St John's CHAMBERS

Contract law Case law update

January – March 2017

In this issue…

From timeshares to all-inclusive holidays - roll on summer!

Welcome to the Spring 2017 edition of our contract law case updater, now in its fourth publication. We hope you will continue to find these handy case summaries to be a useful tool in keeping you up to speed with the most significant contract law developments of the last quarter.

In this issue Nick Pointon considers intentions to create legal relations over dinner (MacInnes v Gross [2017] EWHC 46), agreements to agree to sell ships (Teekay Tankers v STX [2017] EWHC 253), unfair contract terms in timeshare schemes (Abbott v RCI Europe [2016] EWHC 2602) and the metaphysics of buffets in the package holiday industry (Wood v First Choice [2017] EWCA Civ 11).

Natasha Dzameh reviews the duty of solicitors to warn clients about the risks of alternative interpretations (Balogun v Boyes Sutton and Perry [2017] EWCA Civ 75) and the scope of solicitors' professional indemnity insurance (AIG Europe Ltd v Woodman [2017] UKSC 18).

We also take this opportunity to draw readers' attention to the launch of the exciting new "SJC Junior Insight" seminar series, a brand new collection of seminars on key aspects of civil procedure rolling out this Summer. Introductory details of the new series appear below – please do let us know if your firm would like to arrange any seminars with our junior counsel in the coming months.

Nick Pointon

April 2017

Contributors to this edition…

Nick Pointon (2010 call)

Ranked as a leading junior in commercial dispute resolution by Chambers and Partners 2015, 2016 and 2017, Nick acts in a wide range of commercial and chancery matters. Nick has also taught the subject of contract law at both undergraduate and postgraduate level at the University of Bristol and regularly delivers seminars to regional and national law firms.

"He's a class act who is really good at the detail – he just oozes ability" **Chambers UK, 2017**

"An impressive advocate and one to watch; an extremely capable and bright young barrister" **Chambers UK, 2016**

Natasha Dzameh (2010 call)

Natasha joined Chambers as a commercial and chancery tenant in October 2016 following the successful completion of her pupillage. She enjoys a busy court and paper practice, regularly appearing in trials and interim applications on the Western Circuit and beyond. She has already been successful in an application for permission to appeal and the appeal itself.

Natasha accepts instructions in a broad range of commercial fields including specialist areas such as construction, insolvency, insurance and intellectual property. She has an interest in professional negligence claims against architects, builders, solicitors and surveyors. Natasha's chancery practice encompasses a variety of real property, personal property, trust and will disputes. She is happy to attend firms to deliver seminars on topics related to her practice areas.

Intentions to create legal relations over dinner.

MacInnes v Gross [2017] EWHC 46 (QB)

Nick Pointon

Fans of the hit television show Madmen will be familiar with the customary practice among 1960s advertising executives of doing each and every deal in an upmarket steak restaurant with a hefty number of Old Fashioneds to lubricate the process. In MacInnes v Gross the High Court reiterated that such an informal setting would rarely (and did not on this occasion) evidence an intention to create legally binding relations, with the result that any deal done would not alter the parties' positions in the slightest, save perhaps by giving them a raging hangover to contend with.

In this case A claimed €13.5 million from B for breach of contract. It all started at a meeting over dinner in an upmarket Mayfair restaurant (Zuma). A's case was that during this meeting he agreed that he would leave his job at an investment bank (Investec) and provide his services to B instead, in exchange for which A would receive 15% of any difference achieved between the target and actual sale price of B's business. That night, after dinner, A emailed B expressing his delight "that we are agreed on headline terms". Nine months later a sale of the business began to materialize and A forwarded his earlier email to B. B replied in positive terms but added "next time we see each other let's make a proper contract". The business was sold and A sued for payment under the alleged contract.

Coulson J began with the leading case of RTS v Molkerei [2010] UKSC 14; [2010] 1 WLR 753, surmising that *"the governing criteria is the reasonable expectations of honest and sensible businessmen"* (at [76]). Paragraphs 76 – 78 of the judgment contain a very useful summary of the key principles relating to the intention to create legal relations.

At [81] Coulson J said *"The mere fact that the discussion took place over dinner in a smart restaurant does not, of itself, preclude the coming into existence of a binding contract. A contract can be made anywhere, in any circumstances. But I consider that the fact that this alleged agreement was made in a highly informal and relaxed setting means that the court should closely scrutinise the contention that, despite the setting, there was an intention to create legal relations."*

A also put his claim on the alternative footing of quantum meruit, again beginning with the leading case of Benedetti v Sawiris [2013] UKSC 50. Paragraphs 162 – 164 contain a useful summary of the key principles applicable to claims for unjust enrichment. Interestingly Coulson J suggested that even where the parties have reached an agreement about remuneration, it would usually need to be supplemented with objective evidence relating to the market value of the services being provided (at [166]). Although the parties subjective valuation of the services (as reflected in any agreement about remuneration) is something of which the court can take account, it remains the case that the starting point for valuing any benefit to the defendant is the objective market value of the services provided.

Surprisingly the claim in quantum meruit was pleaded at the same value as the contractual claim (€13.5m) and no lesser claim advanced in the alternative. That was fatal and Coulson J expressly refused to consider any claim for a lesser sum because it was not pleaded. At [180] Coulson J explain that *"a proper quantum meruit claim has to be set out in full – services provided, value ascribed, explanation for that value – in order that a defendant can consider it and join issue with those parts of the claim to which it takes objection."* Applying that statement, the oft appearing throwaway alternative pleas of a quantum meruit suddenly look rather precarious and, in future, care should be taken to plead such claims properly.

In brief…

- An informal setting for negotiations will rarely evidence an intention to create legal relations in matters of importance or value.
- The governing criteria for determining intention to create legal relations remains the *"reasonable expectations of honest and sensible businessmen."*
- Vague alternative pleadings of *quantum meruit* will rarely assist a claimant who fails in his primary contractual claim. The *quantum meruit* case requires full particularization.

A disagreeable agreement to agree.

Teekay Tankers Ltd v STX Offshore and Shipbuilding Co Ltd [2017] EWHC 253 (Comm)

Nick Pointon

In Teekay Tankers Ltd v STX Offshore and Shipbuilding Co Ltd [2017] EWHC 253 (Comm) a purported agreement to grant an option to purchase ships was held to be of no effect, being merely an agreement to agree.

The judgment contains a very detailed survey of the authorities on both agreements to agree [129] – [149] and the general principles applicable to the implication of terms [152] – [160].

The clause in issue provided that the ships would be delivered on a date to *"be mutually agreed"* and that STX would make *"best efforts"* to have a delivery within 2016 for the first vessels and 2017 for the rest. Walker J felt unable to imply a term as to the date for delivery because doing so would be inconsistent with the express language of the agreement, by which the parties were to mutually agree such a date.

The claimant sought to overcome the apparent uncertainty by arguing that a term should be implied that, failing agreement, the delivery date would be such date as the defendant offered, having used its best efforts, within 2016 or 2017, or the earliest date thereafter; or alternatively an "objectively reasonable date" determine by the court.

Although the Court plainly recognized that the parties had intended their agreement to be binding, it ultimately felt unable to resolve the uncertainty created by the mutual agreement clause by means of implying terms. The Court cited Mamidol-Jetoil Greek Petroleum v Okta Crude Oil Refinery AD (No 1) [2001] EWCA Civ 406 as authority for the (fairly obvious) proposition that the court should strive to give effect to the parties' bargain where possible. In that case Rix LJ, at [69] set out ten guiding principles which Walker J adopted here, together with five similar principles identified by Chadwick LJ in B J Aviation v Pool Aviation [2002] 2 P & CR 25 (to which he gave the catchy title, "the Rix/Chadwick principles").

The first implied term proposed by Teekay Tankers was rejected because it was unilateral in nature (effectively allowing Teekay to impose the date), whereas the express terms of the parties' agreement clearly envisaged mutual agreement.

As to the second implied term proposed by Teekay Tankers, Walker J recognized that this was mutual in character but ultimately also impossible to imply. He drew a distinction between agreeing to use best efforts or endeavours to achieve a particular result, and agreeing to use best efforts or endeavours to reach agreement upon an essential term in a contract (at [203]). It was the presence of the reference to *"best efforts"* in the later context which proved fatal and, in Walker J's words, *"aspirational"*.

In brief…

- Vague contractual statements about terms *"to be mutually agreed"* or agreeing to use *"best endeavours"* to agree may have the unintended effect of limiting the scope for the implication of terms to complete the parties' bargain.

The importance of the case lies in (1) reiterating the inclination of the courts to uphold a contractual bargain wherever possible; but (2) identifying a limit upon its ability to do so, namely where the terms of the parties' agreement are inconsistent with, and thereby prevent, the implication of a term based solely upon reasonableness.

> *"[W]here the parties may desire or need to leave matters to be adjusted in the working out of their contract, the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain."*
>
> Mamidol-Jetoil Greek Petroleum v Okta Crude Oil Refinery AD (No 1) [2001] EWCA Civ 406

Unfair terms constrained by implied statutory obligations.

Abbot v RCI Europe [2016] EWHC 2602 (Ch)

Nick Pointon

In Abbot v RCI Europe [2016 EWHC 2602 (Ch) the High Court considered the circumstances in which terms will be unfair as creating a significant imbalance in the parties' rights and obligations within the meaning of reg 5(1) of the Unfair Terms in Consumer Contract Regulations (SI 1999/2083). The latter have since been replaced by the Consumer Rights Act 2015, but the relevant provisions of both are materially identical.

The importance of this case lies in the fact that (1) a statutorily implied obligation to use reasonable care and skill; and (2) the common law requirement not to exercise a discretion arbitrarily, capriciously or unreasonably, had the effect of preventing a wide contractual discretion from being unfair.

In brief…

- An otherwise unbridled contractual discretion might be saved from "unfairness" by reference to statutorily implied terms to use reasonable care and skill and / or the (suggested) common law requirement not to exercise discretion arbitrarily, capriciously or unreasonably.
- An obligation to act in good faith might be crafted by a liberal interpretation of the implied obligation to exercise a discretion reasonably.

The facts of this test case involved a scheme for exchanging weeks at timeshare properties. The operators of the scheme had, under its rules, a very wide discretion as to how weeks in properties were traded. The claimants were members of the scheme and the defendant was its operator. In essence the claimants complained that the operator had been renting out their timeshare usage rights to people outside of the scheme pool, effectively reducing the rights available for exchange within that scheme.

The scheme contained a very widely worded clause which provided that when a member deposited their timeshare rights into the exchange pool they thereby relinquished all rights to use them and agreed that the scheme operator could use them without restriction (the "permitted user clause").

Proudman J held that the permitted user clause did not create a significant imbalance in the parties' rights and obligations because the scheme operator's rights were, even though expressed very broadly, limited by statutory and common law principles. Firstly, by virtue of ss. 13 of the Supply of Goods and Services Act 1982 the operators had to operate the system with reasonable care and skill. Curiously, at

> *"There are signs, therefore, that the contractual implied term is drawing closer and closer to the principles applicable in judicial review."*
>
> Braganza v BP Shipping [2015] UKSC 17, per Baroness Hale at [28]

[46] Proudman J suggested that the impact of this implied term was that the scheme had to be operated *"fairly, with reasonable care and skill"*, citing the 1982 Act in support. Nothing in the 1982 Act imposes any obligation to act fairly.

Secondly, Proudman J held that at common law the operator was prevented from exercising this discretion arbitrarily, capriciously or unreasonably, citing in support Braganza v BP Shipping [2015] UKSC 17. But that does not hold water either. In Braganza it was held that a contractual fact-finder (in that case an employer considering whether an employee had committed suicide after disappearing from a ship) had to action rationally in the Wednesbury sense. As all familiar with basic public principles will know,

Wednesbury unreasonableness is a far cry from "reasonableness" as employed in the ordinary contractual (or even tortious) context. Indeed in Braganza the context of the particular contract was important and, at least for Lady Hale (at [32]), the context of the employment contract in that case differed from an ordinary commercial contract because it brought with it an implied obligation of trust and confidence.

Thus the relatively simple suggestion that the scheme operator had to exercise its discretion fairly and could not do so unreasonably (with no reference to the notion of Wednesbury unreasonableness) is not borne out by the authorities relied upon for those propositions. In effect, the limitations which Proudman J has implied so as to restrain the apparently unbridled discretion of the scheme operator approximate quite closely to implying an obligation to exercise that discretion in good faith. Given the ever growing and ever oscillating body of case law on the implication of obligations of good faith, it is surprising that the matter did not resurface here, at least not in those terms. Yet arguably that is precisely what Proudman J has achieved by implying fetters which prevent the unfair or unreasonable exercise of an otherwise unbridled contractual discretion.

The case is therefore interesting in two respects. Firstly, it almost unwittingly touches upon the good faith debate by reaching something very close to an obligation to act in good faith by implying obligations not to act unreasonably or unfairly. Secondly, it provides a potentially very far reaching defence to claims that broad contractual terms which *prima facie*, contrary to the requirement of good faith, create an imbalance in the parties' rights and obligations within the meaning of s. 62(4) of the 2015 Act might be saved by using these implied fetters to cut down their effect, even if the contractual counterparty might never appreciate those fetters until tested in litigation.

The metaphysics of buffets.

Wood v First Choice [2017] EWCA Civ 11

Nick Pointon

Every legal bandwagon tends to come with a radio and daytime television marketing campaign which begins with a forthright enquiry into the listener's private affairs, though the enquirer tends only to be interested in the last three or six years. The latest claims industry surrounds food poisoning while on holiday, and it just received a helping hand in the form of the Court of Appeal's decision in Wood v First Choice [2017] EWCA Civ 11.

The issue was whether property in food or drink consumed while on an all-inclusive holiday passed to the customer, such that the contract was one for the sale of goods into which s. 4(2) of the Supply of Goods and Services Act 1982 would imply a term that the food or drink must be of satisfactory quality. The Court of Appeal held that it was.

If the contract were only one for the provision of services (i.e. the provision of a holiday) then the furthest one gets is an implied term that the service will be provided with reasonable care and skill (s. 13 of the 1982 Act). Food might, conceivably, still induce food poisoning even if the tour operator has exercised all reasonable care and skill in the selection of hotels, restaurants etc. Yet when a term as to satisfactory quality of the goods themselves is implied, that possibility falls away. On no view can it be said that food which induces food poisoning is of satisfactory quality, even if the fault for that lies with the hotel and the tour operator is free from blame. Nevertheless, the effect of this ruling is that the tour operator will ordinarily be liable.

First Choice put their case quite attractively. They argued that all that First Choice did was to provide a licence to all-inclusive customers to consume food and drink with no question of them ever becoming the owners of what was on their plates or in their glasses. Once consumed, the goods were destroyed. Yet the Court of Appeal, founding itself on a first instance decision in 1938 (Lockett v A&M Charles [1938] 4 All ER 170) and distinguishing the more recent Supreme Court decision in PST Energy 7 Shipping v OW Bunker Malta [2016] UKSC 23, held that when the customer takes food from the buffet the property in the fare becomes his.

In response to First Choice's floodgate concerns, Sir Brian Leveson P opined that *"it will always be difficult (indeed, very difficult) to prove that illness is a consequence of food or drink which was not of satisfactory quality, unless there is cogent evidence that others have been similarly affected and alternative explanations would have to be excluded"* (at [34]), though presumably only on the balance of probabilities. No doubt a plethora of newly incorporated claims companies will have a good go.

The case is not completely devoid of academic interest. Query what would happen if, in quite flagrant breach of buffet etiquette, a holidaymaker took food from the buffet (at which point it apparently becomes his property) before changing his mind and putting it back. Would he be responsible for the havoc it might wreak on his fellow holidaymakers digestion, or would the law perceive some re-transfer of property, not to the hotel but to the package tour operator with whom the guest had contracted?

> *"We too have enjoyed submissions of a metaphysical nature which might surprise the many thousands of customers who enjoyed breakfast, perhaps with orange juice, tea or coffee, in their hotels or guest houses every morning…"*
>
> Wood v First Choice [2017] EWCA Civ 11, *per Coulson J [48]*

Solicitors' duty to warn and alternative interpretations

Balogun v Boyes Sutton and Perry (a firm) [2017] EWCA Civ 75

Natasha Dzameh

The decision of *Balogun v Boyes Sutton and Perry (a firm)* [2017] EWCA Civ 75 confirms the fact sensitive nature of determining whether a solicitor is in breach of a duty to warn a client as to the risk of alternative interpretations by the court.

Facts and First Instance Decision (High Court – QBD)

Mr Balogun was a restauranteur who retained the service of Boyes Sutton and Perry ("Boyes"), a solicitors' firm, in relation to the acquisition of a 15 year commercial underlease ("the Underlease") of a unit known as Unit 1 on the lower and upper ground floors of a building on Norwood Road in London ("the Unit"). Mr Balogun specifically instructed Mr Davies, a partner at Boyes, who knew that he intended to fit out and run a restaurant in the Unit. Mr Davies qualified as a solicitor in 1976 and had substantial experience of commercial conveyancing which included involvement with approximately 10 leases of restaurants as shell fit-outs.

The Unit was comprised of residential premises above the ground floor and commercial premises on the ground and basement levels. The commercial units were subject to a 999 year lease ("the Headlease") granted to Anacar Ltd ("Anacar"). The head landlord was originally Mizen Properties Ltd ("Mizen") but at the material times it was London & Quadrant Housing Trust Ltd ("L&Q"). The Unit had planning permission for restaurant use and a purpose built ventilation shaft ran from the ground floor ceiling through to the roof of the second floor. Completion occurred and a dispute arose between Mr Balogun and L&Q regarding the works Mr Balogun proposed to execute, in particular the size of the chimney which was to be installed above the ventilation shaft.

Mr Balogun brought a professional negligence action against Boyes, the key points being that:

1. Mr Davies failed to provide him with any or any adequate advice concerning the permission required from L&Q for use of the ventilation shaft;
2. The Underlease created a risk in relation to which advice and drafting were required;
3. Mr Davies failed to prove Mr Balogun with advice as to his rights to install something in the ventilation shaft bearing in mind that the planning permission contained a condition concerning the extraction of fumes;
4. Mr Davies failed to adequately advise Mr Balogun that the plans he was submitting to Anacar in support of the grant of a licence were inadequate.

The claim was dismissed and Michael Bowes QC held that Mr Balogun:

1. Did not explain to Mr Davies that ducting would need to be installed in the ventilation shaft. He did not obtain the necessary professional advice regarding the ventilation shaft prior to completion. The scope of Mr Davies' duty was limited by the terms of its retainer thus he was entitled to accept Mr Balogun's instructions that no works needed to be carried out in relation to the ventilation shaft. Mr Davies' duty of care did not require him to go behind his instructions and investigate whether this was true;
2. Could not show that there was *"real scope for dispute"* as to whether the Underlease gave him

In brief…

- A solicitor may breach the duty to warn even where his/her interpretation of the contract is correct.
- The strength of the factors favouring an alternative construction is key to determining whether the duty has been breached.

a right to connect and use the ventilation shaft to vent Unit 1;

3. Failed to prove Mr Davies had a duty to make further enquiries of Mr Balogun regarding the specific condition within the planning permission;

4. Had submitted plans which showed everything he was asking for in the licence. Mr Davies had indicated more detail was necessary but Mr Balogun did not provide it and there was no duty on Mr Davies to push him further on this point.

Court of Appeal

Mr Balogun appealed to the Court of Appeal in relation to points 2 and 3 of the deputy judge's findings noted above.

Solicitors' duty to warn

This was presented in two ways. Firstly that the Underlease did not provide a right of access to the ventilation shaft and secondly, even if it did, there was a risk it did not and Mr Balogun should have been warned of that risk.

> *"The question whether a solicitor is in breach of a duty to warn his client of the risk that a court may come to a different interpretation from that which the solicitor advises is correct will necessarily be highly fact-sensitive and will depend on the strength of the factors favouring a different interpretation and thereby giving rise to the risk."*
>
> *Balogun v Boyes Sutton and Perry (a firm) [2017] EWCA Civ 75, per Lloyd Jones LJ*

Lloyd Jones LJ determined that the Underlease did provide a right to connect to and use the ventilation shaft. He stated:

"The question whether a solicitor is in breach of a duty to warn his client of the risk that a court may come to a different interpretation from that which the solicitor advises is correct will necessarily be highly fact-sensitive and will depend on the strength of the factors favouring a different interpretation and thereby giving rise to the risk."

If Mr Davies had considered the provisions he would have appreciated that the Headlease and the Underlease did not necessarily correspond in relation to the ventilation shaft access. Regardless of the court's finding as to the correct construction of the provisions, the risk of the court arriving at a different determination was sufficiently great that Mr Davies should have advised Mr Balogun accordingly and amended the draft underlease to remove the risk. Failure to do so constituted a breach of duty.

Mr Balogun had not suffered any loss because of the breach of duty as Anacar and L&Q accepted he had the right to vent through the ventilation shaft. The dispute had instead concerned the extent of the right.

Failure to make further enquiries

This point had arisen in the course of cross examination on the last day of trial and had not been pleaded. Lloyd Jones LJ expressed concerns as to the fairness of the trial judge's decision to allow this point to be taken. Nonetheless he did not consider it appropriate to determine this ground of appeal on a pleading point.

Lloyd Jones LJ stated that Mr Davies was not under a duty to investigate whether written approval had been given in relation to the relevant planning permission condition. Further, had Mr Davies made an enquiry of the local planning authority and discovered there was no written approval, it would not necessarily have provided him with any information as to whether the work had been done in constructing a flue in the ventilation shaft. The relevant condition was tied to the operation of the restaurant and there was no requirement to comply with it until the restaurant was to operate. Lack of written approval did not mean no flue had been constructed in the ventilation shaft.

Analysis

The duty to warn a client that a court may arrive at a different construction when interpreting a contract is particularly important. The mere fact a solicitor has correctly interpreted the contract does not absolve him/her from a finding that the duty has been breached should the appropriate advice not have been given. This case also reiterates that determining whether the duty has been breached is fact-sensitive and depends upon the strength of the factors favouring an alternative construction.

The saving grace for Boyes was that Mr Balogun was unable to establish he had suffered any loss as a result of Mr Davies' failure to inform him of the contentious nature of the interpretation point. This will not always be the case. Solicitors should be aware that if a client fails to recover losses which s/he has suffered as a result of their breach, even though they have interpreted the contract correctly, the client may pursue them for these sums.

The scope of solicitors' professional indemnity insurance

AIG Europe Ltd v Woodman [2017] UKSC 18

Natasha Dzameh

Facts and First Instance Decision (High Court – QBD)

A developer was advised by a solicitors' firm ("the Firm") which designed a scheme whereby investors' money was placed in an escrow account and the Firm acted as escrow agent. The investors were investing in two proposed holiday home developments in Turkey and Morocco. Following the placing of funds in the escrow account the investors became beneficiaries of a trust which held security over the land that was to be purchased for the developments. The scheme failed and 214 investors sued the Firm for losses totalling approximately £10 million. The Firm held professional indemnity insurance ("the Insurance") with the claimant which had a limit of £3 million. The Insurance was required to comply with the Law Society's Minimum Terms and Conditions ("the MTC"). Clause 2.5 of the MTC permitted the aggregation of claims as follows:

"The insurance may provide that, when considering what may be regarded as one Claim …

(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

…

will be regarded as one Claim."

The issue arose as to whether the claims could be aggregated in accordance with Clause 2.5(iv) of the MTC. The insurer applied for a declaration that the investors' claims against the Firm should be aggregated and considered as one claim with a £3 million indemnity limit. The trustees contended that the land purchases had failed for different reasons so the acts or omissions were not similar. Alternatively, the individual investments were separate and independent of each other thus they were not part of a series of related matters or transactions.

Mr Justice Teare refused the application. He considered that:

1. The policy underlying the MTC was to ensure solicitors were financially capable of compensating their client when claims were made against them albeit the limit per claim and the aggregation meant the ability to compensate may be limited to a sum less than the claim. Whilst the court must consider the underlying policy it was too simplistic an approach to simply adopt the construction which provided the public with the greatest level of protection. The court had to construe Clause 2.5 in a neutral manner and identify the meaning it would reasonably be understood to bear in its context.

2. In construing the adjective "similar", *"the requisite degree of similarity must be a real or substantial degree of similarity as opposed to a fanciful or insubstantial degree of similarity"*. The developer could not pay the vendor for the land and the firm had failed to provide effective security thus the cover test was not properly applied.

> *"Because such clauses have the capacity in some cases to operate in favour of the insurer (by capping the total sum insured), and in other cases to operate in favour of the insured (by capping the amount deductible per claim), they are not to be approached with a predisposition towards either a broad or a narrow interpretation."*
>
> per Lord Toulson JSC at [14]

In brief…

Construction of aggregation clauses is fact sensitive and must be viewed objectively rather than from the subjective viewpoint of one of the parties.

This meant that after the investors' money was released, they were exposed to loss when the developments failed. Consequently, the requisite degree of similarity was present.

3. A *"series of related matters or transactions"* referred to transactions which, by reason of their terms, were dependent on each other rather than being independent.

Court of Appeal

AIG appealed the decision. The Court of Appeal determined Mr Justice Teare had been incorrect to say the transactions must be dependent on each other in order for aggregation to occur albeit they must be inter-connected in some way. There were different degrees of connection and it was not the case that any degree of relatedness would be sufficient. The aggregation clause did not adopt a wide formulation. The history of origin of the clause constituted part of the matrix against which it must be construed. This resulted in a conclusion that the relationship between the relevant transactions must be intrinsic rather than remote.

Supreme Court

The Supreme Court determined that the Court of Appeal's formulation was unsatisfactory. Judgment was delivered by Lord Toulson JSC. The term *"intrinsic"* was an elusive term when describing the relationship between two transactions. Each limb of sub-clause (iv) must be satisfied for it to apply. The word *"related"* implied some inter-connection between the matters or transactions or that they fit together in some way. The Law Society had not applied any criterion to *"a series of related matters or transactions"* which was unsurprising given the scope of transactions which could involve solicitors providing professional services. Determining whether transactions are related is *"acutely fact sensitive"* and involves *"an exercise of judgment, not a reformulation of the clause to be construed and applied"*.

Lord Toulson stated the first step was to identify the matters or transactions. The act giving rise to the claim was the payment of money from an escrow account which should not have occurred. This happened in the course of a transaction which involved investment in a development scheme pursuant to a contractual arrangement within which the trust deed and escrow agreement were encompassed as means by which investors would obtain security. It was a principally bilateral transaction with a trilateral component due to the solicitors being escrow agents and trustees. The trust deed created a multilateral element as a result of the investors being co-beneficiaries. The transactions entered into by the investors were connected in significant ways. The investors were investing in a common development and the money they had advanced was intended to provide developers with the requisite capital. All investors participated in a standard scheme and were co-beneficiaries of a common trust. Lord Toulson further explained that the application of the aggregation clause was to be judged by *"objectively taking the transactions in the round"* rather than looking at them exclusively from the viewpoint of one party or another. On an objective basis, he considered that the connecting factors he had identified resulted in the conclusion that the claims of each group of investors arose from acts or omissions in a series of related transactions. These transactions fit together due to the common underlying objective of execution of a specific development project and through trusts whereby the investors were co-beneficiaries.

> *"By requiring that the acts or omissions should have been in a series of related transactions, the scope for aggregation is confined to circumstances where there is a real connection between the transactions in which they occurred, rather than merely a similarity in the type of act or omission."*
>
> per Lord Toulson JSC at [18]

The claims of the two separate sets of investors could not be aggregated with one another as although there was a similarity that was insufficient. The transactions entered into by the investors in the Turkish development were not connected to the transactions entered into by the investors in the Moroccan development. Whilst the development companies were related and the development projects had a similar legal structure, the projects were separate and unconnected. They concerned different sites and different deeds of trust over different assets which protected different groups of investors. The insurers had no right to aggregate the claims of the Turkish investors with the Moroccan investors.

Analysis

The Supreme Court has provided guidance as to how to approach the construction of *"a series of related matters or transactions"*. Nonetheless it is evident that this is not an easy task as it is a fact sensitive one. This judgment will not bring an end to claims which turn on construction of the relevant aggregation clause but may encourage more careful policy wording.

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Chambers UK, Company (2017)

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