Aggregation of Claims & Fraudulent Solicitors: Lord Bishop of Leeds & Others v Dixon Coles & Gill (A Firm) & Others [2020] EWHC 2809 (Ch)

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Changing Perceptions

Introduction

The High Court has recently handed down judgment in the above case, which concerns the ability of Insurers to aggregate Claims of different clients who have had monies misappropriated by a dishonest solicitor under clauses 2.5(a)(i) & (ii) of the Minimum Terms & Conditions. The judgment also considers the applicability of the Supreme Court decision in ***AIG v Woodman & Others [2017] UKSC 18***, which concerned the ability of Insurers to aggregate Claims under clause 2.5(a)(iv) of the Minimum Terms & Conditions.

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 fraudster.

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. The honest partners were of course, as a matter of law, liable for the acts of the dishonest partner, Mrs Box. The parties making Claims in question were as follows:

a. The Lord Bishop of Leeds and the Leeds Diocesan Board of Finance.

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

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. The policy contained an aggregation clause compliant with the Minimum Terms & Conditions.

An issue for His Honour Judge Saffman, sitting as a judge of the High Court, was whether the Claims aggregated such that the Insurers' liability was capped at £2 million in the context of misappropriations in excess of £4 million. The court had jurisdiction to determine that pursuant to the ***Third Parties (Rights against Insurers) Act 1930.***

The SRA Minimum Terms & Conditions / Solicitors Accounts Rules

The issue for the court concerned how the Minimum Terms & Conditions were to be construed. The express terms of the Minimum Terms & Conditions are well known to those dealing with solicitors' professional indemnity claims. However, it is worth setting out some key parts of the Minimum Terms & Conditions and the Solicitors Accounts Rules. The aggregation provisions in clause 2.5 of the Minimum Terms & Conditions provide:

*"**2.5 One Claim***

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"* (emphasis added)

A *"Claim"* means:

*"a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages. **For these purposes, an obligation on an Insured Firm and/or any Insured to remedy a breach of the SRA Accounts Rules**.... shall be treated as a Claim, and the obligation to remedy such breach shall be treated as a civil liability for the purpose of clause 1 of the MTC, **whether or not any person makes a demand for, or an assertion of a right to, civil compensation or civil damages**..."*

Rule 7 of the Solicitors Accounts Rules (in force at the material time) provided that:

*"7.1 Any **breach of the rules** must be remedied **promptly upon discovery.** This includes the replacement of any money improperly withheld or withdrawn from a client account.*

7.2 In private practice, the duty to remedy breaches rests not only on the person causing the breach, but also on all Principals in the firm...."

The Issue - The Application of Clauses 2.5(a)(i) & (a)(ii) of the Minimum Terms & Conditions

The issue for the court was whether the Insurers were entitled to aggregate all the Claims by all of the firm's clients who had sustained loss by virtue of Mrs Box's dishonesty. The Insurers took the position that the Claims aggregated under both clauses 2.5(a)(i) and (a)(ii) of the Minimum Terms & Conditions because all of the thefts, and, therefore, Claims arose from *"one act or omission"* or *"one series of related acts or omissions"*. The Claimants and Dixon Coles and Gill disagreed. We deal with the issues in more detail below.

The Word "Related" - The Supreme Court Decision in AIG v Woodman & Others (2017) UKSC 18

However, before dealing with the issues in this case it is worth remembering that in 2017, the Supreme Court considered the meaning of clause 2.5(a)(iv) of the Minimum Terms & Conditions, 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"*.

The aggregation provisions in clause 2.5(a)(iv) of the Minimum Terms & Conditions were not relied on in this case. However, the Supreme Court decision in ***AIG*** is relevant because of the judgment concerning when "*matters and transactions*" were *"related"* and clause 2.5(a)(ii) of the Minimum Terms & Conditions permits insurers to aggregate Claims when they arise from a series of "*acts or omissions*" which are *"related"*.

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 nor Morocco was able to complete. Claims in excess of £10 million were brought by the investors against the solicitors. The professional indemnity insurers argued that the Claims by the Turkish investors and the Moroccan investors aggregated such that only one limit of indemnity of £3 million was payable. Lord Toulson held at paragraphs 22 -27:

*"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**…..*

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……

*Viewed objectively, the connecting factors identified above drive me to the firm conclusion that the claims of each group of investors arise from acts or omissions in a series of **related transactions**…..*

***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**. They 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)

The Decision

Clause 2.5(a)(i) – Claims *"arising from one act or omission"*

The Insurers' position was that all the Claims should be aggregated and be treated as one Claim under clause 2.5(a)(i) of the Minimum Terms & Conditions because there was one *"single, indivisible obligation"* to remedy the breach by Mrs Box of the Solicitors Accounts Rules, which arose from *"one act of omission"* being Mrs Box's *"dishonest conduct"*.

Counsel for the Insurers used the analogy of building a house to exemplify his contention that Mrs Box's fraud amounted to *"one act"* arguing that *"an individual engages in a single act when he builds a house. That may involve a number of individual steps but at the end of the day there was one act intended"*.

The Claimants and the Insured argued that Insurers' contention was contrary to the definition of a *"Claim"* which includes *"**an obligation** on an Insured Firm and/or any Insured to remedy **a breach** of the SRA Accounts Rules"* because the use of the singular in the definition could only mean that each breach is a separate breach and, therefore, a separate Claim. It was also submitted that Mrs Box's dishonesty was not an *"act or omission"* but was a *"state of mind"*. Rather, it was argued that the *"acts"* in this case were the thefts from clients and that there was not one theft, but multiple thefts which could not amount to *"one act of omission"*.

The court agreed with the Claimants and Dixon Coles and Gill, in finding that the Claims did **not** aggregate under clause 2.5(a)(i) of the Minimum Terms & Conditions. The court stated:

*"**I really cannot accept that these are claims arising from one act or omission**... I think Mr Pooles put it best himself in his analogy about the house builder. **On any basis it is difficult to see how the actions of Mrs Box, perpetrated over a number of years can be seen as one act**. It is right that, with regard to building a house, several steps may be intended to result in that one act of building a house but this situation is much more analogous to the building of a whole housing estate. If I may put it thus, the acts intended to build 1 Acacia Avenue cannot sensibly be seen as acts intended to build 2 Acacia Avenue. The building of each house is a different act. There may be a single intention to build a housing estate **in the same way that Mrs Box may have had the single intention of stealing as much money as possible but each house, and each theft, must, in my judgment, be a different act although they may be taken with a view to accomplishing one ultimate objective.**"* (emphasis added)

Clause 2.5(a)(ii) – Claims *"arising from one series of related acts or omissions"*

The issue of whether *"matters"* or *"transactions"* were *"related"* was considered by the Supreme Court in ***AIG***, as explained above.

The issue for the court to decide here was whether the different thefts were *"acts or omissions"* which were *"related"* (there was no real focus on the word *"series"*).

It was submitted on behalf of the Insurers that the ***AIG*** decision was not on the point because it concerned whether *"matters"* and *"transactions"* were *"related"* as distinct from *"acts or omissions"*. It was argued that Mrs Box's modus operandi was relevant to determining whether the *"acts"* of misappropriating client funds were *"related"*. Mrs Box had engaged in *"teeming and lading"*, which essentially is where multiple bank accounts or ledgers are used to hide the fraudulent removal or use of funds especially by making accounting entries which appear to move funds from one account to another to disguise the true position. It was said that if there had been sufficient *"teeming and lading"* then that would be a sufficient unifying factor to say that the acts of theft were *"related"* and should, therefore, be treated as one Claim.

On behalf of the Claimants and Dixon Cole and Gills, it was submitted that the extent of the *"teeming and lading"* was irrelevant. It was submitted that each of the acts of theft and therefore Claims were as different from each other as the Claims of the Turkish investors to the Moroccan investors in the ***AIG*** case. It was said there was not an adequate fit and put simply there was not the necessary *"interconnection"* to satisfy the requirement for the acts of theft to be *"related"*.

The court agreed with the Claimants and Dixon Cole and Gills. It was held that the manner in which Mrs Box sought to conceal the thefts including by *"teeming and lading"* was not sufficient to say the Claims aggregated. It was held that teeming and lading *"are not the acts that have to be related for the purpose of aggregation"* and that what had to *"be related for the purpose of the aggregation are the thefts themselves"*.

The court held that what the Supreme Court held in ***AIG*** about what was meant by *"related"* in the context of *"matters and transactions"* was no doubt *"transferable to the question of the relationship between different acts and omissions"*. As such, court held

"…. it is simply unrealistic to conclude that there is any basis upon which [the] evidence can produce a sufficient unifying connection between the thefts from the Bishop and [the Leeds Diocesan Board of Finance] on the one hand and the Scholefield Claimants on the other…."

Accordingly, it was declared that the Insurers were not entitled to aggregate the Claims of the Bishop and the Leeds Diocesan Board of Finance with the Scholefield Claimants or either of those with any Claims of any other of the firm's clients who had been defrauded by Mrs Box.

The court did not deal with the issue of whether the Claims of the Bishop and the Leeds Diocesan Board of Finance aggregated or whether the Claims of the Scholefield Claimants aggregated.

Overall

Overall, it seems to us that the decision is correct particularly having regard to the definition of Claim in the Minimum Terms & Conditions and the Supreme Court's view expressed in ***AIG*** on what is meant by the word *"related"*.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a particular 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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