Aggregation – the End of the Line?

By David Tiplady

It is an abiding, if perhaps misguided, characteristic of the London Insurance Market that practitioners continue to profess an understanding of specific provisions in policy wordings, despite evidence of an ambivalent approach to interpretation from the courts which a decade or more of intensive litigation in the insurance field now provides.

One such provision is the aggregation clause. This comes in numerous varieties; however, the basic (as well as certain less common) types have been the subject of litigation on repeated occasions since the standard "event" wording first came to the attention of the courts in *Caudle v Sharp* in 1994, ([1995] LRLR 80 (Com Ct); [1995] LRLR 433 (CA).

Three Decisions

Following three major decisions in 2003 - *Lloyds TSB v Lloyds Bank* ([2003] Lloyd's Rep I.R. 623); *Scott v Copenhagen Re* ([2003] Lloyd's Rep I.R. 696) and *Midland Mainline v Commercial Union* ([2003] EWHC 1771) - it is strongly arguable that the process begun in *Caudle v Sharp* has now come to an end. Whether we are very much wiser than we were at the beginning is an open question.

However, the Editor of the London Market publication "Insurance Day" seems to have had little doubt. Following the decision of the House of Lords in *Lloyds TSB*, he wrote that the ruling represents "*a liberal dose of common sense and may well act as a healthy indicator of how UK law will handle the whole issue of what can be deemed a single event*." Setting aside the possibly pedantic observations that there is no such thing as UK law in this context, (the case was decided under English Law), and that the aggregation clause in question makes no reference to "*event*", it remains questionable whether this decision, taken in isolation or together with *Scott* and *Midland Mainline*, does indeed offer clear guidance for the future. Sadly, the road sign-posted by "common sense" is still likely to take us on a long and tortuous journey towards an uncertain conclusion.

Lloyds TSB

We begin with *Lloyds TSB v Lloyds Bank*. As a result of the Social Security Act 1986, employees were, for the first time, able to purchase a private pension plan instead of subscribing to their employer's occupational pension scheme. Sellers of pensions, such as the claimants in this case, were regulated by the Financial Services Act 1986. Under this Act, the claimants were obliged to comply with the rules of a

specified regulatory body. These rules provided that, when selling pensions to individuals, the claimants should give what was described as "best advice". Best advice required that an objective assessment be made of each individual's personal financial circumstances and requirements, so that a properly informed decision could be made as to whether that individual would be better off by purchasing a private plan or by remaining with the employer's scheme.

Unfortunately, the claimants, (in company with many other sellers), failed to properly train their sales force, as a result of which "best advice" was generally not given. In consequence, many thousands of individuals purchased personal pension plans whose financial interests would have been better served by staying within their employer's scheme. Approximately 22,000 such individuals made claims for compensation against the claimant companies. Although each claim was relatively modest, (none exceeded £35,000) the total sum paid in compensation by the claimant companies exceeded £125,000,000. The claimant companies sought to recover this sum (less deductible) from the defendant insurers.

The professional indemnity section of the Bankers Composite Insurance Policy gave unlimited cover for claims in excess of £1,000,000. Clearly, no single payment made by the claimant companies to their dissatisfied customers came anywhere near this deductible. However, the policy contained an aggregation clause which provided that: "*if a series of third party claims shall result from any single act or omission (or any related series of acts or omissions) then ... 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 claimant companies alleged, and the defendants denied, that this provision applied to the circumstances in which the £125,000,000 compensation had been paid.

Commercial Court Judgment

The judge at first instance, Mr Justice Moore-Bick, provided a useful reminder of the purpose of an aggregation clause, which 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 of some kind***" (emphasis added.) He then proceeded to find that the claims in this case could be aggregated, either because they flowed from a single act or omission (in the judge's opinion, the failure of the claimants properly to train their sales force) or, alternatively, from a "*related series of acts or omissions*": in other words, the numerous incidences of pensions mis-selling, which were linked, or "related", by the common factor that each member of the claimants' sales force was improperly or inadequately trained.

The relevant unifier in the TSB aggregation clause was identified by the phrase "result from". The defendants strongly urged upon the judge that this expression required the circumstance or set of circumstances covered by the aggregation clause, (i.e. the act, omission, or related series), to be the proximate cause of the losses in question. (While, in practice, losses normally have more than one cause, in order to attribute liability for those losses the law identifies one of them (generally speaking) as the "proximate" cause of the loss. Ultimately, this is done as a matter of impression, or common sense.)

The judge accepted that the words "result from" could signify proximate cause; they could also, however, just as well indicate a wider concept of causation, thus covering circumstances which, while not the proximate cause of the loss, nevertheless contributed significantly to it. The judge did not feel it was necessary to distinguish in this case between proximate and other, less direct, causes: it was sufficient, in his opinion, to address the issue "as a matter of commonsense ...". This somewhat unstructured approach was, in his opinion, justified when one considered that the aggregation clause covered losses resulting from a related series of acts or omissions. In his view, a related series could not be the proximate cause of the losses in question but must be more remote; nevertheless, the aggregation clause clearly contemplated that losses flowing from a related series could indeed be aggregated.

Ultimately, however, the judge was prepared to hold that the failure to train the sales force was, indeed, the single act or omission which proximately caused the losses in question. If, alternatively, the third party claims were proximately caused by the individual incidences of failure to give best advice, then these formed a related series. They were unified by a "single underlying cause", which was that same failure to train.

Court of Appeal Decision

The Court of Appeal upheld the judgment of Mr Justice Moore-Bick, on the grounds that there had been a related series of acts or omissions. However, they rejected the judge's finding that the losses resulted from a single act or omission. In their view, these words required that the losses be proximately caused by the circumstances in question, and the losses in this case had not been proximately caused by the claimants' failure to train. This conclusion was borne out by the definition of the term "act or omission" which appears in the insuring clause of the policy, to which the judge at first instance appears to have given insufficient attention. This definition requires that the relevant act or omission be one which gives rise to civil liability. No such liability attaches to the claimant companies'

failure properly to train their sales force. Only when individual members of the sales force failed to give "best advice" to individual customers did any such liability arise. Mr Justice Moore-Bick therefore appears guilty of the basic error of failing to place the contractual provision which he is called upon to construe into the context of the contract as a whole.

Nevertheless, the Court of Appeal accepted that the losses could be aggregated under the second part of the aggregation clause, applying to a related series. However, their Lordships differed as to what factor caused the series of acts or omissions to be related. In the opinion of Lord Justice Potter, who gave the leading judgment, they were related "*by reason of having a single underlying cause or common origin*": i.e. the failure to train. This mirrors Mr Justice Moore-Bick's decision. In the opinion of Lord Justice Longmore, however, they were related "*because they are an omission to do the same thing ...*". The third judge, Lady Justice Hale, questioned whether this could be correct (albeit without specific reference to her fellow judge). As she said, "*similarity is not the same as relationship ...*". The mere fact that things *look* the same does not mean that they are the same: the fact of similarity merely invites a search for some further circumstance, or underlying factor, which unites them.

House of Lords Decision

With the greatest respect to Lord Justice Longmore, this view appears to be irrefutable. The point however, is rendered moot by the fact that the House of Lords overturned this part of the judgment, while endorsing the Court of Appeal's decision on the requirement of proximate causation in relation to a single act or omission. In Lord Hoffman's opinion the decision on the first part of the aggregation clause – i.e. that a single act or omission must proximately cause the losses in question – required, as a matter of logic and business sense that the second part, the related series, must also be the proximate cause of the losses. Why, asked Lord Hoffman, should the insurers insist that aggregation be limited to losses proximately caused, when they flowed from a single act or omission, only to agree to a much wider or looser basis of aggregation when the losses flowed from a series of acts or omissions? Unfortunately, Lord Hoffman was unable to produce an example of a situation in which the second half of the clause, thus narrowly construed, would apply: in other words, when a series of third party claims would be proximately caused by a related series of acts or omissions. Nevertheless, he was not prepared to allow matters such as the practical application of this part of the clause (or, perhaps, more accurately, its lack of practical application) "*to produce a*

construction which undermines the balance of the clause", albeit that on his interpretation the second part of the aggregation clause is rendered effectively meaningless.

This is the decision which the editor of Insurance Day believes to be infused with "common sense". Paradoxically, the judgment which actually makes frequent reference to common sense and which purports to be ultimately based upon it – i.e. that of Mr Justice Moore-Bick – is completely reversed in the House of Lords, in a ruling which effectively emasculates half of the clause under consideration.

Scott v. Copenhagen Re

The judgment of the Court of Appeal in *Scott v Copenhagen Re*, by comparison, is a model of clarity and consistency. This case arose out of the first Gulf War, and, in particular, the seizure by Iraqi forces of Kuwait International Airport on 2 August 1990. The Iraqis found there, as expected, 15 aircraft, and substantial spares, belonging to the Kuwait Airways Corporation, ("KAC"). They also discovered, quite unexpectedly, a BA Boeing which had been delayed on its departure and should have left before the airport was captured.

The whole account excess of loss reinsurance contract, underwritten by Copenhagen Re and others, which was the subject of this litigation, contained limits for each and every loss. Loss was defined to include "*each and every loss or series of losses arising from one event*." The issue at first instance was whether each aeroplane, and the spares, constituted a separate loss, or whether they should all be aggregated.

Given the lengthy and complex chain of contracts by which these items were insured and reinsured, and given that various participants appeared more than once as parties to different contracts within the chain, it was far from clear where any particular party's best interests lay in determining this particular issue. It was therefore agreed that, in order to have the matter resolved, the Scott Syndicates at Lloyd's should make the case for aggregation, while Copenhagen Re would make the case against.

The judge at first instance held that the KAC losses should be aggregated, but that the BA loss was separate. Although he referred to earlier case law on aggregation during the course of his judgment, Mr Justice Langley commented that "*in a real sense I think the question is one of impression which does not bear too much analysis*".

Issues

The defendants did not appeal Mr Justice Langley's decision that all the KAC losses should be aggregated. The sole question on appeal, therefore, was whether the BA loss should also be included with the others. The appellant syndicates made a variety of points in relation to this. Following a lead in Mr Justice Langley's judgment, they contended that, although it could not be established immediately upon seizure of the airport that the BA aeroplane was lost, nevertheless, following the lapse of a reasonable time during which the aeroplane was not returned to its owners, the loss of the aeroplane was established and thereupon related back to the date of its initial capture.

Secondly, Mr Justice Langley had indicated that the aeroplane was destroyed "*between 13 and 26 February [1991]*", while the claim was being processed in the market. The appellants contended, however, that the physical destruction of the aeroplane took place later, by which time the claim had already been agreed. Hence, it was argued, the physical destruction of the aeroplane could not have been the cause of its loss.

Finally, the appellants argued that the unifying concept in the aggregation clause, signified by the words "arising from", denoted a weak or loose causal connection between the losses and the relevant event. Hence, although it might not be the case that the seizure of the airport was the proximate cause of the BA loss, nevertheless it was incontrovertibly an event in the chain of causation leading to that loss and was, therefore, comprehended by the unifying factor.

Judgment

The Court of Appeal rejected the contention that the loss of the BA aeroplane sometime in February 1991 related back to the seizure of Kuwait Airport in August 1990. Two reasons were given: first, because the aeroplane was lost by its physical destruction; and, secondly, even if lost by lapse of time, because such loss was not the inevitable consequence of the original seizure. The court left unanswered a dilemma to which this conclusion gives rise: if the policy renewal date were to fall between the seizure of the airport and the loss of aeroplane, then the insured would find himself in an impossible position. The loss would not fall into the earlier policy year, but the insured would be unable to insure the aeroplane for the following year, other than at a prohibitive premium. Since these were not the facts before it, the court declined to comment on this problem.

However, the court rejected the assertion that the loss had been caused by deprivation of possession. They agreed with the judge at first instance that the cause of loss was either the physical destruction of the aeroplane by friendly fire during Operation Desert Storm; or, alternatively, by the outbreak of war between Iraq and the United Kingdom. The Court of Appeal accepted the appellant's contention that the third possible cause of loss suggested by Mr Justice Langley – i.e. the inevitability of war – was incorrect: this could not constitute an event, but was, rather, a state of affairs or, perhaps, a judgment about a state of affairs.

Finally, the Court of Appeal ruled that, although the words "arising from" connote a causative link looser than that of proximate cause, nevertheless they signify that the causative link must be significant rather than weak. The seizure of the airport was not sufficiently close to the eventual destruction of the aeroplane to justify aggregating its loss with the loss of the KAC interests. Ultimately, however, the question remains one of judgement or judicial intuition.

"One event"

Another way of testing the matter is to consider whether, for the purposes of the aggregation clause, there was, indeed, "one event". The definitive analysis of this concept (and its equivalent "occurrence") is to be found in the Award of Mr Michael Kerr Q.C. in the *Dawson's Field Arbitration* (1972). It is unlikely that the law can or will be developed beyond the point reached here; any subsequent judgment is likely to be an exegesis upon this seminal text.

Mr Kerr said this: "*whether or not something which produces a plurality of loss or damage can properly be described as one occurrence ... involves the question of degree of unitities in relation to cause, locality, time, and, if initiated by human action, the circumstances and purposes of the persons responsible*".

This has come to be known as the "unities" test. However, it must be emphasised that it is not a "test" in any categorical, still less mathematical, sense. The fact that one (or more) of the unities is absent (for example, that the losses occurred at different times or in different localities) does not necessarily prevent them from being the product of one event. The test of the "unities" is a guideline only, which reinforces or facilitates the judge's own intuitive conclusion.

Midland Mainline Limited v. Commercial Union Assurance Company Limited

The final case is *Midland Mainline Limited v Commercial Union Assurance Company Limited*. This concerned the derailment of a passenger train caused by a cracked rail, and the subsequent closure of parts of the rail network for repairs to sections

of the track suffering similar defects. These closures caused disruption to the timetables of various train operating companies and consequent loss of passenger revenue. The train operating companies sought compensation for these losses from their insurers.

Two issues arose for decision: first, whether the claimant train operating companies had suffered a single loss of passenger revenue or a series of separate losses; and, secondly, whether, if there was a series of separate losses, those losses could be aggregated. The aggregation clauses in issue were in standard event wording: i.e. they covered losses "arising from a single event".

Mr Justice Steele decided that there had been a series of separate losses, but that those which fell within the policy period could be aggregated and presented as a single claim. Unfortunately, only a very small part of his extensive judgment is given over to the issue of aggregation. The judge accepted, without explanation or analysis, the submission of the claimants that the relevant event was the derailment itself. This, clearly, was not the proximate cause of the series of losses; these were brought about by the separate and individual decisions to close particular parts of the rail network from time to time in order to effect repairs.

Mr Justice Steele quoted from the judgment of Lord Mustill in *AXA Reinsurance v Field* ([1996] 2 Lloyd's Rep 233 (HL)), in which his Lordship contrasted the effect of an aggregation clause written with "event" wording from one written with "originating cause" wording. Lord Mustill famously commented that the word "*originating" signifies a unifying factor of the widest possible kind*". Having correctly observed that an aggregation clause in standard event wording does not require that the unifying factor be the proximate cause of the losses, Mr Justice Steele then went, quite inexplicably, to the opposite extreme and ruled that "*the qualifying single event can properly include the original causative event*". While, arguably, the derailment was a sufficiently strong and close link to the losses caused by the various track closures to justify aggregation, (the matter is, after all, one of judicial impression), this is not the way in which Mr Justice Steele explains his conclusions. On the contrary, the learned judge appears to have conflated the two distinct poles of interpretation represented by "event" wording and "originating cause" wording so carefully delineated by Lord Mustill in *Axa Reinsurance v Field*. In short, this judgment leaves an already complex area of law in an unnecessarily confused state.

The End of the Line?

Nevertheless, some important themes can be derived from these three judgments when examined together. First of all, the process of legal analysis of the constituent ingredients of an aggregation clause is unlikely to be carried any further by the English courts. Secondly, it has been made increasingly clear that the decision in any particular case regarding a given form of aggregation clause will depend upon its particular formulation and the facts into which that is set. Finally, it is noticeable how often, in these cases, the judges have referred to factors such as "intuition", "judgement", and "common sense". When expressions such as these are used in our courts, we can conclude one of two things: either that the particular judge is unable or unwilling to analyse the matter any further; or that the matter is, in fact, incapable of further analysis.

I was recently reading one of Alfred, Lord Tennyson's less well-remembered works: a narrative poem entitled "Aylmer's Field". In it, Tennyson describes the law as "*that wilderness of single instances*". It seems to me that, so far as the explication of aggregation clauses in contracts of insurance is concerned, we have reached the end of the line. The next steps, if any, to be taken by our courts will simply provide us with further examples of the workings of specific clauses; we will be, in other words, in Tennyson's wilderness, if we are not there already.

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This article is a version of an address given to BILA on 12 December 2003, updated to 12 January 2004.