

CORONAVIRUS, AGGREGATION AND REINSURANCE

The Covid-19 pandemic is likely to give rise to questions as to the extent to which losses may be aggregated for reinsurance claims. The outcome of aggregation disputes are generally very fact-specific. In this note, Clifford Chance Partner Philip Hill, and Terry O'Neill, consultant and author of *The Law of Reinsurance*, consider the precedents on this topic, and how they might apply in the current situation.

Key issues

- The Case Law
- Cause and Event
- Whether to Aggregate?

The case law

The English courts have frequently had to consider how aggregation language is applied to detailed fact patterns. *Simmonds v Gammell* [2016] EWHC 2515 (“**Simmonds**”) was a reinsurance dispute concerning respiratory illnesses (not Covid-19 related) suffered by thousands of people in New York. The Port of New York Authority (“**PONY**”) received some ten thousand workers’ compensation claims from a number of groups – firefighters, police officers, clean-up and construction workers, volunteers – for respiratory illness caused by the Twin Towers dust. It was alleged that PONY had been negligent in failing to provide protective equipment and training (one could envisage similar claims being made at the present day in relation to Covid-19).

The reinsured, S, was a Lloyd’s syndicate and the liability insurer of PONY. S paid the claims of PONY for the compensation that PONY had paid to the victims and to the estates of those who actually died from the illness. S claimed in turn on G, with whom S had an excess of loss reinsurance contract on Joint Excess of Loss Committee (“**JELC**”) wording. The deductible was US\$1 mn and the limit US\$1.5 mn “*each and every loss*” – so US\$1.5 mn of cover provided in excess of US\$1 mn. Loss was defined to include “*loss, damage, liability or expense or a series thereof arising from one event.*”

The reinsured’s argument, which maximised its recovery on the reinsurance, was that all the respiratory claims arose from one event, that event being “*the WTC (“**World Trade Centre**”) attacks*”. Reinsurers, on the other hand, argued that the “*WTC attacks*” were too remote to be the event from which the illnesses arose. Reinsurers argued that the illnesses arose from PONY’s repeated and continuing failures to provide protective clothing, and thus there were numerous “events”.

The matter went to arbitration and the arbitrators found in favour of S. G challenged the award before the English courts. The Judge, Cooke J, dismissed the appeal, thus also finding in favour of S, the reinsured, and finding that the arbitrators were not wrong in law in determining that all the losses, claims, liability and expense, arose from one event, “*the WTC attacks*”.

The Judge used as his guide, in deciding that there was one event, the so-called four unities test (as derived from the award in the Dawson’s Field Arbitration), set out by Rix LJ in *Scott v Copenhagen* [2003] LL Rep 696:¹

1. Was there something that could be called an “event”?

¹ This was the case that decided that when Iraq invaded Kuwait in 1990 and seized the airport, the loss of Kuwait Airways planes and spares that were found there arose from one event, but the loss of a British Airways plane that was also at the airport occurred later, and not from the same event.

2. Did it occur before the losses sought to be aggregated?
3. Was there a causative link between the event and the losses?
4. Was there sufficient proximity between the event and the losses?

The decision in *Simmonds* can be compared with that in an earlier case involving losses arising from the WTC attack(s), *Aioi Nissan Dowa Insurance v Heraldglen (No.3)* [2013] EWHC 154 ("**Aioi v Heraldglen**").

Whereas in *Simmonds*, the reinsured argued for aggregation of losses, in *Aioi v Heraldglen*, it was the reinsurer who argued that there was one event when the WTC attacks occurred – on which basis the reinsurer would only have had to pay up to one limit, whereas if there were two events, he would pay twice. The wording of the reinsurance in this instance was London Standard Wording 351, which provided that "*each and every loss*" meant each and every loss, accident, or occurrence "*or series thereof arising out of one event*".

As with *Simmons*, the dispute went to arbitration, and the arbitrators found that the attack on each of the two towers was a separate event. There were two separate hijackings of different aircraft, each causing separate loss and damage to different towers. This was the case notwithstanding the overall conspiracy by the terrorists, or the closeness in time of the two events. The appeal against the award to the English court failed. The finding of two events was upheld.

The two cases show the importance of considering exactly what the trigger for cover is. In *Simmonds*, the court was concerned with the actions of PONY; in *Aioi v Heraldglen*, it had to analyse the actions of the hijackers.

We have described these two cases in some detail to demonstrate two important matters in disputes on aggregation and one important matter in how disputes between a reinsured and a reinsurer on aggregation are likely to be resolved:

- The wording of each reinsurance contract may be different, and each wording needs to be carefully considered.
- The facts in each case have to be considered carefully against the wording, to see what might constitute an event or a cause, and a broad-brush approach will not work.
- It can be seen, both from these two cases, and from the court's general approach to appeals from arbitrators' awards, that if the arbitrators apply the right tests, the likelihood of a successful appeal against their awards is low.

Since reinsurance disputes typically go to arbitration, any new law developed from Covid-19 disputes is likely to come out of arbitrations. As the Dawson's Field Arbitration award demonstrates, such law can have a significant impact on how later cases are decided and can be adopted by the courts.

It can be noted that in the first case, *Simmonds*, it was the Twin Towers attacks that constituted the 'event' and in the second, the two hijackings were separate events. In neither case was it the (negligent) state of mind of PONY or the (murderous) state of mind of the hijackers that constituted the 'event'. This is in line with the views of Evans L J in *Caudle v Sharp* [1995] LRLR 433 that a state of mind is not an event. There, the Lord Justice was considering whether the state of mind of an underwriter could constitute an 'event'.²

2. There is probably a competition one should run about that question.

Cause and event

Lord Mustill made it clear in *Axa v Field* [1996] 1 Lloyd's Rep 26 that 'cause' and 'event' are not synonymous. An 'event' needs to occur in a particular time and place; a 'cause' does not. For Lord Mustill, 'cause' is less constricted, and can be a continuing state of affairs. That makes it at least possible to argue that everything virus connected comes from an originating cause, the virus, where the ability to aggregate is cause driven rather than event driven.

Whether to aggregate?

It will be apparent from the above two cases that in the first case, the reinsurer would have paid less if *there was no* aggregation, and in the second case, would have paid less if there was aggregation.

What is the best outcome for a party in any reinsurance claim is dependent on several factors, including:

- the number and size of the claims on the reinsured;
- the limits of indemnity per claim and in total;
- the deductible/excess per claim and in total;
- the limits of indemnity on the reinsurance;
- whether the reinsurance is proportional or excess of loss; and
- whether reinstatements are possible.

One cannot be sure whether an aggregation provision is reinsured-friendly or reinsurer-friendly until one knows the facts.

To give an example, a company with a reinsurance of US\$1 mn excess of US\$100,000 each and every loss, where losses from one event constitute one loss, which receives ten claims of US\$1 mn, would maximise recovery if the ten claims were ten losses. Its reinsurer, on the other hand, would minimise its exposure if there was one event causing all the losses. If the same company, with the same reinsurance, receives ten claims of US\$100,000, the position will be reversed.

Each reinsured and reinsurer will also wish to consider its entire reinsurance programme before it takes a view on the effect of wordings and the relevant facts. A reinsurer may take a position on one reinsurance contract that advantages it in that dispute but may raise difficulties if it is also a *reinsured* under a similar contract, or if the argument would rebound on the reinsurer in other disputes with other cedants.

Reinsured and reinsurers therefore need to take time to look at their whole portfolio of risks accepted/risks reinsured, to make good business decisions. This will likely not be a straightforward exercise.

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