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TWIN TOWERS – HOW MANY EVENTS?

The horrific events of 11 September 2001 and in particular the attacks on the Twin Towers of the World Trade Center, when flights AA11 and UA175 were hijacked by terrorists and used as guided missiles to destroy WTC1 and WTC2, have spawned a massive amount of litigation. This litigation has, 11 years on, resolved many of the most important issues, but the English Court's view on whether, for reinsurance aggregation purposes, the attacks amounted to one or two "events" has remained uncertain. A High Court decision today (8 February 2013) in *AIOI Nissay Dowa Insurance Company Limited v Heraldglen Limited and Advent Capital (No 3) Ltd* shone a very clear light on this and should put an end to any remaining uncertainty in the reinsurance market.

In the aviation and whole account catastrophe excess of loss reinsurance markets, the losses of each aircraft hull and the resulting massive liabilities to victims and property owners fell to be aggregated (or not) under a variety of contract wordings in place in 2001, some more straightforward to interpret than others: thus the "any one aircraft, any one loss" formulation clearly gave two losses and the War and Hijacking clauses (LSW339 et al), less clearly but in the opinion of most informed practitioners led to the same result (although the *AIOI v Prosight - Mutual Marine Office* decision in the US threw a little doubt on this).

As for those excess of loss (specifically whole account catastrophe) contracts which incorporated the more generalised LSW 351 clause, in which *"each and every loss"* is defined as *"each and every loss or accident or occurrence or series thereof arising from one event"*, although some peripheral guidance could be obtained from some US and UK decisions, the central question of whether the liabilities arising from WTC1 and WTC2 could be aggregated remained tantalising, and opinion remained divided, although it is thought that the majority of reinsurers have settled the WTC losses as two events, sometimes under a reservation of rights.

Mr. Justice Field's decision today in *AIOI Nissay Dowa Insurance Company Limited v Heraldglen Limited and Advent Capital (No 3) Ltd*, on appeal from an arbitration, brings rather more certainty in favour of there being two events, one per Tower.

This was reinsurer AIOI's appeal from an arbitration award by a distinguished panel consisting of Ian Hunter QC, David Peachey and Richard Outhwaite. Contrary to AIOI's argument that the attack on the WTC complex was one occurrence/event, the Tribunal had earlier decided that cedant Heraldglen had properly presented its numerous whole account catstrophe XL reinsurance claims to AIOI as two separate occurrences arising out of two separate events.

The Judge very firmly upheld the arbitrators' award in favour of Heraldglen (which is managed by RiverStone) and he ruled that the Tribunal (i) had correctly applied the relevant law; and (ii) had had regard to all materially relevant matters; and (iii) had not taken into account impermissible considerations.

The underlying facts, as described in the 9/11 Commission Report, were never in dispute.

In construing LSW351, which is materially identical to other XL aggregation clauses, eg JELC, the Tribunal had applied the famous "unities" test from the *Dawson's Field* arbitration, which was later adopted by Rix J. in *Kuwait Airways Corporation v Kuwait Insurance Co*. Rix J. said that:

"An "occurrence" (which is not materially different from an event or happening, unless perchance the contractual context requires some distinction to be made) is not the same as a loss, for one occurrence may embrace a plurality of losses. Nevertheless, the losses' circumstances must be scrutinised to see whether they involve such a degree of unity as to justify their being described as or arising out of one occurrence. The matter must be scrutinised from the point of view of an informed observer placed in the position of the insured."

The fact that the outwards reinsurances were whole account catastrophe excess of loss policies meant that there were a plurality of losses making up claims under each contract, including the liabilities of both the airlines and passenger security companies in respect of both property damage on the ground and personal injury (in the air before and after each plane was flown into the Twin Towers, and on the ground). These included liabilities which were the subject of a US$1.2 billion global settlement of a New York Court action between the aviation interests and subrogated property interests, in 2010.

The Tribunal's approach had been to analyse each of the four so-called "unities" of time, place, cause and intention in turn.

In assessing unity of time, the Tribunal had had regard to the whole period from passenger check-in and security vetting at Logan airport for each of flights AA11 and UA175 to the collapse of each Tower later that day. They recognised that there were similarities in the timing of each period but they decided that these were not sufficient to support a conclusion that there was one occurrence, or two occurrences arising out of one event.

The Tribunal had held that the proximity of location between the Twin Towers (and indeed their connection through an underground mall) did not give rise to a sufficient degree of unity because each Tower was a separate building: they did not stand or fall together. Hence, the fact that both Towers were destroyed was attributable to the fact that there were two successful hijackings, directed at destroying each Tower respectively.

In relation to the unity of cause, the Tribunal had reasoned that *"there were two separate causes because there were two successful hijackings of two separate aircraft, admittedly in execution of a dastardly plot to turn each of them into a guided missile each aimed at one of the two signature Towers of a single property complex."*

The Tribunal also had regard to the fact that both hijackings were part of an overarching plan, but as is clear from the authorities (notably the Dawson's Field arbitration award), the Tribunal held that a plan cannot itself be an 'event' (although it might well be a 'cause', which was why the property losses were aggregated in the US case of *World Trade Center Properties v Hartford Fire Insurance Co*).

The Tribunal had concluded that:

"An objective observer watching each of the hijackings and then death and personal injury on board would have concluded that there were two separate hijackings. The same observer then hypothetically

transported to the proximity of the WTC would then have observed two aircraft flying into the Twin Towers and would clearly have in his mind two incidents."

The Tribunal had also appraised this conclusion in context of all four hijackings carried out on 9/11, in order to test whether their conclusion was consistent with common sense. They noted that:

"[All four hijackings] *were carried out within the space of a couple of hours on the morning of the same day. It has never been suggested on the evidence presently available that these constitute four occurrences arising out of a single event. It would seem to us that it would be a strange result if we were to conclude that the loss resulting from Flights 77 and 93 each constituted separate occurrences but Flights 11 and 175 resulted in two occurrences arising out of one event..."*

A variety of criticisms of the arbitration award were made by AIOI, in attempting to show there had been an error of law which should be corrected on appeal. In a carefully reasoned and robust judgment the Judge dismissed each of these criticisms and ruled that the Tribunal had made no error of law in reaching their conclusion that the insured losses caused by the attacks on the World Trade Center arose out of two events and not one. The award (which of course remains confidential to the parties, although the Judge's decision is public) thus stands.

The judgment thus brings much greater certainty to WTC aggregation issues in the whole account catastrophe XL market and indeed may put an end to any further disputes (although it is still possible, perhaps unlikely, that a different Tribunal might find differently). The approach adopted by the Judge confirms the Court's reluctance to disturb decisions of experienced arbitrators.

HFW acted for Heraldglen, which is managed by RiverStone. A copy of the judgment can be obtained from http://www.bailii.org/ew/cases/EWHC/Comm/2013/154.html.

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