AIG Solicitors Aggregation appeal – Court of Appeal allows appeal and provides guidance on MTC aggregation wording.

Brief underlying facts

The background to this case concerns the development of estates of holiday homes in Turkey and Morocco. AIG’s Insured (TILP Solicitors) helped devise a scheme whereby individual investors entered into loan and/or purchase agreements, trust deeds and escrow agreements and placed their funds into escrow accounts held by TILP in respect of the developments. Release of investor funds from escrow was only to be on certain conditions being complied with in order to protect the investors. The developments failed and 214 investors sued TILP alleging funds were wrongly released from escrow by them.

The key MTC language (Clause 2.5) to be interpreted was whether the numerous investors’ claims arose out of “similar acts or omissions in a series of related matters or transactions…”. If so, all claims would aggregate and AIG would never pay more than one £3m limit of indemnity under their primary policy.

High Court decision

Mr Justice Teare refused to grant the declaration sought by AIG based on his narrow interpretation of the aggregation wording effectively holding that there were “similar acts or omissions..[but not] in a series of related matters or transactions…”.

“… the most natural meaning of the phrase “a series of related matters or transactions” in the context of a solicitors’ insurance policy is…a series of matters or transactions that are in some way dependent on each other. It is difficult to talk of transactions being related unless their terms are in some way inter-connected.”

The Court of Appeal decision

The Court of Appeal yesterday rejected the Judge’s interpretation requiring “dependency” as too narrow but also rejected the interpretations argued for on appeal by the parties. AIG’s purported interpretation was “impossibly wide….as in the end everything is related to everything else..”
The Appeal Court held "...the transactions have to be “related” and that can only mean related to one another. The question then is how that connection or relationship is to be established – what degree of connection or relation is required for the purpose of the aggregation clause? Will any connection do, however remote?"

"...there must be a [intrinsic] relationship of some kind between the transactions relied on rather than a relationship with some outside connecting factor, even if that [outside] extrinsic relationship is common to the transactions. Thus transactions which all take place with reference to one large area of land in a particular country might be related transactions if they refer to or (perhaps) envisage one another, but if the relevant transaction is the payment of money out of an escrow account which should not have been paid out of that account, the fact of geography is too remote; what will be intrinsic will depend on the circumstances of that payment...."

The Court also suggested that (i) if the escrow account or the contract of one investor referred to the escrow/contract of another investor, there might be a sufficient "intrinsic": relationship and (ii) if the scheme required investor funds to be held in separate escrow accounts, that might point to an insufficient "intrinsic": relationship.

As factual arguments had not been made before it, the Court of Appeal remitted the case back to the Commercial Court for the Judge to decide how its interpretation of the MTC language would apply to this specific case.

Commentary

We have some further (angels dancing on a pinhead) clarification of what the MTC aggregation language means but, as in all similar cases, the application of the facts is key – we wait to see if the parties can agree an outcome between themselves based on the Appeal decision or whether the High Court will need to determine this for them. Meantime, Insurers of solicitors may wish to review their pricing models as, while the Appeal Court decision is more helpful to them than the High Court position, the outcome is that they do not have the aggregation protection in the MTC that they thought they had before the start of this case.

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