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SOLICITORS' PROFESSIONAL INDEMNITY – THE AGGREGATION OF 'RELATED' CLAIMS

AIG Europe Limited v OC320301 LLP and others

The Court of Appeal has, for the first time (AIG Europe Ltd v. OC320301 LLP and others [2016] EWCA Civ 367), provided guidance on the aggregation clause contained in the Minimum Terms and Conditions applicable to Solicitors' professional indemnity policies. The Appeal Court has ruled that it is not necessary for claims to arise from transactions which are "dependent on each other" to be related claims but there must be an intrinsic (as opposed to extrinsic) relationship between the transactions. Predictably, whether a relationship is intrinsic will depend on all the circumstances.

Background

The case concerned two property developments by Midas (a UK property company) in Turkey and Morocco, for which it had attracted more than 200 investors. The developments failed when the local Midas companies were unable to complete the land purchases.

The investors brought proceedings against the Defendant, a firm of solicitors, alleging that it had wrongly released monies from an escrow account in breach of a "cover test" set out in a Deed of Trust designed to protect their investment. The investors, through the Trustees of the Trusts, claimed to have lost in excess of

£10 million.

Solicitors' professional indemnity policy

The solicitors were insured by AIG Europe subject to a limit of indemnity of £3 million any one claim. AIG brought proceedings seeking a declaration that the underlying claims should be treated as "one claim" as they all arose from "similar acts or omissions in a series of related matters or transactions" (clause 2.5(a) (iv) Solicitors' Minimum Terms and Conditions).

First Instance

The Judge at First Instance, Teare J, held that whilst all the claims arose out of "similar acts or omissions" they did not arise from "a series of related matters or transactions" and, as such, it was not permissible to aggregate the claims. He held that to be 'related' it was necessary for the transactions to be conditional or dependent on each other.

Court of Appeal

AIG argued that the only possible construction of the clause led to the conclusion that there was only one claim; all claims arose from a series of related matters or transactions, as they all arose out of Midas's property business which was operated in a uniform manner to all investors and in respect of which investments had been made in return for a promise that they would be protected by the escrow agreements and trust deeds.

The Trustees, unsurprisingly, supported the Judge's finding that an element of dependence was required in order to aggregate claims. The SRA were given permission to intervene and make oral submissions.

The Court of Appeal rejected AIG's contention on the basis that it was impossibly wide and would lead to very many claims being aggregated such that the aggregation clause itself would become almost meaningless. The Court distinguished the wording of the Solicitors' policy with that of traditionally wide aggregation clauses which used words such as "any claim or claims arising from one originating clause ...". Had the parties intended such a wide aggregation clause then, the Court reasoned, the clause would have been drafted in such terms.

Equally, the Court rejected the submissions of the Trustees and ruled that the Judge had gone too far when he held that the transactions had to be “dependent on each other”; the Appeal Court agreed that the transactions had to be inter-connected but that the degree of inter-connection does not need to extend to dependence.

Longmore LJ, delivering the judgment, held that the correct approach was to interpret the clause neutrally, rather than from the standpoint of either Insurers or the Insured and went on to review the history of the origin of the clause which he held to be the factual matrix against which it was to be construed.

The Court held that that the wording of the clause was “both itself imprecise and deliberately avoids the available wide formulations”. It was therefore appropriate to imply a unifying factor from the general context, with the result that an “intrinsic relationship” between transactions is required for them to be “related”; an extrinsic relationship would not be sufficient.

Having reached its decision on the interpretation of the wording, the Court of Appeal remitted the application of the test to the facts of the case back to the Commercial Court.

Intrinsic relationship – application

What then is required for there to be an intrinsic relationship between transactions?

The phrase “intrinsic relationship” has no established legal meaning and the judgment offers little guidance as to its application, presumably as the Court of Appeal was dealing with an appeal on issues of principle only (permission being refused to deal with factual issues).

Although the Court of Appeal was careful not to interfere with the Commercial Court’s application of its decision, it did suggest that transactions:

• “where the contracts or escrow accounts in respect of one investor referred to the contracts or the escrow accounts of the other investors; or

• which take place with reference to one large area of land in a particular country if they refer to or (perhaps) envisage one another",

might be related.

By contrast, transactions where there was a specific requirement that investors' funds were to be held in a separate designated account for each investor are unlikely to be related.

Further transactions which involve the sale of a number of units at a single development, will probably not, without more, be sufficiently related. The fact of geography is not sufficient. The circumstances of the payment will dictate whether there is an intrinsic relationship.

CPB Comment

The Court of Appeal has adopted the middle ground between the narrow interpretation adopted by Teare J at first instance (under which very few claims would be ‘related’) and the “impossibly wide” construction as contended for by Insurers that any degree of relatedness is sufficient.

However, it is disappointing that the Court of Appeal decided not to give further guidance as to how its ruling should be applied particularly given that this was the first reported consideration of the clause by the Courts. We will need to wait and see how "intrinsic relationship" will be interpreted.

Insurers will no doubt be pleased with the decision. Further, it does seem that the Judgment will assist Insurers when dealing with claims involving multiple and repeated fraud. Adopting the Court of Appeal’s analysis it should follow that transactions which are part of a single fraud will be related, the fraud providing the intrinsic connection. This may give some relief to Insurers faced with potentially large claim payments from such claims.

Insurers and those drafting policy wordings should be aware that the Courts will interpret such clauses against the background of other formulations of the clause, whether wider or more restricted. Insurers should therefore exercise great care when drafting aggregation clauses where the market gives them free rein.

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