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Case Alert

Shaping the future of insurance law

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Aggregation in a representative proceeding – Court gives further guidance for insurers

***Bank of Queensland Ltd v AIG Australia Ltd* [2018] NSWSC 1689**

AT A GLANCE

- The NSW Supreme Court recently considered the application of a "related wrongful acts" aggregation provision in the context of a representative proceeding commenced against the insured, Bank of Queensland.
- The Court held that the representative proceeding itself constituted one "claim" under the policy, but each Class Member Registration Form constituted another 192 individual "claims".
- In considering whether the wrongful acts were related, his Honour referred to related matters being those that required some interconnection or some logical or causal connection. His Honour also suggested that what was required was a "unifying factor or common cause" that was "no more remote than the act or omission that actually constituted the cause of action".

Wotton + Kearney recently acted for Catlin Australia Pty Ltd as one of three insurer defendants in NSW Supreme Court proceedings commenced by Bank of Queensland (the insured under the policy). This case provides guidance on whether a representative proceeding constitutes just one "claim" under a policy and how aggregation provisions operate.

The case background

The proceedings arose from a claim for indemnity by Bank of Queensland (BOQ) under a civil liability insurance policy regarding a representative proceeding brought against it and DDH Graham (DDH) under Part IV of the *Federal Court of Australia Act 1976* (Cth). BOQ and DDH settled the representative proceeding with Petersen and the Group Members. BOQ then sought indemnity under the policy for its share of the settlement sum and its representative proceeding defence costs.

The representative proceeding was commenced by Petersen Superannuation Fund Pty Ltd on behalf of at least 191 other Group Members who held bank accounts with BOQ that were operated by DDH (the MMDA accounts). Petersen and the Group Members alleged that from at least February 2010, Sherwin Financial Planner (SFP) had used the funds in the MMDA accounts without authority and for its own purposes to conduct a "Ponzi scheme".

They alleged that, on receiving various withdrawal instructions that gave effect to the scheme (the suspicious instructions), BOQ and its agent DDH knew, or ought to reasonably have known, that there was a serious possibility of fraud being conducted on the MMDA accounts and that SFP was committing a similar fraud on other MMDAs.

Petersen and the Group Members alleged that once BOQ had knowledge of the fraud being conducted, it was contractually obliged to question and not act on any suspicious or other instructions received from SFP for withdrawals from MMDAs.

Additionally, they alleged that the withdrawals implemented by BOQ and/or DDH were unauthorised because the withdrawal instructions were provided by an unauthorised person and/or the instructions were received via email, which was alleged to be a breach of the terms of the product disclosure statements for the MMDA accounts.

Stevenson J summarised the claims against BOQ as:

- a breach of contract claim for implementing withdrawal instructions from SFP with knowledge of the fraud (the suspicious instructions breach)
- a knowing assistance claim regarding the suspicious instructions
- a breach of contract claim for implementing withdrawal instructions via email (the email breach), and
- a breach of contract claim for implementing withdrawal instructions from persons not authorised by the account holder to provide those instructions (the authorised signatory breach).

The aggregation provision

The proceeding centred on the definition of "claim" in the Policy:

> "2.2 Claim means:
>
> (i) any suit or proceeding…
>
> (ii) any verbal or written demand from any person that it is the intention of the person to hold an insured responsible for the results of any specified Wrongful Act…
>
> For the purposes of this policy all Claims arising out of, based upon or attributable to one or a series of related Wrongful Acts shall be considered to be a single Claim; conversely where a Claim involves more than one unrelated Wrongful Act, each unrelated Wrongful Act shall constitute a separate Claim".

BOQ sought a declaration from the Court that the representative proceeding constituted one "claim" for the purpose of the policy and therefore one applicable retention was payable.

The parties' positions

Bank of Queensland

BOQ's position was that the representative proceeding constituted one "claim" under the policy, as it involved one wrongful act. BOQ alleged that its wrongful act was continuing to implement withdrawal instructions without question once it had knowledge of the fraud being conducted.

Alternatively, BOQ alleged that, to the extent there was more than one "claim" under the policy, those claims still arose from a single wrongful act: continuing to implement the withdrawal instructions without question.

Insurers

The insurers' primary position was that the representative proceeding constituted multiple "claims" either because of:

- the nature of representative proceeding, as it was brought "on behalf of" the Group Members, or
- the individual Class Member Registration Forms submitted by each Group Member in line with orders made in the representative proceeding to facilitate a mediation.

Insurers submitted that the multiple "claims" arose from a number of wrongful acts that were not related. Insurers contended that each unauthorised withdrawal was a wrongful act and that the withdrawals were not causatively related to each other, which meant they did not form a "series of related wrongful acts" as required by the aggregation provision.

Alternatively, the insurers submitted that, if the representative proceeding constituted one "claim" under the policy, that "claim" involved multiple unrelated wrongful acts that triggered the second limb of the aggregation provision, and therefore each wrongful act constituted a separate "claim" under the policy.

The decision

"Claim"

His Honour accepted that the representative proceeding had been "brought by" Petersen on its own behalf and on behalf of the Group Members and that, by the representative proceeding, Petersen and each Group Member "brought" a claim against BOQ. However, his Honour held that it did not follow that the "suit or proceeding" constituted by the representative proceeding was more than one "claim" under the policy.

However, his Honour went on to say that the Class Member Registration Form, completed by each Group Member following orders made by Yates J in the representative proceeding, each constituted a separate "claim" under the policy. His Honour reasoned that each registration form set out the amount that each Group Member claimed and for which they intended to hold BOQ responsible, as required by the second limb of the definition of "claim" under the policy.

His Honour noted that even if his conclusions regarding the number of "claims" was incorrect, this issue did not determine the result, due to the operation of the aggregation provisions.

Aggregation

Unifying factor

His Honour referred to the concept that aggregation clauses operate by identifying a "unifying factor". This concept was set out in the English Court of Appeal in *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd*[1] and approved by the House of Lords.[2] In identifying the "unifying factor", his Honour relied on Emmett AJA's judgment in *Ritchie v Woodward*[3] to say that it is necessary to consider the words used in the aggregation provision – in this case a "wrongful act".

His Honour considered that, while the one wrongful act described by BOQ in its submission was one of the categories of wrongful acts alleged in the representative proceeding, it was the specific withdrawals that formed the allegations in the representative proceeding that were the relevant wrongful acts. His Honour stated that some of the withdrawals were made before BOQ knew of the fraud by SFP. Those withdrawals were alleged to be wrongful acts because of the email breach and/or the authorised signatory breach.

His Honour reached the conclusion that there were multiple wrongful acts, being the individual withdrawals that were alleged to be unauthorised because of the suspicious instructions breach, the email breach and/or the authorised signatory breach.

Policy response

Having reached conclusions on the number of "claims" and wrongful acts, his Honour noted that the next question was whether the "claims" arose out of, or were based on or attributable to, "a series of related" wrongful acts as required by the aggregation provision.

His Honour referred to general definitions of the word "series" – for events to form a series they must be "be similar in nature",[4] have more than "mere contiguity of time or place"[5], have an "integral relationship"[6] and be in "temporal succession".[7]

In considering whether the wrongful acts were related, his Honour referred to related matters requiring some interconnection[8] or some logical or causal connection.[9] His Honour also referred to the reference in Derrington's *The Law of Liability Insurance* [10] suggesting that a "unifying factor or common cause" that was "no more remote than the act or omission that actually constituted the cause of action" was required.

His Honour concluded that the individual withdrawals all shared a common factor – they were part of the overall fraud being conduct by SFP. However, this factor was more remote than the wrongful act required by the policy (the withdrawals themselves). His Honour decided that some withdrawals may be related to others within the overall fraudulent scheme however, ultimately, his Honour decided:

- each and every withdrawal did not have the necessary similarity or integral relationship to constitute a series, and
- each and every withdrawal did not have the necessary causal or logical interconnection to make them related.

For these reasons, his Honour held that the multiple "claims" constituting the representative proceeding did not aggregate. His Honour also confirmed that, for the same reasons, if his conclusions in respect of the number of "claims" was incorrect, one "claim" would involve more than one unrelated wrongful act sufficient to fulfil the second limb of the aggregation provision.

> The decision affirms that a unifying factor is required for aggregation.

[1] [2001] 1 All ER (Comm) 13.
[2] *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2003] 4 All ER 43; [2003] UKHL 48.
[3] *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 .
[4] *Distillers Co (Bio-Chemicals) (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1.
[5] *Attorney-General v Cohen* [1937] 1 KB 478; [1937] 1 All ER 27.
[6] Ibid.
[7] *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.
[8] *AIG Europe Ltd v Woodman* [2017] UKSC 18; (2017) Lloyd's Rep IR 209
[9] *American Automobile Insurance Co v Grimes* US Dist LEXIS 1696
[10] D K Derrington and R S Ashton, *The Law of Liability Insurance,* 3rd ed, 2013, Lexis Nexis Butterworths, [8.486] – [8.488]

What's the lesson for insurers?

The decision affirms that a unifying factor is required for aggregation. That unifying factor is located in the specific words used in the aggregation clause. In this case, the parties chose "wrongful acts" as the unifying factor, which created a narrow scope for aggregation.

The inclusion of broader concepts such as "acts, errors or omissions" or "originating cause or source" as the unifying factor in an aggregation clause will create a greater scope for the aggregation of claims under a policy.

Need to know more?

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