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192 reasons to check your aggregation clause - NSW Court decision considers aggregate claims

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Introduction

A recent decision of the Supreme Court of New South Wales has highlighted the importance of aggregation clauses in insurance policies in determining an insured's and an insurer's liability for multiple related claims by separate parties. In circumstances where class actions are seemingly becoming more prevalent, the case of *Bank of Queensland Ltd v AIG Australia Ltd*[1] presents a timely reminder to insurers and insureds to carefully consider their respective liability when confronted with multiple claims of a similar nature.

Aggregation clauses

Aggregation clauses define the number of '*claims*' that have been made pursuant to an insurance policy. Triggering a policy's aggregation clause so as to aggregate multiple claims can affect the respective financial exposure of the insured or insurer. Aggregation clauses have application to both the limit of indemnity an insurer is liable to pay, as well as the number of retentions (deductibles or excesses) payable by an insured.

If an insured is faced with a large number of small claims that individually would not exceed the amount of the retention payment, whether they are to be treated as one claim for the purpose of calculating the retention, or multiple single claims, will determine whether the insured will reap any benefit from its insurance contract.

Likewise, an insurer may seek to aggregate a number of large claims so as to only be liable to pay the limit of cover specified in the policy for any one claim, potentially leaving the insured to pay any amount of the claims exceeding the indemnity limit.

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Background

The Bank of Queensland Ltd (**Bank**) was the defendant in class action proceedings brought by a group of the Bank's customers. During the period between March 2004 and January 2013, Sherwin Financial Planners (**SFP**) advised the plaintiff and 191 other investors (**Group Members**) to deposit funds into an account operated by the Bank. The Group Members claimed they were unable to recover the money deposited into the Bank's accounts and that SFP had effectively been operating a Ponzi scheme.

SFP had allegedly withdrawn money from the Group Members' bank accounts in breach of the Bank's contract with the Group Members, without proper instruction and through unauthorised signatories. The Group Members claimed against the Bank for, among other things, breach of contract and knowingly assisting SFP in its breach of fiduciary duties (**Class Action**).

The Class Action was settled in May 2018 for a payment of $12 million to the Group Members: $6 million of which was contributed by the Bank.

Issues

The Bank sought indemnity under its Civil Liability Insurance policy (**Policy**) for '*Loss*' and '*Defence Costs*' it had incurred in defending and settling the Class Action.

The Policy provided that the Bank was to pay a $2 million retention for each '*Claim'*. The definition of '*Claim'* in the Policy contained both an aggregation and a disaggregation clause. It provided:

1. Claims '*arising out of, based upon or attributable to one or a series of related Wrongful Acts*' would be considered a single Claim; and
2. If a claim involved a number of unrelated Wrongful Acts each act would constitute a separate '*Claim'*.

The issue for the court was whether the loss for which the insurer was liable under the Policy arose from a single '*Claim'* (in which case only one retention would apply) or from multiple '*Claims*'. If it was found that multiple '*Claims'* had been made, multiple $2 million retentions would apply so that, for all practical purposes, the Bank would be uninsured in relation to its $6 million settlement payment to the Group Members.

Decision

Multiple Claims

Stevenson J found in favour of the insurer on two grounds. Firstly, although His Honour found that the Class Action represented only one '*suit or proceeding*' under the Policy's definition of Claim, he concluded that each of the Group Members had commenced 192 separate '*Claims'* against the Bank.

In order to join the Class Action, each of the 192 members of the class completed a Class Member Registration Form. His Honour concluded that each form was a '*Claim'* because it set out the amount each member was claiming from the Bank and that they intended to hold the Bank responsible by seeking to participate in any settlement. It was held that the nature of the separate claims was not changed simply because those claims had been commenced within the context of the Class Action.

Claims could not be aggregated

Having found there were 192 separate '*Claims'*, His Honour went on to consider whether those '*Claims'* arose from a single or a series of related Wrongful Acts. His Honour found that the operation of the aggregation clause and the characterisation of Wrongful Acts also resulted in a finding of there being multiple '*Claims'* for the purposes of the Policy.

In his analysis, Stevenson J considered the purpose of an aggregation clause by citing Moore-Bick J in *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd*,[2] who said the purpose was '*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*' [**emphasis added**].

In this instance, His Honour considered the unifying factor, as indicated by the wording of the aggregation clause, was the characterisation of the term Wrongful Acts. The Bank submitted there was only one Wrongful Act as alleged in the Class Action statement of claim, or alternatively that there had been a series of related Wrongful Acts, such that (in light of the terms of the aggregation clause) only one Claim had been made against it.

Stevenson J considered each individual withdrawal by SFP from Group Members' accounts to be the relevant Wrongful Act for each '*Claim*'. His Honour then analysed the case law to determine whether there was a '*series of related*' Wrongful Acts such as to enliven the aggregation clause.

His Honour concluded that for events to be a '*series*' they must, to a sufficient degree, be similar in nature,[3] must have more than a mere contiguity of time or place,[4] and must be one of a kind or have some characteristics in common.[5] As regards the term '*related*' His Honour considered their Lordships' observations in *AIG Europe Ltd v Woodman*[6] that the word '*related*' implies that there must be some '*interconnection between the matters or transactions*'.

His Honour concluded that while the various purported withdrawals by SFP were '*similar in nature*' and had '*characteristics in common*' (given they occurred within the broader fraudulent scheme perpetuated by SFP), each was a separate act, made on a different occasion, from a different account, causing loss to a different party in response to different and separate instructions.

His Honour highlighted that some withdrawals were made as a result of the Bank breaching its mandate, some were within the Bank's mandate but were based on suspicious instructions provided by SFP and should have been questioned, some were made by unauthorised signatories and some were made after the Bank had knowledge of SFP's fraud. As a result Stevenson J did not consider that each of the withdrawals had a '*sufficient degree*' of similarity or an '*integral relationship*' such that they could be considered a '*series of related Wrongful Acts*'.

His Honour therefore concluded that multiple '*Claims*' had been made and multiple retentions applied, leaving the Bank effectively uninsured for the Class Action.

Comment

We wait to see whether the Bank will appeal the decision. In the meantime, this decision is a useful reminder of the importance for all the parties to an insurance contract to take the time to carefully review the wording of their aggregation clauses to ensure it achieves the desired outcome in claims involving a number of Wrongful Acts.

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[1] [2018] NSWSC 1689.

[2] [2001] 1 All ER (Comm) 13.

[3] *Distillers Co (Bio-Chemicals)(Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1 21.

[4] *Attorney-General v Cohen* [1937] 1 KB 478.

[5] *Ritchie v Woodward (Executor of The Estate of The Late Brian Patrick Woodward); Rujo Pty Ltd v Woodward (Executor of The Estate of The Late Brian Patrick Woodward); Barona Group Pty Ltd v Woodward (Executor of The Estate of The Late Brian Patrick Woodward)* [2016] NSWSC 1715 587.

[6] [2017] UKSC 18.

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