Court of Appeal Decision on Aggregation in the Solicitors' Minimum Terms

Decisions by the Court on aggregation clauses involving solicitors' insurance policies are rare (since the issues are mostly dealt with in confidential arbitrations). The Court of Appeal's recent decision in *Baines & Anor v Dixon Coles & Gill (A firm) & Ors* [2021] EWCA Civ 1211 (06 August 2021) (bailii.org) will therefore be studied by those who deal in high value professional liability claims. It substantially limits the scope of aggregation.

Background

A partner in a small unincorporated practice had, over many years, stolen £millions from her clients. When the innocent partners discovered the wrongdoing, she was expelled from the firm and the Crown Court Judge sentenced her to 7 years in prison whilst the firm went out of business and was intervened in. In the meantime, out of pocket clients started to bring claims. The indemnity limit was £2m but the missing money at least double that. It is well established in insurance law that there is a "first come first served" principle when it comes to obtaining money from insurers. In other words, the available indemnity is paid to the claimants who first obtain judgment/have a claim agreed and when it runs out there is nothing for anyone else.

It is therefore vital to work out what claims are counted towards the £2m and whether situations like this involve one claim with one limit of indemnity, or two or more claims each with their own independent limit of indemnity.

The Policy

The policy largely followed the solicitors' minimum terms and permitted insurers to aggregate all claims arising from "*one series of related acts or omissions*".

Issue

Insurers said that since the claims arose from a sustained and profound course of thefts and dishonesty, all of which were related, the various claims therefore fell to be aggregated. The claimants disagreed.

Decision

The Court of Appeal sided with the claimants. The fact that the thefts were all related to the solicitor's dishonesty was insufficient, rather "*if there is a series of acts A, B and C, it is not enough that act A causes claim A, act B causes claim B and act C causes claim C. What is required is that claim A is caused by the series of acts A, B and C; claim B is also caused by the same series of acts; and claim C too*". So, the fact that the dishonest partner stole from client X and then from client Y does not mean that the corresponding claims arise from a sufficiently unified "series of related acts". Instead, it would have been necessary for the claims by the clients to arise from a combination of both thefts, before aggregation would occur. "*It is not*

enough that claims A, B and C result from acts A, B and C respectively and that the acts are related; what needs to be shown is that claims A, B and C each result from the series of acts A, B and C."

Comment

A lot of people in the market might be a bit surprised by this. The facts in this case are (sadly) not so unusual and the argument made by insurers in the CA has often prevailed. Insurers are now clearly exposed to potentially limitless liability for claims arising from a series of thefts. And indeed, past claims which have been dropped on the back of a lack of cover might now be reopened.

The case also has some interesting observations about the need for client protection, the extent to which aggregation might arise where a professional has cut and pasted the same inaccurate advice over and over (which often arises in claims involving IFAs, pension professionals and solicitors caught up in investment or tax schemes) and whether the fact the client account was used makes any difference. In respect of all of this, the Court's observations were client friendly.

Michael Pooles QC and Lucile Taylor of Hailsham Chambers appeared for insurers in the Court of Appeal.

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