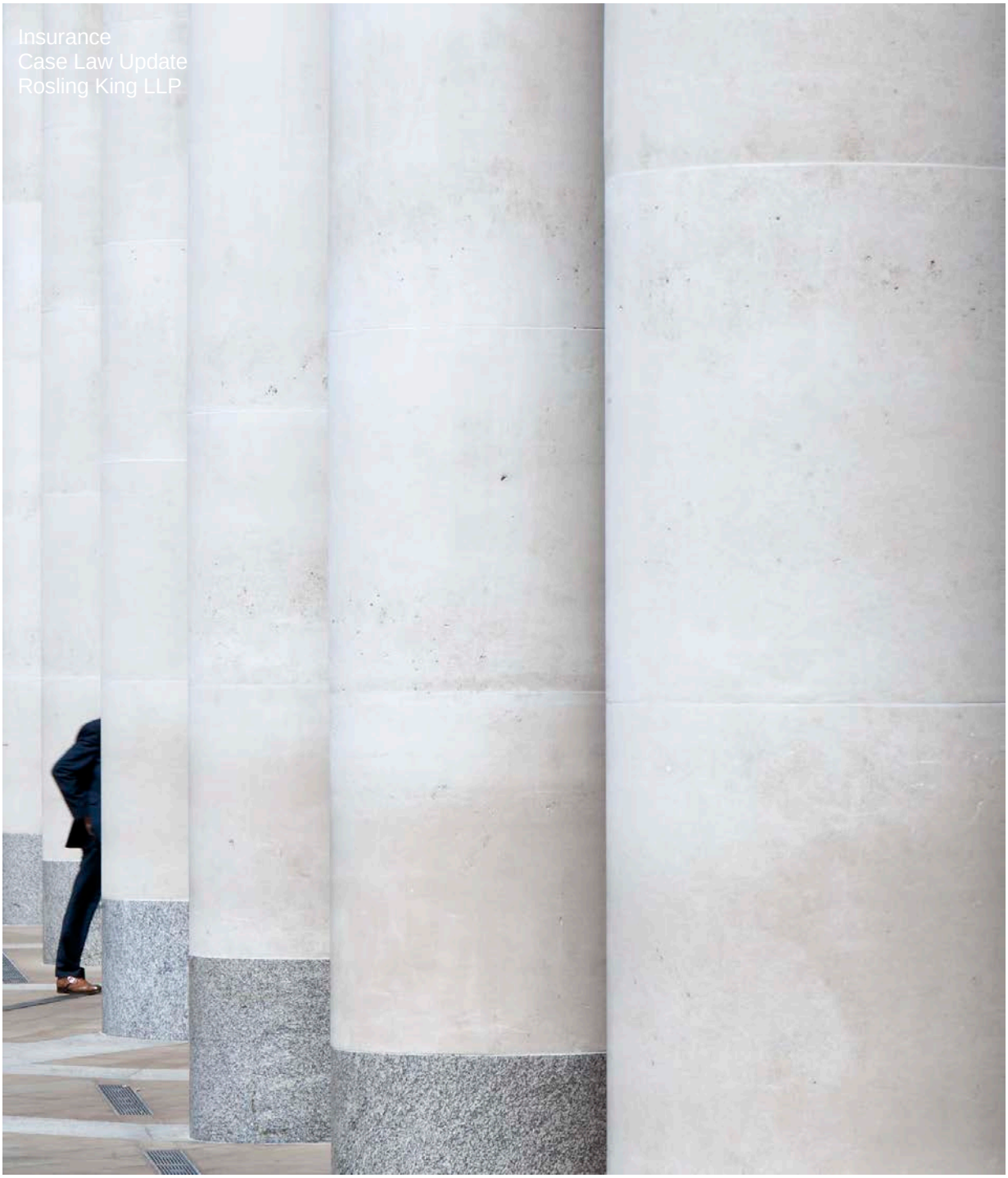
Insurance
Case Law Update
Rosling King LLP

The Facts

The International Law Partnership LLP ("ILP") was instructed to deal with transactions relating to the development of two holiday resorts in Turkey and Morocco (the "Development Sites"), which were to be financed by private investors who would be granted security over the Development Sites. The developments failed and the investors brought a claim against ILP relating to each of the Development Sites. This was on the basis that ILP had allegedly released investor money to the developers in breach of the terms of the agreement that had been put in place between the parties, resulting in the funds being released without adequate security. The investors' claim amounted to over £10m.

ILP had professional indemnity insurance (the "Policy") in place with the appellant, AIG. The Law Society requires that there are Minimum Terms and Conditions ("MTC") for solicitors' professional indemnity insurance. In particular, the MTC proscribes a minimum figure for which solicitors must be insured for any one claim. It also permits the aggregation of claims in a number of circumstances including if the claims arise from "*similar acts or omissions in a series of related matters or transactions*." AIG's liability was limited to £3m in respect of each claim made. AIG issued proceedings against ILP for a declaration that the investors' claims be considered as one claim under the aggregation provision.

First Instance Decision

The judge, Teare J, refused to grant AIG the declaratory relief it sought that the investors' claims should be treated as a single claim for the purposes of the Policy. Teare J, accepted that all the claims arose from similar acts or omissions, but rejected that they were "*in a series of related matters or transactions*" since the transactions between the developers and each investor were not mutually dependent.

Court of Appeal Decision

AIG brought an appeal against the decision of Teare J. The Court of Appeal did not agree that the transactions had to be dependent on each other and held that the construction of the words "*in a series of related matters or transactions*" was that the matters or transactions must have an intrinsic relationship with each other, not an extrinsic relationship with a third factor (the "Intrinsic Test"). AIG appealed to the Supreme Court.

The Arguments

AIG, amongst other things, criticised the Court of Appeal decision for introducing an unwarranted qualification (through the Intrinsic Test) into the concept of "related matters or transactions". Those words were unspecific as to the nature of the relationship, because the clause may fall to be applied in a huge variety of factual situations not capable of prediction; that its application requires an exercise of judgment tailored to assessing whether on the particular facts there is a substantial connection; and that it is wrong for the court to try to create a greater degree of certainty than the natural meaning of the words allows. The investors and the Law Society (as interveners) supported the Court of Appeal's interpretation.

Supreme Court's Decision

The Intrinsic Test is unnecessary and unsatisfactory.

Aggregation clauses are not to be approached with a predisposition towards either a broad or a narrow interpretation. Use of the word "related" implies that there must be some interconnection between the matters or transactions, or in other words that they must in some way fit together. Determining whether transactions are related is therefore an acutely fact sensitive exercise. It involves an exercise of judgment, not a reformulation of the clause to be construed and applied.

In considering the application of the phrase "*a series of related matters or transactions*" it is necessary to begin by identifying the matters or transactions. The application of the clause is to be judged not by looking at the transactions exclusively from the viewpoint of one party or another party, but instead they must be looked at objectively taking the transactions in the round.

On the facts of the instant case, the transactions relating to the investment in Turkey fitted together in that they shared the common underlying objective of the execution of a particular development project; and fitted together legally through the trusts under which the investors were co-beneficiaries thus they were aggregated by the Court. In respect of the investment in Morocco, although the development companies were related and the legal structure of the development projects was similar to the Turkey development, the actual projects were different. In particular, they related to different sites, different groups of investors protected by different deeds of trust over different assets so all of the claims in the Morocco development were also aggregated by the Court but they were not aggregated with the claims in the Turkey development.

Comment

This is the first time that the Supreme Court has been asked to consider an aggregation clause since the *Lloyds TSB* case in 2003. The Supreme Court has scrapped the "Intrinsic Test" altogether and clarified the principles in the *Lloyds TSB* case. The clarification is useful but ultimately the Court has stressed that this is a very fact-sensitive area and each case will have to be decided in the round.

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