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Insurance
Case law update
Rosling King LLP

The Commercial Court has provided useful guidance on interpretation of the aggregation clause contained in the Law Society Minimum Terms and Conditions of Professional Indemnity Insurance for Solicitors and Registered European Lawyers in England and Wales (the "MTC"), which will have a significant impact on insurers' ability to aggregate claims against solicitors.

The Facts

The matter involved claims brought by two trustees (who represented around 214 investors or beneficiaries) (the "Investors") against a firm of solicitors (the "Insured") for losses of around £10 million.

Midas International Property Development PLC ("Midas") wished to develop holiday homes in Turkey and Morocco and offered opportunities to invest in those holiday homes by way of interest bearing loans or direct purchase. Midas instructed the Insured to advise it on all international property law aspects of the property transactions. A scheme was developed to protect the interests of Investors (in order to encourage them to invest) which involved the Investors becoming part of an Escrow Agreement with the Insured (who was to act as the escrow agent) and a beneficiary under a Deed of Trust. The Insured was required to hold Investors' monies until such time as the promised level of security was in place. The level of security was assessed by applying a test (the "Cover Test") contained in the Deed of Trust.

The Insured is alleged by the Investors to have, in breach of their duties, failed to put in place an effective form of security and/or failed to apply the required Cover Test adequately or at all before releasing the Investors' monies. The Insured therefore should not have released the Investors' funds from the escrow account, which resulted in losses to Investors when Midas was unable to complete the contracts for the purchase of the land and the purchase in shares in the land-owning company and was subsequently wound up.

AIG Europe Limited (the "Insurer") sought a declaration that the claims against the Insured were to be aggregated and thus considered a single claim under the indemnity insurance policy, which would have limited the recovery for the Investors to £3 million under clause 2.1 of the MTC. This was argued by the Insurer on the basis that the transactions were of a similar kind, involving the same security structure or "modus operandi". The Investors argued against this on the basis that 1) the transactions were not dependent on each other and, in the alternative, 2) the transactions were independent but not related (i.e. the Turkish claims as one and the Moroccan claims as another).

In order to determine the issue of aggregation, the Judge needed to consider the proper construction of the aggregation clause contained in clause 2.5 of the MTC (as this took precedent over the one in the policy) and apply it to the facts of the case, which he confirmed should be done without any predisposition to favour consumers or insurers.

The Decision

The Court held that although the claims arose out "similar acts or omissions", which must involve a real or substantial (as opposed to a fanciful or insubstantial) degree of similarity, the acts or omissions were not in a "series of related matters or transactions". The Judge held that a series of related matters or transactions required a level of dependence on each other (i.e. they needed to be inter-connected). As the transactions, in this case, were

not conditional or dependent on each other he reached the conclusion that they were not a "series of related matters or transactions" and the Insurer's request for a declaration was refused.

Commentary

The Commercial Court's decision that mutual dependence must be established before claims can be aggregated is an important ruling with potentially far reaching consequences in relation to solicitor insurance coverage disputes.

In cases involving misappropriation of funds by a dishonest fee earner, or widespread use of negligently drafted documentation, large losses can arise quickly and broad application of aggregation wording has been of real benefit to insurers. Conversely aggregation will favour the insured in some cases, for example where a number of relatively small claims would otherwise fall within the policy excess. This case restricts the use of such wording and could have a significant impact on insurers' approach to such claims. It may also be reflected in the current review of the MTC required by the Solicitors Regulation Authority and/or lead to increased premiums.

In the meantime, the Insurer has been given permission to appeal, which is not surprising given the importance of the outcome of this matter.

For further information, please contact Georgina Squire or the Partner with whom you usually deal.