INSURANCE & REINSURANCE | JANUARY 2022

SPIRE V RSA – ROUND 4: COURT OF APPEAL CONSIDERS AGGREGATION WORDING "ONE SOURCE OR ORIGINAL CAUSE"

On 14 January 2022, the Court of Appeal gave judgment on the wording of an aggregation clause found commonly in many types of policy wordings (*Spire Healthcare Limited v Royal & Sun Alliance Insurance Limited* [2022] EWCA Civ 17). The effect of the clause was to aggregate "all claims on consequent or attributable to one source or original cause". The judgment confirms existing case law that this wording will aggregate claims on a wide basis, and permits a broad search for a unifying factor. In so doing, the Court of Appeal unanimously overturned the decision of the Commercial Court.

Aggregation cases are very fact dependent, but the Court of Appeal has emphasised the breadth of "original cause" language, and in doing so has given guidance as to how such wording may apply in professional indemnity claims where claims arise from separate acts or omissions of an individual where such acts arise from their dishonesty, incompetence, or perhaps a failure to monitor or supervise them.

Facts

The case arises from the misconduct of a consultant breast surgeon contracted to Spire over a period of approximately fourteen years, resulting in 750 claims from patients suffering, or at risk, from breast cancer. There were two groups of patients: "Group 1" consisted of patients, for whom mastectomies were clinically necessary, but the surgeon had failed to remove all breast tissue, which exposed the patient to an unnecessary risk of recurrence of cancer. "Group 2" patients were the victim of the surgeon's criminal conduct, as part of which he falsely reported pathology test results as indicative of cancer, and then performed unnecessary mastectomies. The surgeon was convicted in relation to the Group 2 patients and is currently serving a sentence of 20 years imprisonment.

Claims were brought against Spire by patients in Group 1 and Group 2, and Spire claimed under its professional indemnity insurance provided by RSA. An issue then arose as to whether, for the purposes of the application of the policy limit of £10 million, the claims against Spire ought to be treated as one or more claims under the policy.

The aggregation wording read as follows:

> "*The total amount payable by [the Insurer] in respect of all damages costs and expenses arising out of all claims during any Period of Insurance consequent on or attributable to one source or original cause irrespective of the number of Persons Entitled to Indemnity having a claim under the Policy consequent on or attributable to that one source or original cause shall not exceed the Limit of Indemnity stated in the Schedule.*"

Spire argued that the Group 1 and Group 2 claims arose from different sources and original causes and therefore ought to be subject to different £10 million policy limits (resulting in a total limit of indemnity of £20 million). RSA argued that all claims from patients in both groups had the same source or original cause and therefore ought to be treated as a single claim with a single limit.[1]

First instance judgment

The High Court found there to be a different source and original cause of the Group 1 and Group 2 claims, arising from the different motivation behind the surgeon's action in relation to the Group 1 and Group 2 patients. It

[1] Judgment on the aggregation issues followed earlier findings in the Court of Appeal relating to whether the relevant provisions were in fact an aggregation clause at all (*Spire Health Care v Royal & Sun Alliance* [2018] EWCA Civ 317)

dismissed the argument that the surgeon's misconduct could be source or original cause of both sets of claims. RSA appealed the decision.

Court of Appeal judgment

Principles of aggregation

The Court of Appeal started by setting out the relevant principles of aggregation:

- Aggregation wordings should be interpreted in a balanced fashion without predisposition to a narrow or broad interpretation (*Lloyds TSB General Insurance Holdings v Lloyds Bank Group Insurance Co Ltd* [2003] UKHL 48) – whether or not claims aggregate or not can, in different circumstances, favour the insured or insurer;
- A cause is something less constricted than an event, and can be a continuing state of affairs or the absence of something happening. The use of the words "originating cause" opened up the widest possible search for a unifying factor in the history of the losses it is sought to aggregate. (*Axa Reinsurance UK Ltd v Field* [1996] 1 WLR 1026 at 1025);
- There is no distinction in this context between the terms "originating cause" and "original cause" (*Countrywide Assured Group Plc & Others v Marshall and others* [2002] EWHC 2082 (Comm));
- The word "event, occurrence or claim" describes what has happened; the word “cause” describes why something has happened *Countrywide Assured Group Plc & Others v Marshall and others* [2002] EWHC 2082 (Comm);
- "Original cause" does not mean "proximate cause". Although some causative link between the original cause and the loss was required, it may be considerably looser that proximate cause, but not coincidental, with a limit to the degree of remoteness that is acceptable. (*Beazley Underwriting Ltd v The Travelers Companies Incorporated* [2011] EWHC 1520 (Comm));
- There is no meaningful distinction between a "source" and an "original cause". The inclusion of the word "source" simply serves to emphasise the intention that proximate cause did not apply, and the losses should be traced back to a common origin (*Standard Life Assurance v ACE European Group* [2012] Lloyd's Rep IR 655).

Application to the facts

The Court of Appeal unanimously overturned the first instance decision. Significantly, it found that:

- The High Court had erred in conducting a search for a single effective cause of all of the claims and should instead have looked for a *unifying factor* in the history of the claims.
- The judge had misapplied *Cox v Bankside* (where the acts of three underwriters acting under the same misapprehension could not be aggregated) in finding that, where the same individual acts under several different misapprehensions, claims arising from such misapprehensions cannot be aggregated.
- The High Court also erred in placing significance on the surgeon's motivations, which, the Court said were irrelevant to (and did not cause) Spire's liability. Rather, the Court of Appeal said all of the claims arose from "*a pattern of deliberate (and dishonest) behaviour by one individual who operated on hundreds of patients over 14 years in the two private hospitals run by Spire, with cavalier disregard for their welfare.*" It was within that pattern of behaviour that the unifying factor was to be found.

Thus, the Court found that "(i) Mr Paterson, (ii) his dishonesty, (iii) his practice of operating on patients without their informed consent, and (iv) his disregard for his patients’ welfare" operated alone or collectively as a unifying factor in the history of the claims for which Spire was negligent, irrespective of whether the patients concerned fell into Group 1 or Group 2 (or both), and that none of those factors could be regarded as too remote or coincidental.

As a result, the Court of Appeal held, in favour of the insurer, that all of the claims in Group 1 and Group 2 could be aggregated with one another, and that a single £10 million limit applied.

Comment

The judgment contains a useful summary of the principles applicable to questions of aggregation, and the importance of identifying a unifying factor (as opposed to an "effective cause"), which is not remote from or coincidental to the losses.

Whilst questions of aggregation always turn on the precise facts of the case, insurers may regard this decision as moving the needle towards an even broader application of "original cause" aggregation language, at least in relation to professional indemnity insurance.

In particular, although it recognised there were instances where the behaviour of an individual could be too remote or vague from claims to constitute a unifying factor, the Court of Appeal was receptive to the argument that the misconduct of an individual could be a sufficient unifying factor however claims subsequently arose.

In this respect, the Court gave the example of an orthopaedic surgeon who negligently fails to diagnose an incomplete fracture in Patient A, then negligently performs an operation on Patient B, and finally gives the wrong aftercare instructions to the physiotherapist in respect of Patient C. In all these cases the reason that the hospital would be liable to those patients for their personal injuries is because it engaged (or failed to take adequate steps to supervise or manage) an incompetent orthopaedic surgeon who was incompetent. The fact that the pattern of incompetence manifested itself in different ways did not alter the fact that the problem could be traced back to one incompetent/negligent surgeon who failed to treat his patients with adequate skill and care.

Other recent cases on aggregation (see for example, *Baines v Dixon Coles* [2021] EWCA Civ 1097) have taken a more restrictive approach to aggregation, albeit on different wording. It remains to be seen whether the Court of Appeal judgment in *Spire v RSA* marks a change in approach generally or simply a decision on its own facts.

For more information, please contact the author(s) of this alert

RUPERT WARREN
Partner, London

T +44 (0)20 7264 8478
E Rupert.warren@hfw.com

LARA KERBELKER
Associate (South African Qualified), London
T +44 (0)20 7264 8410
E lara.kerbelker@hfw.com

hfw.com