Neutral Citation Number: [2016] EWCA Civ 367

Case No: A3/2015/3082

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE TEARE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/04/2016

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE KITCHIN
and
THE RIGHT HONOURABLE LORD JUSTICE VOS

- -

Between:

AIG EUROPE LIMITED	**Appellant**
- and -	
1) OC320301 LLP (formerly THE INTERNATIONAL LAW PARTNERSHIP LLP)	**Respondents**
2) STEPHEN JOHN HOWELL	
3) JANINE ELSPETH HOWELL	
4) PETER GERARD JASON ESDERS	
5) RICHARD MARCUS WOODMAN	
6) ROYDS TRUSTEE COMPANY LIMITED (as trustees of the HOWELL PENINSULA PROTECTION TRUST and the MIDAS MARRAKECH TRUST and as representatives of the Beneficiaries)	
-and-	
THE LAW SOCIETY OF ENGLAND AND WALES (acting in its regulatory capacity as the Solicitors Regulatory Authority)	**Intervener**

- -
- -

Mr John Lockey QC & Mr Ben Lynch & Mr Peter Morcos (instructed by **Mayer Brown**) for the **Appellant**
Mr Tom Leech QC & Mr Edward Risso-Gill (instructed by **Royds LLP**) for the **5th & 6th Respondents**

Mr David Edwards QC & Mr Tim Jenns (instructed by **Russell-Cooke**) for the **Intervener**

Hearing dates: 21st & 22nd March 2016

- -

Approved Judgment

Lord Justice Longmore:

1. This is the judgment of the court.

2. This appeal turns on the true construction of an aggregation clause contained in an insurance policy applicable to all solicitors' indemnity policies pursuant to the requirement in the Solicitors' Act 1974 for compulsory liability insurance for solicitors and the Minimum Terms and Conditions ("MTC") required to be incorporated into such polices.

3. The claimant is AIG Europe Limited ("AIG"), a multinational insurance corporation. The first respondent is a solicitors' firm which from 1st September 2006 until it was dissolved in 2010 was called The International Law Partnership LLP ("ILP"). It was subsequently restored to the Register of Companies for the purpose of meeting claims brought against it ("the Underlying Claims"). The second and fourth respondents, Mr John Howell and Mr Peter Esders, were two of the firms' partners and the third respondent, Mrs Janine Howell, was an employee at the firm and Mr Howell's wife. The fifth and sixth respondents are the trustees of the trusts that are subject to the Underlying Claims and were appointed in place of the second, third and fourth respondents by a deed of appointment dated 24th February 2010. The first to fourth respondents have played a limited role in the matter and were unrepresented below. Although the fifth and sixth respondents are not parties to the insurance policy written by AIG, they are the principal opponents to the declaratory relief sought by AIG.

The Underlying Claims

4. ILP specialised in international legal work. In late 2004, when the solicitors' firm was called John Howell & Co, it was engaged by a UK property development company, Midas International Property Development Plc ("Midas"), to assist with its intention of building holiday resorts in a number of foreign locations, which included for present purposes Peninsula Village, near Izmir, in Turkey and Al Johara near Marrakech in Morocco. In particular, Midas sought "seed corn" capital in order to finance the development of the projects. ILP were engaged to devise a mechanism whereby Midas could solicit investments in the developments (either by way of loans bearing interest at attractive rates or by way of direct purchase of holiday homes) and those investments could then be held on some form of security for the investors. ILP devised a scheme whereby the investment funds were held in an escrow with ILP as the escrow agents who received the funds. A Deed of Trust was also granted in favour of the investors as beneficiaries, holding security over the land to be purchased. There was one trust for Peninsula Village and another trust for Al Johara. ILP were not to release the funds from the escrow to the local Midas developer until the value of the security held in the trust was at least the same as the total amount of the investments to be protected ("the Cover Test"). Once the Cover Test was met ILP was entitled to release monies from the escrow account for the purchase of a holiday home or for the purpose of generally financing the development.

5. Between April 2006 and August 2009 Midas was successful in attracting investors to the developments, including 214 investors who now claim to have lost their investment. On 30th April 2007 the local Midas company in Turkey signed an agreement for the purchase of development land in Peninsula Village at a price of €6.4 million. In or about November 2007, Midas agreed to purchase a Moroccan-

based company, Les Kasbahs du Sud ("Kasbah") which owned a large area of land near Marrakech for €13million. On various occasions ILP authorised the payment of monies including from the Marrakech escrow on dates between November 2007 and February 2008 and from the Peninsula Village escrow in October 2008. However, the local Midas companies were unable to complete the contract for the purchase of the land in Turkey or for the land-owning company in Morocco which in turn led to the failure of the two developments.

6. There is a dispute about the reasons for these failures. It is said that, although Midas or ILP established some sort of security in respect of the Peninsula Village, it was always subject to what was called a "usufruct" in favour of the vendors. Likewise the security established over the shares in Kasbah was only over a minority shareholding and was in any event subject to prior pledges in favour of other shareholders. The failures are also said to have arisen because the FSA in England prohibited Midas and its subsidiaries in May 2008 from receiving any further investment in relation to the developments. By November 2009 Midas had entered liquidation, and it was found that all the invested monies held in the escrow accounts had been paid out.

7. The 214 investors brought what have been called their Underlying Claims in the Chancery Division (one claim in relation to each trust) on 20th August 2013 and 19th September 2013 respectively. There is a prospective trial window of 1st February to 30th April 2017. In each action the case of the 214 investors is (inter alia) that ILP failed to apply the Cover Test properly when electing to release the investment funds from the escrow, with the consequence that the investors have lost over £10million. The principal causes of action are in negligence, breach of fiduciary duty, misrepresentation and breach of the escrow agreements. The claimant investors may on investigation be found to fall into five broad categories:-

   i) those who lent money to the Peninsula Village development which was paid out of the escrow account in April 2007;

   ii) those who lent money to the Marrakech development which was paid out of the escrow account in November 2007;

   iii) those who lent money to the Marrakech development which was paid out of the escrow account on various dates between November 2007 and February 2008;

   iv) those who had paid money to purchase holiday homes in Peninsula Village which was paid out of the escrow account in October 2008; and

   v) those who had originally entered into loan or purchase agreements regarding Peninsula Village but following planning delays were encouraged to invest in the Marrakech development instead – also referred to as the "crossover" investors.

The policy of insurance

8. ILP had insurance cover with AIG dated 1st October 2008. Pursuant to the terms of the policy AIG now provides run-off insurance cover to ILP on the same terms as the policy, for the six year period commencing from 30th September 2009. The AIG

cover has a limit of liability of £3million and a retention or excess clause of £7,500 subject to an overall aggregate limit of £22,500. There was an aggregation clause in the AIG cover, but it is common ground that it is not in the same terms as the aggregation clause 2.5 in the MTC and thus the latter was the governing clause. Clause 2.5 of the MTC entitled "One Claim", provides as follows:-

> "The insurance may provide that, when considering what may be regarded as one Claim for the purposes of the limits contemplated by clauses 2.1 and 2.3:
>
> (a) All claims against any one or more insured arising from
>
> (i) one act or omission;
>
> (ii) one series of related acts or omissions;
>
> (iii) the same act or omission in a series of related matters or transactions;
>
> (iv) similar acts or omissions in a series of related matters or transactions
>
> and
>
> (b) all Claims against one or more Insured arising from one matter or transaction.
>
> will be regarded as One Claim."

The Judgment

9. On 4th March 2014, AIG filed a claim form in the Commercial Court seeking a declaration that the Underlying Claims were to be considered "One Claim" for the purposes of the Aggregation Clause. On 14th August 2015 Teare J refused to grant AIG the declaration it sought. He said (para 40):-

> "… the most natural meaning of the phrase "a series of related matters or transactions" in the context of a solicitors' insurance policy is, in my judgment, a series of matters or transactions that are in some way dependent on each other. It is difficult to talk of transactions being related unless their terms are in some way inter-connected."

It was common ground on the pleadings that the individual transactions were not dependent on each other. The judge plainly thought, therefore, that there are 214 claims, although he did not incorporate that conclusion into his formal order which merely refused the claimant the declaration sought in the Claim Form.

10. The judge granted AIG permission to appeal and also granted the Trustees permission to argue on the appeal that there were two claims, one relating to Peninsula Village and the other to Al Johara. The parties then sought an expedited hearing since any decision would be likely to impact on insurance premiums of subsequent years

beginning on 1st October. They said further that 3 days would be required for the appeal since they wished to obtain findings of fact for the contentions pursued by the parties when the judge had not found it necessary to make any such findings, it being accepted that none of the transactions were inter-dependent. When the application was put before Longmore LJ, he took the view that a 3 day expedited hearing was not justified but that there should be an expedited hearing to address issues of principle only. He asked the parties to agree a list of issues of principle and, if possible, an agreed statement of facts. That has now been done and this judgment will address those issues of principle as far as appropriate.

Submissions

11. Mr Lockey QC for AIG submitted that there was no justification for reading into the phrase "a series of related matters or transactions" a requirement that they be dependent upon one another for the purposes of the aggregation clause. He contended further that the only possible construction of the phrase led to the conclusion that there was one claim but accepted that, if this court was not prepared to make the necessary factual findings in support of that conclusion, there would have to be a trial before that conclusion could be incorporated into a judgment.

12. Mr Leech QC for the Trustees supported the judgment and referred to AG v Cohen [1937] 1 KB 478 in which Greene LJ had said that the word "series" means "something of which it can be said that there is some integral relationship between its parts".

13. We gave the Solicitors' Regulatory Authority permission to intervene and make oral submissions. On its behalf Mr Edwards QC said that the clause required a relationship between the matters or transactions. Inter-dependence would satisfy that requirement but the clause could have a wider connotation; there had to be at least some intrinsic connection between the relevant matters or transactions, not merely a connection with some external common factor such as that the transactions or matters were conducted by the same solicitor or both related to the same geographical area.

Meaning

14. One must start by trying to ascertain the literal or natural meaning of the aggregation clause.

15. AIG do not suggest that ILP's acts or omissions constitute one act or omission or one series of related acts or omissions or the same act or omission in a series of related matters or transactions but it does contend that they constitute

> "similar acts or omissions in a series of related matters or transactions."

For this purpose it is not enough that the similar acts or omissions occurred on their own; they have to occur "in a series of related matters or transactions" and it is this phrase which is at the centre of the debate.

16. The words "matters or transactions" are common enough in policies covering solicitors who may receive instructions in relation to a "matter" such as drafting a will

or negotiating a compromise which would not themselves be "transactions"; a solicitor may also be required to perform a transaction such as concluding a contract of sale or drawing up and executing a conveyance or a transfer. The phrase "matters or transactions" is intended to cover all aspects of a solicitor's business and it may not be of great concern whether the source of a solicitor's liability is a matter or a transaction. In the present case, however, it is more natural to say that the liability arises from negligence in relation to a transaction since the making of the contracts and the setting up of and the transfer of money from an escrow account are essentially "transactions" rather than "matters". The critical question is whether the negligence or breach of duty occurred "in a series of related … transactions".

17. The word "series" itself usually implies some connection between the events or concepts which constitute the series. It is, after all, derived from the Latin "serere" which means to connect. When the mortified Mr Elton left Highbury "after a series of what had appeared to him strong encouragement" it was the same lady who had, in his optimistic opinion, given him that encouragement (Emma, Volume 2, chapter 4).

18. As used in the phrase "in a series of related … transactions" it is even more obvious that there has to be a connection since the transactions have to be "related" and that can only mean related to one another. The question then is how that connection or relationship is to be established – what degree of connection or relation is required for the purpose of the aggregation clause? Will any connection do, however remote?

19. In our view it must, as Mr Edwards submitted, be an intrinsic rather than a remote relationship. That means that there must be a relationship of some kind between the transactions relied on rather than a relationship with some outside connecting factor, even if that extrinsic relationship is common to the transactions. Thus transactions which all take place with reference to one large area of land in a particular country might be related transactions if they refer to or (perhaps) envisage one another, but if the relevant transaction is the payment of money out of an escrow account which should not have been paid out of that account, the fact of geography is too remote; what will be intrinsic will depend on the circumstances of that payment.

20. We conclude, therefore, that the judge went rather too far when he said that the transactions had to be "dependent on each other" before aggregation could occur. In the very next sentence (as quoted above) he said that transactions could not be related unless they were in some way inter-connected. With that we can agree but there can be degrees of connection (or inter-connection) which are less than "dependence" and we do not think the terms of the policy require the degree of closeness contemplated by "dependence".

21. Mr Lockey criticised the judge for implying the word "dependent" into the phrase "series of related … transactions"; he would no doubt criticise this court for implying the word "intrinsic" into the phrase. The difficulty, however, with Mr Lockey's construction (that any degree of relatedness will do) is that it is impossibly wide since it can be said that, in the end, everything is related to everything else and the aggregation clause becomes almost meaningless. The traditional and well-known way in which to formulate an extremely wide aggregation clause is to use words such as "any claim or claims arising out of all occurrences … consequent on or attributable to one source or original cause" or "arising from one originating cause or series of events or occurrences attributable to one originating cause (or related causes)". The

aggregation clause in the present case is, almost ostentatiously, not formulated in this way and cannot therefore have been intended to have the same width as clauses drafted in such terms.

22. The decision of the House of Lords in Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd [2003] 4 All E.R. 43 is authority for this approach. The case arose from mis-selling by the claimants of personal pension schemes. The claimants' representatives had failed to comply with the LAUTRO code of conduct in that they had not given "best advice" to investors; nor had the claimants themselves established the required training and monitoring schemes. The defendants insured the claimants against third party claims which exceeded the deductible of £1 million. No single claim was for more than £35,000 but the total paid out by the claimants was £125 million. The insurers argued that each claim was a separate claim and that none of the claims exceeded the deductible. There was, however, an aggregation clause which provided that if a series of third party claims resulted from "any single act or omission (or related series of acts or omissions)" then all such claims were to be considered to be a single third party claim for the purpose of the deductible. This court held that, while the lack of training and monitoring systems in respect of the representatives was not a single act or omission, the words "related series of acts or omissions" meant acts or omissions which had a single underlying cause or common origin and that the deductible was accordingly exceeded. The House of Lords held the contrary, saying that the insurers had not been willing to accept as a unifying factor a cause which was more remote than the act or omission which had constituted the third party's cause of action. The true failure was the failure to give best advice to the particular investor and the individual acts or omissions of the individual representatives were not a "related series of acts or omissions".

23. The case is not an authority of direct application to the present case because the critical phrase was more similar to (ii) of clause 2.5 (which is not relied on) and because the fact that there was a parenthesis in the relevant phrase was an important factor, but their Lordships specifically drew attention to the available width of aggregation clause which had deliberately not been adopted by the parties. Lord Hoffmann quoted the approach of Moore-Bick J at first instance who had said that the purpose of an aggregation clause was to enable two or more separate losses covered by the policy to be treated as a single loss when they were linked by a unifying factor of some kind. He continued:-

> "15 That seems to me a fair description. The unifying factor is often a common origin in some act or event specified by the clause. But much will turn upon the precise nature of the act or event which, for the purposes of aggregation, the clause treats as a unifying factor. The more general the description of that act or event, the wider the scope of the clause. For example, in Municipal Mutual Insurance Ltd v Sea Insurance Co Ltd [1998] Lloyd's Rep IR 421 the unifying cause was expressed in very general terms "… all occurrences of a series consequent on or attributable to one source or original cause …"
>
> 16 This meant that as long as one could find any act, event or state of affairs which could properly be described as a cause of

> more than one loss, they formed part of a series for the purposes of the aggregation clause. Hobhouse LJ held that a series of losses caused by theft and vandalism from the port of Sunderland over a period of time were attributable to one original cause, namely the inadequacy of the port's system for protecting the goods of which it was bailee. On the other hand, in AXA Reinsurance (UK) v Field [1996] 3 All ER 517 at 526-527.[1996] 1 WLR 1026 at 1035 Lord Mustill contrasted the words "arising from one originating cause" which had been used in Cox v Bankside Members Agency Ltd [1995] 2 Lloyd's Rep 437 with the words "arising out of one event" which was the unifying factor designated by the clause then before the House. An "event", he said was "something which happens at a particular time, at a particular place, in a particular way". A "cause" on the other hand, was less constricted: it could be a continuing state of affairs or the absence of something happening. The word "originating" was also in his opinion chosen to "open up the widest possible search for the unifying factor". This meant that in the AXA case the incompetence of a Lloyds underwriter was not an "event" giving rise to the losses under a number of separate policies which had written on behalf of various syndicates, whereas in Cox's case it had been held to be the "originating cause" of such losses.
>
> 17 The choice of language by which the parties designate the unifying factor in an aggregation clause is thus of critical importance and can be expected to be the subject of careful negotiation: as Lord Mustill observed in the AXA case [1996] 3 All ER 517 at 526, [1996] 1 WLR 1026 at 1035, among players in the reinsurance market "keen interest [is] shown … in the techniques of limits, layers and aggregations"."

He also said:-

> "26 When one speaks of events being "related" or forming a "series", the nature of the unifying factor or factors which makes them related or a series must be expressed or implied by the sentence in which the words are used. It may sometimes be necessary to imply a unifying factor from the general context. But the express language may make such an implication unnecessary or impermissible."

24. Lord Hobhouse agreed saying:-

> "47. The assureds' argument … therefore runs as follows. Each of the assureds was under a statutory obligation to take the steps indicated in the Code of Conduct to guard against mis-selling. They did not do so. As a result, "consultants" did not give best advice and mis-selling occurred. It follows that the various assureds did not ensure that it did not occur. The underlying cause of all the cases of mis-selling was the same -

the failure to take the steps required by the Code to guard against mis-selling. The requisite steps and the failure to take them were either the same in every case or very similar. This argument therefore takes the inquiry back to an earlier stage. It looks at not what caused the financial loss to the third party, the subject of the third party claim, but at the underlying situation which gave rise to the conduct of the "consultant" *vis-à-vis* the third party. It can be commented that the underlying situation could equally well have been the failure of the assured to pay its "consultants" a viable salary so that they became over-dependent upon commissions and were thus unduly influenced not to perform their duty to give best advice, a temptation to which a proportion of the "consultants" would predictably succumb. The way in which the argument seeks to get round the basic difficulties is to say that the failure of each relevant assured to take the requisite steps, whilst not being the act or omission itself or the proximate cause of the third party's loss, provides the relationship between the various acts and omissions so as to justify the description of them as a 'related series', or, as Hale LJ might have put it, they all had the same parent, i.e. the failures of the assureds (or, perhaps, the same parent or uncles and aunts). Is this the correct construction to place on this clause?

48. It is possible to have an aggregation clause which may have this effect. In AXA Re v Field [1996] 1WLR 1026, the policies discussed included two different sets of wording, one referring to "each and every loss and/or occurrence … and/or series of losses and/or occurrences … arising out of one event" and the other referring to "any claim or claims arising from one originating cause or series of events or occurrences attributable to one originating cause (or related causes)". Lord Mustill said (at p.1035):

> "In my opinion these expressions are not all the same, for two reasons. In ordinary speech, an event is something which happens at a particular time, at a particular place, in a particular way. …. A cause is to my mind something altogether less constricted. It can be a continuing state of affairs; it can be the absence of something happening. Equally, the word "originating" was in my view consciously chosen to open up the widest possible search for a unifying factor in the history of the losses which it is sought to aggregate. To my mind the one expression has a much wider connotation than the other."

Accordingly where the words falling into the second category were used, losses caused by a mistake shared in common by three different underwriters as to the nature of the LMX spiral could be the single underlying cause of their having entered

into a series of fatally defective reinsurance treaties and could therefore be the unifying factor justifying the aggregation of the losses suffered under those treaties, whereas the use of words falling into the first category would not suffice.

49. Similar reasoning had earlier been adopted by Evans LJ, giving the leading judgment of the Court of Appeal in Caudle v Sharp [1995] LRLR 433 at pp.439-440. That case involved the former type of wording – "each and every loss and/or occurrence … and/or series of losses and/or occurrences … arising out of one event". He did not in the context of that policy consider that the 'one event' need be an insured peril but rejected the idea that anything that happened could properly be described as "an event". He distinguished between a historical event such as the hundred years war and a single event such as a particular hurricane. The case was about a series of 32 asbestosis reinsurance contracts which Mr Outhwaite had underwritten without doing any proper assessment of the risk. Mr Outhwaite's repeated negligence, his sustained state of ignorance of the truth, could not be described as a single event.

50. Similarly, in a later case Municipal Mutual Ins Ltd v Sea Ins Co [1998] Lloyd's Rep IR 421, the Court of Appeal made the same distinction between a simple "any one event" clause and a clause, which was the clause in the policy with which the Court of Appeal were concerned, which included the words "or arising out of all occurrences of a series consequent on or attributable to one source or original cause". Accordingly they held that, where a large piece of machinery had been left unguarded and unprotected on the dockside for some 18 months and progressively stripped during that period by petty thieves, the losses fell to be aggregated under the clause because "on an ordinary use of language, the acts of pilferage and vandalism were a series of occurrences attributable to a single source or original cause". (pp.433-4)

51. Returning to the aggregation clause in the present policy, there are no words of equivalent strength to those found in the AXA and Municipal cases – "attributable to" – "a single source" – "originating cause". The argument of the assureds has to be built upon the inclusion of the phrase "related series". But this does not have the same force or create such a strong and wide connecting factor. One is still left with the necessity to look at the acts and omissions of the individual "consultants" which gave rise to the financial loss suffered by the third party and ask whether they were a related series of acts or omissions. In my opinion they were not. The parties could, if they had so chosen, have used a clause such as that found in the AXA and Municipal cases. They chose not to and, no doubt, the cost of

> obtaining insurance cover was reduced as a result. Their choice should be respected."

25. We regret the length of these citations. But they show the importance of construing the critical words of the insurance policy against the background of knowledge of the availability of wide aggregation clauses as well as narrow ones. If the widest form of the clause has not been chosen, the parties' choice must, as Lord Hobhouse said, be respected.

26. Lord Hoffmann made the important point that the necessary unifying factor must be expressed or implied by the sentence in which the words (such as "a series of related … transactions") are used. This is one of those cases where in our judgment it is necessary to imply the unifying factor from the general context because the express language ("a related … transaction") is both itself imprecise and deliberately avoids the available wide formulations. It is for this reason that we have concluded that the relationship must be an intrinsic relationship between the relevant transactions.

27. Mr Lockey and Mr Lynch relied on paragraph 27 of Lord Hoffmann's judgment to argue that the unifying element was a common causal relationship, in this case the relationship of investor and solicitor. But the words which Lord Hoffmann was construing were claims which resulted from "any single act or omission (or related series of acts or omissions)" and naturally enough the word "resulted" implied a common causal relationship. In the present case, what constitutes a single claim are acts or omissions "in a series of related matters or transactions" and "related" in this phrase does not, to our minds, have the same connotation as it does in the phrase "related series of acts or omissions". Acts or omissions can be related by one unifying cause but the cause of transactions or matters is different. To say that a transaction is caused by the decision of the parties to enter into it tells one nothing about whether the transactions are related or not.

28. No doubt the insurers were pleased with their victory in the Lloyds TSB case inasmuch as it was held that none of the claims exceeded the deductible in the policy but it seems to have caused consternation to the professional indemnity insurers of solicitors in which aggregation clauses applied not so much to deductibles (where the insured would wish to aggregate) but to any limit of liability of the insurers under the policy (where it would be the insurers who would wish to aggregate claims in order to rely on the overall limit in the policy). When, prior to September 2000, the Solicitors Indemnity Fund had provided insurance against third party claims in the sum of £1 million the relevant aggregation clause had read

> "All claims arising from the same act or omission … shall be regarded as one claim."

When the Fund ceased to provide insurance and solicitors from 1st September 2000 went to Qualifying Insurers in the commercial market, the required minimum terms and conditions (clause 2.5) said:-

> "The insurance may provide that all claims against any one or more insured arising from the same act or omission or from one series of related acts or omissions will be regarded as one claim

> for the purposes of the limits contemplated by clauses 2.1 and 2.3."

There is an obvious similarity between this clause and the clause in the Lloyd's TSB case (any single act or omission "or related series of acts or omissions") construed by the House of Lords in July 2003.

29. The Law Society Gazette for 27th January 2005 takes up the tale:-

> "Clause 2.5 follows the standard commercial market wording and was settled as part of the negotiations with the commercial insurers when drawing up the Minimum Terms and Conditions. The principal difference between the SIF wording and the Minimum Terms and Conditions wording is the introduction of the words "or from a series of related acts". The Qualifying Insurers had assumed that the wording of clause 2.5 would enable them to treat as one claim multiple claims arising not only from a series of related acts but also from a series of similar acts. The House of Lords' decision in the case of Lloyds TSB General Insurance Holdings Limited and others v Lloyds Bank Group Insurance Co Ltd [2003] UK HL 48 ("the Lloyds TSB case") has established that the Qualifying Insurers' assumption was wrong.
>
> The House of Lords' decision has given clarity to the phrase a "related series of acts or omissions" which is found in many aggregation clauses. The Qualifying Insurers are seriously concerned that the decision in the Lloyds TSB case has narrowed the effect of the aggregation clause in the Minimum Terms and Conditions (clause 2.5) to an unacceptable extent. They sought an amendment of clause 2.5 put them back in the position they thought they were in before the Lloyds TSB case. The Qualifying Insurers maintain that if some action is not taken to mitigate their exposure, there will inevitably be some disruption in the marketplace in relation to firms' ability to obtain insurance at an affordable cost.
>
> The reworded definition of one claim agreed by the Council is as follows:-
>
> "The Insurance may provide that
>
> a) all claims against any one or more Insured arising from
>
> i) one act or omission
>
> ii) one series of related acts or omissions
>
> iii) the same act or omission in a series of related matters or transactions

iv) similar acts or omissions in a series of related matters or transactions

and

b) all claims against one or more insured arising from one matter or transaction

will be regarded as one Claim".

The new wording ostensibly provides greater scope for aggregation of claims. In agreeing the change, the Council took into account advice from the Law Society's Indemnity Insurance Committee and the Law Society's external Indemnity insurance advisers, Marsh, that this issue was of sufficient concern to Qualifying Insurers that there was a risk that a number of insurers would withdraw from the market for solicitors' compulsory indemnity insurance precipitating an increase in premium rates.

Any wording which gives greater potential for the aggregation of claims will make it more likely that the current minimum limit of £1 million will be exhausted. The Council has, therefore, reviewed the adequacy of this minimum sum and determined that it should be increased to £2 million any one claim. It is now 15 years since the current minimum sum insured was increased from £500,000 to £1 million. Based on simple indexing, the equivalent of £1 million in 1989 would be around £1.7 million today. Although indexing is a useful indicator it does not necessarily reflect the development in claims settlements since 1989. The index contains elements which are not relevant to claims against solicitors and omits relevant elements, such as the value of property and the level of personal injury claims. Property values generally have more than doubled since 1989 and, ignoring the impact of structured settlements, maximum personal injury awards now exceed £3 million.

By not increasing the minimum sum insured under its compulsory professional indemnity scheme since 1989, the Law Society has fallen behind other regulators of legal services in the UK. Under the Law Society of Scotland and the Law Society of Northern Ireland schemes the minimum sums insured are £1.25 million and £2 million respectively.

The effect on premium levels for individual firms will be dependant (sic) on the state of the market at renewal and the firm's current level of cover. For firms that already carry cover of £2 million or more, the change will have little or no effect. For firms that are insured for only the minimum sum, insurers would like to be able to raise premium rates by around 20% to cover the increased exposure. However, in the current soft market such rises are unlikely to be achieved.

The increase in the minimum sum insured will not affect policies which expire or enter into run-off cover before 1 October 2005. Similarly the level of run-off cover provided by the Solicitors Indemnity Fund to practices that ceased with no successor practice prior to 1 September 2000 will be unaffected.

> The Council believe that the agreed changes strike the right balance between ensuring adequate consumer protection on the one hand, and the additional cost to the profession of providing such protection coupled with the ability and willingness of the market to provide it, on the other."

30. This published history of the origin of the clause is, in our judgment, part of what has come to be called the "matrix" against which the clause has to be construed and is a legitimate aid to construction, although (as we understand the matter) it was not put before the judge. Both parties wished to rely on it in this court; AIG submitted that it showed the judge's construction was impermissibly narrow and too similar to that adopted by the House of Lords when the intent was to give the words a wider construction; the Trustees submitted that it showed that the parties had well in mind the reasoning of Lloyds TSB to the effect that there were available wider words if the aggregation clause was to have a wide construction and that such words had not been chosen. There is some merit in both parties' contentions but we consider that the history does give some support for the argument that it was not intended that the phrase "a series of related … transactions" is to be interpreted in such a manner that any relation, however loose, will suffice. There must be some restriction on the concept of relatedness and the most satisfactory approach is that the relation must be an intrinsic relationship not an extrinsic one.

The Facts

31. This court is in no position to make any findings of fact for the purpose of the aggregation clause. It has not seen or had detailed submissions on the contracts between ILP and the investors or the terms on which escrow accounts were set up on behalf of the investors and does not wish to inhibit the trier of the facts in any way. If the contracts or the escrow account in respect of one investor referred to the contracts or the escrow accounts of the other investors, there might be the relevant intrinsic relationship; if they do not, there might not be. If there was a specific requirement that investors' funds were to be held in a separate designated account for each investor that might militate against a finding that there was an intrinsic relationship between the relevant matters or transactions for the purpose of the aggregation clause. All this will have to be investigated by the trier of the facts and for this purpose the case will now have to be remitted to the Commercial Court for such findings to be made in accordance with such assistance as can be derived from this judgment.

"Similar acts or omissions"

32. In paragraphs 28-31 of his judgment, Teare J held that all the claims arose out of similar acts or omissions for the purpose of the aggregation clause. Although the Trustees were given permission to argue on appeal that there were two (similar) acts or omissions in relation to (a) Turkey and (b) Morocco (and that is obviously one possible outcome), that is not the only alternative outcome. The question therefore arises whether the Trustees should have permission to appeal the judge's finding that there were similar acts or omissions. If we had upheld the judge and his construction of "a series of related matters or transactions", we would not have granted permission to appeal on the aspect of "similar acts or omissions". But as we have not upheld the judge's construction and have adopted a construction for which neither the appellant nor the respondents have submitted as their primary case, the focus of the factual inquiry will now be whether there was a series of matters or transactions which were

intrinsically, rather than extrinsically, related. In these circumstances there will have to be a fresh start and just as we do not wish the trier of fact to be inhibited by anything we have said about the facts, we think he should not be compelled to hold that the relevant acts or omissions were similar for the purposes of the clause. The new focus on the intrinsic relationship between the matters or transactions may possibly have some influence on how one should look at "similar acts or omissions" and the trier of the facts should have complete freedom to come to whatever conclusions he or she considers to be appropriate in relation to the clause as a whole. The court always has to be alive to the inherent risks and dangers of preliminary points which the parties are anxious to have decided; the less trammelled the decider of facts is, the better.

The List of Issues of Principle

33. We do not propose to resolve these issue by issue since we have said all that we believe can be usefully said before the trier of the facts begins his or her task. We will, however, summarise our conclusions by saying

    i) the true construction of the words "in a series of matters or transactions" is that the matters or transactions have to have an intrinsic relationship with each other, not an extrinsic relationship with a third factor;

    ii) the judge was therefore wrong to say that the matters or transactions had to be dependent on each other;

    iii) the judge was right to hold that the aggregation clause had to be approached neutrally without any assumptions in favour of the insurers or the insured; in these circumstances it is not helpful to consider whether the approach should be from any particular perspective let alone whether the right perspective is that of the insured or that of the public who need the relevant advice or assistance and may be concerned that the solicitor should have adequate insurance cover;

    iv) the parties are entitled to refer the court to the matters set out in the Law Society Gazette article referred to above;

    v) the court gives permission to the Trustees to appeal the question of mixed law and fact whether the relevant acts or omissions of ILP were similar acts or omissions; and

    vi) the court remits the entire case to the Commercial Court to determine it in accordance with the guidance given in this judgment.

Conclusion

34. The appeal will therefore be allowed to the extent indicated and the court invites the parties to agree an appropriate form of order.