Aggregation of Claims & Dishonest Solicitors Revisited: Lord Bishop of Leeds & Others v Dixon Coles & Gill (A Firm) & Others (2021) EWCA Civ 1211

Caytons
Changing Perceptions

Introduction

The Court of Appeal has very recently handed down judgment in the above case, which concerns the ability of an insurer to aggregate claims of different clients who have had monies misappropriated by a dishonest solicitor pursuant to clause 2.5(a)(ii) of the Minimum Terms & Conditions, which allows for claims to be aggregated if they arise from a "*series of related acts or omissions*".

The judgment will no doubt be of interest to those dealing with solicitors' professional indemnity claims and, therefore, we have prepared a note on the case.

The Facts

Dixon Coles and Gill was a firm of solicitors which had been established for 200 years and at the material times consisted of three equity partners being Linda Box, Julian Gill and Julia Wilding. Unfortunately, it transpired that Mrs Box was a rouge.

On Christmas Eve 2015, Mr Gill discovered evidence that Mrs Box had dishonestly made unauthorised payments from the firm's client account. Towards the start of 2016, Mrs Box was expelled from the partnership.

In March 2017, Mrs Box pleaded guilty to a number of offences comprising of theft, fraud and forgery in respect of the misappropriation of over £4 million. She was sentenced to 7 years imprisonment.

Two parties brought separate claims against the honest partners in the firm, Mr Gill and Mrs Wilding, to recover the sums misappropriated by Mrs Box. Essentially, the honest partners would be liable for the acts of the dishonest partner, Mrs Box (subject to any limitation arguments). The parties making claims in question were as follows:

a. The Lord Bishop of Leeds and the Leeds Diocesan Board of Finance ("the Lord Bishop Claimants"). We refer to their claim as the "Lord Bishop Claim".

b. 4 charities who were residual beneficiaries pursuant to a Will of Ernest Scholefield, which was administered by Mrs Box ("the Scholefield Claimants"). We refer to their claim as the "Scholefield Claim".

The firm had professional indemnity cover with HDI Global Specialty ("the Insurers") with a limit of indemnity of £2 million in respect of each and every claim compliant with the Minimum Terms and Conditions.

The High Court's Decision

His Honour Judge Saffman sitting as a judge of the High Court considered whether the Lord Bishop Claim, on the one hand, and the Scholefield Claim, on the other hand, aggregated such that the Insurer's liability was capped at £2 million in the context of misappropriations in excess of £4 million. Insofar as was relevant to this appeal, he found that the claims did not aggregate because they were not sufficiently related in the sense required clause 2(a)(ii) of the Minimum Terms and Conditions.

The Court of Appeal's Decision

Lord Justice Nugee gave the leading judgment with whom Lord Justice Phillips and Lord Justice Moylan agreed. We only deal with the main comments in relation to the aggregation provision of the Minimum Terms and Conditions which was in issue.

The Insurer's main ground of appeal was that the Lord Bishop Claim and Scholefield Claim aggregated because they arose out of a "*series of related acts or omissions*" within the meaning of clause 2(a)(ii) of the Minimum Terms and Conditions. The Insurer's position was that Mrs Box's thefts were a series of acts and omissions which were sufficently related because they all formed part of an extended course of dishonest conduct on multiple occasions over many years, which were all underpinned by the dishonest way in which she had treated the firm's client account.

The Court of Appeal discussed the judgment of the House of Lords in ***Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd [2003] UKHL 48,*** which concerned similar aggregation language albeit in a bankers composite policy of insurance. In that case Lord Hoffmann stated:

*"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....."*

*"In the present case, the only unifying factor which the clause itself provides for describing the acts or omissions in the parenthesis as **'related' and 'series' is that they 'result' in a series of third party claims**. In other words, the unifying element is a common causal relationship. But that common causal relationship is, so to speak, downstream of the acts and omissions within the parenthesis. **They must have resulted in each of the claims**. **This obviously does not mean that it is enough that one act should have resulted in one claim and another act in another claim.** That provides no common causal relationship. **It can only mean that the acts or events form a series if they together resulted in each of the claims**....."* (emphasis added)

Lord Justice Nugee found that whilst all the acts of theft by Mrs Box were based on her dishonesty, if what Lord Hoffmann found in ***Lloyds TSB*** applied to the particular wording of the Minimum Terms and Conditions, the submission by the Insurer that the dishonesty was a sufficient factor to aggregate the Lord Bishop Claim and the Scholefield Claim would fail. He explained the reason for that by stating that the unifying factor has to be apparent in the clause. In clause 2(a)(ii) of the Minimum Terms and Conditions the Lord Bishop Claim and the Scholefield Claim had to result from a "*series of related acts or omissions*". He explained what that meant in theory by stating:

"In other words, if there is a series of acts A, B and C, it is not enough that act A causes claim A, act B causes claim B and act C causes claim C. What is required is that claim A is caused by the series of acts A, B and C; claim B is also caused by the same series of acts; and claim C too…."

He found that what Lord Hoffman said was directly applicable to clause 2(a)(ii) of the Minimum Terms of Conditions. He said that the requirement of clause 2(a)(ii) was not satisfied in this case. That was because each of the Lord Bishop Claim and the Scholefield Claim did not arise from the combination of the respective thefts from the Lord Bishop Claimants, on the one hand, and the Scholefield Claimants, on the other hand. Rather, they arose separately due to independent acts of theft against each. Mrs Box's general dishonest conduct was not sufficient to enable the Lord Bishop Claim and the Scholefield Claim to aggregate - that did **not** constitute an "*act*" or "*omission*" within clause 2(a)(ii) of the Minimum Terms and Conditions.

The next issue was whether what the Supreme Court held in ***AIG v Woodman & Others (2017) UKSC 18*** made any difference to the position. That case concerned a different aggregation clause in the Minimum Terms and Conditions being clause 2.5(a)(iv), which provide that claims can be treated as one claim if they arise from "*similar acts or omissions in a series of related matters or transactions*".

In summary, ***AIG*** was a case where a property development company instructed a firm of solicitors to devise a scheme for private investors to finance a development of two holiday resorts. One was in Turkey and the other was in Morocco. The solicitors created a trust for each development pursuant to which the investors monies were held. The solicitors were the trustees and the investors were the beneficiaries of the monies, which were held in an escrow account. Ultimately the solicitors released the monies to the developers, but unfortunately neither the development in Turkey or Morocco was able to complete. Claims in excess of £10 million were brought by the investors against the solicitors. The professional indemnity insurers sort to argue that the claims by the Turkish Investors and the Moroccan investors aggregated such that only one limit of indemnity of £3 million was payable. The Supreme Court disagreed.

In this case, the Insurer had sought to argue that Mrs Box's general dishonesty was sufficient to aggregate the Lord Bishop Claim and the Scholefield Claim because it provided the level of necessary "*inter-connection*" between those claims. The argument was seemingly based on a passage in the Supreme Court's judgment which stated:

*"Use of the word "**related**" implies that there must be **some inter-connection** between the matters or transactions, or in other words that **they must in some way fit together**….."*

However, the Court of Appeal did not think that was of assistance because the Supreme Court had said that similar acts were not sufficient to aggregate under the particular provision of the Minimum Terms and Conditions. The Supreme Court's analysis in relation to that was:

"*The transactions entered into by the [Turkish investors] were connected in significant ways and likewise the transactions entered into by the [Moroccan investors]. The members of each group were investing in a common development, for which the monies advanced by them were intended in*

combination, to provide the developers with necessary capital…. They were co-beneficiaries under a common trust……

The case for aggregating the claims of the (Turkish investors) with those of the (Moroccan investors) is much weaker. ***They have a striking similarity but that is not enough****…. It is difficult to see in what way the transactions entered into by the members of the (Turkish investors) were* ***related*** *to the transactions entered into by the members of the (Moroccan investors)…. Although the development companies were related, being members of the Midas group and the legal structure of the developments project was similar,* ***the development projects were separate and unconnected****. There are related to different sites and the different groups of investors were protected by different deeds of trust over different assets. Accordingly,….* ***the insurers have no right to aggregate the claims of the (Turkish investors) with those of the (Moroccan investors)****."* (emphasis added)

Ultimately, the Court of Appeal did not consider ***AIG*** assisted the Insurer.

Overall

The decision will be disappointing for the professional indemnity market. However, it is probably not a surprising result having regard to the language used in the Minimum Terms and Conditions and the relevant authorities dealing with similar language.

Further Information

This note should not be treated as specific advice in relation to a specific matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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