Dillon Eustace

D&O and Company Reimbursement Insurance: Commercial Court considers Aggregation and Coverage Disputes

March 2024

In *Chubb European Group SE & Ors v. Perrigo Company PLC & Ors [2024] IEHC 9*, the Commercial Court considered the interpretation of an aggregation clause in a contract of insurance and in particular, the circumstances in which a subsequent claim ought to aggregate back to the policy of an earlier claim. In addition, the Commercial Court determined a number of other coverage related disputes between the parties, including the question of whether proceedings specified in an exclusion clause remain excluded in the event those proceedings are subsequently amended.

Background

Certain directors of the first defendant ('**Perrigo**'), a company incorporated in Ireland, were accused of falsely inflating Perrigo's value to dissuade shareholders from accepting a financially attractive offer for their shares ($179 per share) from another company, Mylan. Shortly after the offer was rejected, the share price of Perrigo dropped to $89 per share and Perrigo shareholders took a number of class actions in the USA against the company and its directors. Mylan also pursued an action against Perrigo for a series of alleged misrepresentations regarding the offer made ('**Mylan Counterclaim**').

Perrigo had taken out a series of Directors' and Officers'

and Company Reimbursement insurance policies ('**Policy**'), including in the years 2014, 2015 and 2016, which covered legal expenses and costs incurred by the directors in the event of any claims against them in the exercise of their duties. The relevant insurers were represented in the proceedings by the first plaintiff ('**Chubb**').

The Mylan Counterclaim was covered by the 2014 Policy and the Commercial Court had to consider whether additional claims made against the directors of Perrigo in 2015 and 2016 should be aggregated back to the 2014 Policy. Each year's Policy had a limit on the insurance of $125 million and so if claims from 2015 and 2016 were aggregated to the 2014 Policy, instead of coming within the relevant Policy for 2015 and 2016, recovery would be limited to $125 million for all applicable claims.

"Relevant Background" to the Aggregation Clause

The aggregation clause in the Policy provided that if a wrongful act gave rise to a claim under the Policy, in this instance the 2014 Policy, any additional claims made subsequent to the expiry of the 2014 Policy arising from a "*similar or related*" wrongful act would be treated as being made under the 2014 Policy.

The court noted that the meaning of "*similar or related*" is what the parties using those words would reasonably have understood them to mean as against the "*relevant background*", namely in this instance, the specialised world of aggregation clauses within insurance contracts. The court looked at a number of pertinent factors when considering the relevant background in this context.

Unifying Concept

In considering an aggregation clause, a court will consider the existence of any "*unifying concept*" in relation to the wrongful acts in the relevant claims that would make it appropriate to regard those two sets of losses as constituting, for the purposes of aggregation, one loss. In deciding this question, regard must be had to the wrongful acts "*in the round*".

The words used are critical

An aggregation clause is the subject of careful negotiations between parties and as such, the actual words that the parties chose for an aggregation clause form a critical part of the "*relevant background*" when interpreting the contract. The court held that the expressions "*similar*" and "*related*" should be narrowly interpreted, as their meaning, in the context of an aggregation clause, is different to their general dictionary meaning.

Event Aggregation Clause vs Originating Cause Aggregation Clause

Another key element of the "*relevant background*" identified by the court is the type of aggregation clause chosen by the parties, namely whether the "*unifying factor*" leading to the aggregation of claims is an 'event' (e.g., something that occurs at a particular time, place and in a particular way) or an 'originating cause' (e.g., a continuing state of affairs). Event aggregation clauses, as found in the 2014 Policy, generally reduce the likelihood of aggregation.

Court's Findings

The court noted that the consideration of whether aggregation applies is an "*acutely fact sensitive exercise*", involving an exercise of judgement, and as such, it had to consider the nature of the alleged wrongful acts which formed the basis of the Mylan Counterclaim, and compare them as against the alleged wrongful acts in the subsequent claims. Dissimilarities between the complaints were not determinative because, in light of the wording of the clause, the task for the court was to compare the alleged wrongful acts themselves and not the consequences of the wrongful acts.

In its ruling, the court held that one of the subsequent alleged wrongful acts could be aggregated back to the initial claim but that the balance could not. In the initial claim, one of the alleged wrongful acts was the claim that Perrigo falsely told investors that the offer made substantially undervalued Perrigo, while the subsequent alleged wrongful act was that Perrigo gave misleading statements regarding the size of the exchange offer premium for the shares under the terms of the offer. The court held that the two acts were sufficiently "*similar and related*" to aggregate the later claim with the first. However, other alleged wrongful acts were considered by the court to be confined to their own very specific facts and not capable of being considered "*similar or related*" to the Mylan Counterclaim.

Exclusion under the Policy

The Commercial Court further determined that the exclusion of a claim relating to proceedings specified in an exclusion clause in the 2016 Policy did not extend to exclude a subsequent amendment to those underlying proceedings. The claim in question was notified to the insurer on the 2014 and 2015 Policies but was excluded from the 2016 Policy. An amended claim in the proceedings was filed in 2017, which included additional claims of wrongdoing. The court stated that because the exclusion clause is for the benefit of the insurance company, the onus is on it to establish clearly and unambiguously that the exclusion of the complaint included the additional alleged wrongful acts contained in the amended claim. Chubb sought to argue that as the Policy listed the case and the record number as being excluded, it covered any amendments to the proceedings. However, the court held that such an interpretation was not clear from the terms of the Policy and determined that the additional claims of wrongdoing were not excluded.

Conclusion

While this judgment highlights how the specific wording in an insurance policy and the facts of any given claim will be critical in determining the application of an aggregation clause, it provides useful commentary on how the court will interpret such clauses and in particular, the different factors to be considered when determining the '*relevant background*' to an aggregation clause.

The judgment also illustrates the extent to which an onus is placed on the insurer to establish that an exclusion clause applies to a particular claim, with the requirement for clear and unambiguous wording on the scope of such clauses being emphasised by the court.

The authors would like to thank Jane Rigby for her contribution to this article

CONTACT US

Our Offices

Dublin
33 Sir John Rogerson's Quay
Dublin 2
Ireland
Tel: +353 1 667 0022

Cayman Islands
Landmark Square
West Bay Road, PO Box 775
Grand Cayman KY1-9006
Cayman Islands
Tel: +1 345 949 0022

New York
33 Irving Place
New York
NY 10003
United States
Tel: +1 646 770 6080

Tokyo
12th Floor,
Yurakucho Itocia Building
2-7-1 Yurakucho, Chiyoda-ku
Tokyo 100-0006,
Japan
Tel: +813 6860 4885

CONTACT POINTS

For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the team members below.

Rachel Turner
Partner | Dublin
E rachel.turner@dilloneustace.ie
T + 353 1 667 0022

Fiona O'Connell
Knowledge Lawyer | Dublin
E fiona.oconnell@dilloneustace.ie
T + 353 1 667 0022