HENDERSON CHAMBERS

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Insurance

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Spire Healthcare Ltd v Royal and Sun Alliance Insurance Ltd: [2022] EWCA Civ 17

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Judgment recently handed down in Spire Healthcare Ltd v Royal and Sun Alliance Insurance Ltd [2022] EWCA Civ 17 is the latest word from the Court of Appeal regarding the correct approach to the application of aggregation clauses in policies of insurance. The Court focused in particular upon construction of the phrase "consequent on or attributable to one source or original cause" and its application to different forms of wrongful conduct of a professional. It found that such clauses are to be construed in a balanced way without a predisposition towards either a narrow or broad interpretation. As the clause is a standard provision in insurance policies, it was appropriate to follow the construction of identical or substantially similar provisions in earlier cases unless there was a clear contextual distinction and/or other strong reason suggesting that that would be inappropriate.

FACTUAL BACKGROUND

1. At issue was the limit of professional liability cover with respect to personal injuries caused by a rogue consultant breast surgeon, Mr Ian Paterson, who over the course of 14 years conducted operations on patients without their informed consent at two private hospitals owned and operated by Spire. Spire was insured by Royal & Sun Alliance ("RSA") for injuries arising out of medical negligence.

2. The consultant breast surgeon's conduct was both negligent and dishonest in that in cases where a mastectomy was clinically indicated he would fail to remove all

breast tissue, which exposed patients to the risk of recurrence of cancer and/or metastasis (Group 1 claims). The serious misconduct also included falsifying pathology results, meaning unnecessary surgical procedures were then carried out (Group 2 claims). Mr Paterson is now serving a 20-year prison sentence having been convicted under the Offences Against the Person Act 1861.

3. Around 750 former patients brought proceedings against Mr Paterson, Spire and the NHS trust. The action was settled in October 2017 by the setting up of a substantial compensation fund for the victims. Spire contributed around £27 million to the fund. Its overall outlay (including on its own defence costs) was a little over £37 million.

4. The aggregation clause in question was worded 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*." (**Emphasis** as per Court of Appeal decision at §2).

5. Aggregation clauses of this kind, by which multiple claims indemnified under the terms of a Policy are treated as attributed to a single cause or source for the purpose of the application of the indemnity limit, have been the subject of detailed consideration by the Courts in recent years, notably (albeit in a different context) in *AIG v Woodman* [2017] UKSC 18 and the further cases considered at paragraphs 19 to 26 of this judgment).

6. The limit of indemnity stated in the Policy in question was £10 million. The evidence at trial established that Spire's outlay in respect of Group 2 claims alone exceeded £10 million. RSA accepted that it was liable to indemnify Spire under Section 4 of

the Policy. The sole issue on appeal was whether that liability was capped at £10 million as the Insurers contended, or £20 million, as the judge at first instance held (on the basis that there were two separate originating causes, capped at £10 million for each group of claims).

Decision

7. The Court of Appeal held that:

   (a) The judge at first instance had erred in finding that the cap was £20 million.

   (b) Aggregation clauses follow standard wording in insurance contracts and use a well-known formula to achieve the widest possible effect. An "original cause" need not be the sole cause of the insured's liability, but it is still necessary for there to be some causative link between the originating cause and the loss, and there must also be some limit to the degree of remoteness that is acceptable: *AIG Europe Ltd v Woodman* [2017] UKSC 18, [2017] 1 WLR 1168.

   (c) In the instant case, there was a single unifying factor, namely the pattern of deliberate negligence and/or dishonesty of Mr Paterson who operated on hundreds of patients over 14 years. The pattern of incompetence might manifest in different ways, but the problem could be traced back to the surgeon's misconduct. The claims therefore all arose out of the same source or original cause.

   (d) It followed on an application of the principles set out in the authorities (for a review of those cited, see paragraphs 19 to 26 of the judgment) applicable to aggregation clauses expressed in wide terms, that any or all of (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 can be identified either singly or collectively as a unifying factor in the history of the

claims for which Spire were liable in negligence, irrespective of whether the patients concerned fell into Group 1 or Group 2 (or both).

(e) The judge ought therefore to have concluded that all the claims within Group 1 and Group 2 were to be aggregated for the purpose of the £10 million Policy indemnity limit.

Analysis

8. The Court of Appeal was clear that whilst in *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep. 437 it was found that identical misapprehensions by different individuals could be treated as separate originating causes, the judge in the instant case was wrong to reason from this that the converse was also true: that different misapprehensions leading to negligent acts by the same individual were separate originating causes. The judge should have asked himself whether there was a unifying factor in the history of the claims in accordance with the approach in Countrywide *Assured Group Plc v Marshall* [2002] EWHC 2082 (Comm).

9. This case is a helpful re-statement of the principles applicable to the interpretation and construction of aggregation clauses, but is also an important guide to their application with respect to claims arising from different acts of wrongdoing carried by the same individual. It provides important clarification to Insureds facing multiple claims and/or group litigation in such circumstances with respect to the application of their Policy liability limit. The question is whether there is a single unifying factor linking the claims (such as dishonest behaviour), even if that behaviour can manifest in different outcomes (in this case some patients having an incomplete mastectomy and others having surgery that was unnecessary).

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