except in the case of damage by earthquake or flood.

The different decisions in *Mann* (at first instance and on appeal) demonstrate the subjectivity of interpretation in these cases and the difficulty of identifying whether there is one occurrence. Rix J in *Kuwait* had quoted Mr Michael Kerr QC's award in *Dawson's Field* when he observed, that whether the destruction of the aircraft (three aircraft blown up within a few minutes of each other, but some time after the fourth plane which the hi-jackers had taken) was to be described as one occurrence or a serious of occurrences, "The answer must be subjective". He found that the blowing up of the three aircraft within a few minutes of each other was one occurrence. The informed observer, standing and watching the preparation for the blowing up of the aircraft would observe one occurrence, one event, one happening. The question posed, was why if three aircraft became total losses because of a decision or order to blow them up together, should not be regarded as the carrying out of the decision or order.

Whether or not there has been one occurrence, may be a matter of subjective impression – the impression of the informed observer standing by watching the

events. It is difficult to see why the product of the orchestration of rioting happening over a confined period of two days, should not be regarded in the same light as the capture of the airport over a period of time and subsequent removal of the aircraft by different personnel. Once it is identified that it is the execution of the decision to capture the airport, which is the occurrence leading to the loss of several aircraft, (the occurrence causing a plurality of losses) it is difficult to see why the execution of the decision (to riot and cause damage) which leads to the loss of several supermarkets, should not also be regarded as an occurrence causing a plurality of losses.

The last decision in the recent line of authorities dealing with claims aggregation is *Lloyds TSB* case (*Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Company Ltd and Abbey National PLC v Lee* – Court of Appeal 8th November 2001). This was an appeal from the decision of Moore-Bick J.

Lloyds TSB and Abbey National were each sued by numerous disappointed investors in respect of pension mis-selling. The largest individual claim was £35,000, but the aggregated claims totalled around £100m.

The question was whether advice assumed to be in breach of the FSA Code and given to a number of investors from which numerous claims arose, was to be treated as a series of claims for the purpose of the deductible (all would fall within the deductible) or as one claim for the purpose of the deductible, (giving rise to liability under the policies of around £100m).

The deductible clauses in the two policies were similar. In *Lloyds TSB* it provided:

> "That 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"

Two substantial issues were debated:

(1) What was the meaning of *"shall result from any single act or omission"* and accordingly whether the claims could be brought within those words and therefore aggregated.

(2) What was the meaning of *"(or related series of acts or omissions")* and accordingly whether the claims could be brought within those words and therefore aggregated.

The Judge had concluded that the series of claims resulted from a single act or omission and that they were a related series of acts or omissions. Thus, both parts of the deductible clause could be used to aggregate the claims and only one deductible could be applied.

In the Court of Appeal, Potter L.J gave the leading judgment. The Court of Appeal disagreed with Moore-Bick J on the first point, (that the series of claims resulted from a single act or omission) but agreed with him on the second point (that the series of third party claims was a related series of acts or omissions). Potter L.J held that the series of acts or omissions could be related by reason of having a single underlying cause or common origin. Hale L.J held that the claims were not only similar in their subject matter, but also (it was assumed) linked to one another by a single underlying cause. Longmore L.J did not find it necessary to relate the series of omissions (as he identified them) to a single underlying cause. He considered that the omissions were related and constituted a related series of omissions, because they were an omission to do the same thing (to give Best Advice), although the consequences of each omission were different.

Insofar as there was any search for unity, Potter and Hale LJJ, seem to have relied on the underlying failure of management, as the feature which in fact related the series of acts and omissions, in the second part of the deductible clause. Thus the causative aspect of the single identifiable failure, provided the link necessary to establish the related series of acts or omissions. Longmore LJ seems to have found sufficient unity in the similarity of the claims.

Although the expression "result from" imparts the notion of causation, which in turn incorporates the concept of proximate cause, it may not be necessary for the relating feature to have causative potency. This seems to be emphasised by Longmore L.J.'s observation that the similarity of the omission may suffice to satisfy the "relating" requirement.

Conclusion

For the future, the fallout from the mis-selling of pensions would seem to be a much less certain guide than that from the invasion of Kuwait. *Lloyds TSB* does not answer any question about what is an occurrence or what is the correct approach to "unity". If Longmore LJ is correct, unity may be established by the mere similarity of claim. *Lloyds TSB*, as Hale LJ observed, is different from any other of the cases to which the Court of Appeal was referred. Those cases were of very limited assistance to the Court. I suspect *Lloyds TSB* is also going to be of very limited

assistance in the future. Rix J's judgment in *Kuwait* is likely to continue to chart the way forward, encouraging the search for unity, but permitting a subjective (and unpredictable) foray along the way.

Graham Eklund
2 Temple Gardens
London EC4Y 9AY