COURT OF APPEAL

22 July; 6 August 2021

LORD BISHOP OF LEEDS
(THE RIGHT REVEREND NICHOLAS BAINES) AND ANOTHER
v
DIXON COLES & GILL (A FIRM) AND OTHERS

THE GUIDE DOGS FOR THE BLIND ASSOCIATION AND OTHERS
v
BOX AND OTHERS

SOLICITORS REGULATORY AUTHORITY (INTERVENER)

[2021] EWCA Civ 1211

Before Lord Justice MOYLAN,
Lord Justice PHILLIPS, and
Lord Justice NUGEE

Insurance (professional indemnity) — Aggregation — Whether claims arising from one series of related acts or omissions could be aggregated — Whether two sets of claims arose from one series of related acts.

This was an appeal by HDI Global Speciality SE against the judgment of HHJ Saffman, [2021] Lloyd's Rep IR 344.

Dixon Coles & Gill (DCG) was a firm of solicitors in Wakefield. The firm undertook residential and commercial conveyancing, probate and estate administration, wills, trusts and tax planning, civil litigation and other non-litigation work. It had three equity partners: Mrs Linda Box, Mr Julian Gill and Mrs Julia Wilding. Mrs Box had been the senior partner since 1994, and was head of the probate department.

On Christmas Eve 2015 Mr Gill discovered an unexplained payment from the firm's account. Further discrepancies were uncovered. Mr Gill and Mrs Wilding confronted Mrs Box on 3 January 2016 and she admitted making unauthorised payments from client account, among other things for her own credit card liabilities, and was required to leave the partnership. Mr Gill reported matters to the Solicitors Regulatory Authority (SRA) who intervened in the practice. DCG ceased practice at the end of January 2016, and on 7 June 2016 entered into a Partnership Voluntary Arrangement.

Mrs Box was struck off the roll of solicitors on 14 November 2016. She was subsequently charged on an indictment alleging 13 counts of theft, fraud by abuse of position, and forgery, and, having pleaded guilty, was sentenced by Blake J at Leeds Crown Court on 24 March 2017 to a total term of imprisonment of seven years. The judge described the length and scale of her dishonesty as "quite staggering".

The SRA Indemnity Rules 2013, made by the Law Society under section 37 of the Solicitors Act 1974, required solicitors to take out and maintain qualifying insurance with a participating insurer. To be qualifying insurance it had to comply with the Minimum Terms and Conditions (MTC). DCG took out a policy with HDI for the period 1 October 2015 to 30 September 2016. The policy was written on a claims made basis, and the fraud exclusion meant that Mrs Box was not entitled to cover but Mr Gill and Mrs Wilding, who were not suggested to have condoned or been involved in the fraud, were entitled to cover.

The limit of indemnity for any one claim was £2 million. The aggregation clause provided that:

"(a) all *claims* against any one or more *insured* arising from:

(i) one act or omission;

(ii) one series of related acts or omissions;

(iii) the same act or omission in a series of related matters or transactions;

(iv) similar acts or omissions in a series of related matters or transactions

and

(b) all *claims* against one or more *insured* arising from one matter or transaction

will be regarded as one *claim*."

The word "Claim" was defined as "a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages".

Two actions were brought against DCG: by the Bishop of Leeds and the Leeds Diocesan Board of Finance, for about £2.5 million; and by four charities who were the residuary beneficiaries under the will of Mr Ernest Scholefield, for about £450,000. The Bishop and the Scholefield beneficiaries sought summary judgment against HDI under the Third Parties (Rights against Insurers) Act 1930. The question arose as to whether the sums claimed in the two actions were to be aggregated with a single limit of indemnity of £2 million.

HHJ Saffman held that the sums were not to be aggregated. He held that: (i) Mrs Box's actions over the years could not be regarded as one act; and (ii) the actions did not arise out of one series of related acts or omissions, as there was not a

sufficient interconnection or unifying factor, and that the dishonesty of Mrs Box was not the proximate cause of the loss.

HDI appealed on two grounds. (1) The claims could be aggregated because they arose out of a series of related acts or omissions. (2) Alternatively, the claims amounted to one claim under the definition in the Policy: the SRA Account Rules 2011 imposed an obligation on every insured to remedy a breach of the Rules, including replacing any money improperly drawn from a client account, and the policy permitted the innocent partners to make a claim to replace that money even before any clients knew that they had cause for complaint.

———*Held*, by CA (MOYLAN, PHILLIPS and NUGEE LJJ), that the appeal would be dismissed.

(1) The claims did not arise out of one series of related acts or omissions. Before a series of acts or omissions could be said to be related, it was necessary to find a unifying factor identified, expressly or impliedly, in the wording of the clause. If there was a series of acts A, B and C, it was not enough that act A caused claim A, act B caused claim B and act C caused claim C. What was required was that claim A was caused by the series of acts A, B and C; claim B was also caused by the same series of acts; and claim C too. that requirement would only be satisfied if each of the Bishop's claim and the Scholefield claimants' claim arose from the combination of both thefts. But that would obviously not be so: the Bishop's claim would arise from the theft from the Bishop of Wakefield Fund and have nothing to do with the quite separate theft from the Scholefield estate, and conversely with the Scholefield claimants' claim. Neither claim would therefore arise from a related series of acts (*see* paras 53 and 54);

———*Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2003] Lloyd's Rep IR 623; [2003] 4 All ER 43; *AIG Europe Ltd v Woodman* [2017] Lloyd's Rep IR 209; [2017] 1 WLR 1168, applied; *Swain v The Law Society* [1983] 1 AC 598, referred to.

(2) There was not just one "claim" based on the duty to restore missing funds. In the present case, Mrs Box's thefts gave rise both to the right of the innocent partners to claim the amount needed to remedy the shortfall in the client account, and to a separate claim to indemnify them against liability to third parties, namely the clients (*see* para 92).

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The following cases were referred to in the judgment:

AIG Europe Ltd v OC320301 LLP (CA) [2016] EWCA Civ 367; [2016] Lloyd's Rep IR 289;

AIG Europe Ltd v Woodman (SC) [2017] UKSC 18; [2017] Lloyd's Rep IR 209; [2017] 1 WLR 1168;

Cox v Bankside Members Agency Ltd (CA) [1995] 2 Lloyd's Rep 437;

Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd (QBD (Comm Ct)) [2001] Lloyd's Rep IR 237; (CA) [2001] EWCA Civ 1643; [2002] Lloyd's Rep IR 113; (HL) [2003] UKHL 48; [2003] Lloyd's Rep IR 623; [2003] 4 All ER 43;

Municipal Mutual Insurance Ltd v Sea Insurance Co Ltd (CA) [1998] Lloyd's Rep IR 421;

Swain v The Law Society (HL) [1983] 1 AC 598.

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Michael Pooles QC and Lucile Taylor, instructed by DWF Law LLP, for HDI in both appeals; David Halpern QC, instructed by Lupton Fawcett LLP, for the claimants in the first appeal; Alexander Learmonth QC, instructed by Wilsons Solicitors LLP, for the respondents in the second appeal; Dominic Kendrick QC, instructed by Russell-Cooke LLP, for the intervener in both appeals.

Friday, 6 August 2021

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JUDGMENT

Lord Justice NUGEE:

Introduction

1. These two appeals concern the question whether claims brought against a firm of solicitors, Dixon Coles & Gill ("DCG"), should be aggregated for the purposes of the limit of indemnity in the firm's professional indemnity insurance.

2. The claims all flow from thefts of clients' money carried out over a long period and on a vast scale by DCG's former senior partner, Mrs Linda Box. The relevant insurance policy has a limit of £2 million for any one claim, and contains an aggregation clause which provides that for these purposes all claims arising from one series of related acts or omissions will be regarded as one claim. The position of the insurer, HDI Global Specialty SE ("HDI"), is that Mrs Box's thefts form a series of related acts and that all the claims should be aggregated. Having already paid out claims up to the limit of £2 million, HDI denies that it is liable to pay out any more.

3. The question of aggregation arose in two actions brought against DCG, one ("the Bishop's action") brought by the Bishop of Leeds and the Leeds Diocesan Board of Finance ("the Bishop" and "the LDBF"), and the other ("the Scholefield action") brought by four charities who are the

residuary beneficiaries under the will of Mr Ernest Scholefield. In each action HDI was joined as a party and the claimants applied for summary judgment on, among other things, the aggregation point. The applications were heard together by HHJ Saffman sitting as a High Court Judge in Leeds ("the judge"). He handed down a single judgment at [2021] Lloyd's Rep IR 344 on 28 October 2020 ("the judgment"). This dealt with a number of issues (including a quite separate point on limitation that has already reached this court: see *Dixon Coles & Gill v Baines* [2021] EWCA Civ 1097) but among other things he decided the aggregation point in favour of the claimants, and by orders in each action made on 1 December 2020 made declarations accordingly.

4. HDI appeals in each action with permission of the judge himself. HDI appeared by Mr Michael Pooles QC with Ms Lucile Taylor. The appeal was opposed by both the claimants in the Bishop's action, who appeared by Mr David Halpern QC, and the claimants in the Scholefield action, who appeared by Mr Alexander Learmonth QC. It was also opposed by Solicitors Regulation Authority Ltd ("the SRA"), which was given permission to intervene by Moylan LJ and which appeared by Mr Dominic Kendrick QC.

5. Despite Mr Pooles QC's careful argument, I would uphold the judge's decision on the aggregation point and dismiss the appeals.

Facts

6. DCG was a firm of solicitors in Wakefield until it was forced to close in 2016 as a direct result of the events which give rise to these proceedings. The practice could trace its history back for some 200 years. It undertook residential and commercial conveyancing, probate and estate administration, wills, trusts and tax planning, civil litigation and other non-litigation work. It had three equity partners: Mrs Box, Mr Julian Gill and Mrs Julia Wilding. Mrs Box had been the senior partner since 1994, and was head of the probate department. She appeared entirely respectable and held senior offices in the Church of England, being Registrar of the Diocese of Wakefield for many years until 2005, when she became Chancellor of the Diocese of Southwell and Nottingham.

7. On Christmas Eve 2015 Mr Gill discovered an unexplained payment from the firm's account and after uncovering further discrepancies he, together with Mrs Wilding, confronted Mrs Box on 3 January 2016. She admitted making unauthorised payments from client account, among other things for her own credit card liabilities, and was required to leave the partnership. Mr Gill reported matters to the SRA who intervened in the practice, appointing Gordons LLP ("Gordons") as intervention agents in April 2016. DCG had already ceased practice at the end of January 2016, and on 7 June 2016 entered into a Partnership Voluntary Arrangement. It has not been suggested that either Mr Gill or Mrs Wilding had any involvement in or knowledge of Mrs Box's thefts, but although innocent they are potentially liable as her partners.

8. Following a hearing before a Solicitors Disciplinary Tribunal, Mrs Box was struck off the roll of solicitors on 14 November 2016. In their judgment the tribunal described her conduct as involving "planned, deliberate, systematic, repeated dishonesty over a long period of time". She was subsequently charged on an indictment alleging 13 counts of theft, fraud by abuse of position, and forgery, and, having pleaded guilty, was sentenced by Blake J at Leeds Crown Court on 24 March 2017 to a total term of imprisonment of seven years.

9. Some idea of the length and scale of her dishonesty, aptly described by Blake J as "quite staggering", can be obtained from the indictment and his sentencing remarks. He referred to her admitted offending as having started as long ago as February 2002, although the majority of it took place between 2010 and 2015 when she was regularly diverting enormous sums of money from the firm's client account to pay personal expenses of herself and her family. Count 3 alone charged her with having made payments to her credit card accounts between February 2010 and December 2015 totalling over £3 million; other counts charged her with making payments to HMRC for her personal tax liabilities, to her bank accounts, to pay her mortgage liabilities, to pay her council tax, and so on. The total amount charged on the indictment was over £4 million. Blake J referred to an independent auditor having found 75 individual client files and a further 10 church files that had been the subject of misappropriations, mainly from the estates of deceased persons. It seems very likely that this summary did not state the full scale of her thefts: for example in the Scholefield action it is alleged that she stole over £450,000 from Mr Scholefield's estate alone, and it is very doubtful if this is included in any of the counts on the indictment.

The policy

10. Under section 37 of the Solicitors Act 1974 the Law Society may make rules requiring solicitors to maintain professional indemnity insurance with authorised insurers and specifying the terms on which indemnity is to be available. The Law Society has delegated this function to the SRA which is a wholly-owned subsidiary of the Law Society. The rules are revised from time to time. They apply to

losses arising from claims first made or intimated, or arising out of circumstances notified, during the relevant period.

11. In the present case DCG promptly notified its insurers of Mrs Box's admitted misappropriations in January 2016. The rules then in force were the SRA Indemnity Insurance Rules 2013 (as amended on 1 April 2015) ("the 2013 Rules"). The 2013 Rules required solicitors to take out and maintain qualifying insurance with a participating insurer. To be qualifying insurance it had to comply with the Minimum Terms and Conditions ("the MTC") set out in Appendix 1 to the 2013 Rules. One of those terms (clause 4.12) was that the insurance must provide that if there was any inconsistency between any provision of the insurance and the MTC the latter would prevail, and to be a participating insurer the insurer had to enter into a commitment that the coverage in the MTC would apply as a minimum regardless of the policy wording actually issued.

12. The relevant policy of insurance ("the Policy") is that taken out by DCG for the period from 1 October 2015 to 30 September 2016. The sole insurer was HDI, then called International Insurance of Hannover SE. There was no top-up policy. The Policy duly provides at clause 5.13 that it is to be construed or rectified so as to comply with the requirements of the MTC and that any provision which is inconsistent with the MTC is to be severed or rectified accordingly. Mr Halpern QC suggested that in those circumstances it was the provisions of the MTC rather than the terms of the Policy that fell to be construed. I am not sure I agree, although nothing would appear to turn on this. I think the technical position is that what falls to be construed is the Policy; it is true that it is to be construed in conformity with the MTC, and that if there is any inconsistency the provisions of the MTC will prevail, but the terms of the Policy in fact closely follow the provisions of the MTC, as one would expect, and no party has suggested that its terms are inconsistent with the MTC. In those circumstances I think we should concentrate on the terms of the Policy. On the other hand, the fact that the Policy was written to comply with the MTC forms the context in which the Policy is to be construed, and the policy considerations which underlie the making of the 2013 Rules and the MTC are therefore part of the admissible factual background, and may be relevant to the construction of the Policy. This is a point to which I will return.

13. Clause 2 of the Policy provides for the scope of cover. Clause 2.1 provides, so far as material, as follows:

> "**Insurers** will indemnify the **Insured** up to the **Limit of Indemnity** against:
>
> (a) any civil liability;
>
> (b) …
>
> to the extent that it arises from **Private Legal Practice** in connection with the **Insured Firm's Practice** …
>
> Provided that a **Claim** in respect of such liability:
>
> (i) is first made against an **Insured** during the **Period of Insurance**; or
>
> (ii) is made against an **Insured** during or after the **Period of Insurance** and arising from **Circumstances** first notified to **Insurers** during the **Period of Insurance**."

Terms in bold are defined in clause 1; the effect of the definition of Insured is that it includes not only the firm itself, but the individual partners.

14. Clause 4 contains exclusions. It provides, so far as material, as follows (as permitted by the MTC):

> "**Insurers** shall not be liable to indemnify the **Insured** against any **Claim** …
>
> 4.8 **Fraud or dishonesty**
>
> arising from dishonesty or a fraudulent act or omission committed or condoned by an **Insured**, except that:
>
> (a) this **Insurance** nonetheless covers each other **Insured** who did not commit or condone the dishonesty or fraudulent act or omission; and …"

The practical effect of this provision is that Mrs Box is not entitled to any cover, but Mr Gill and Mrs Wilding are.

15. Clause 6.1 provides for the limit of indemnity as follows:

> "**Limit of indemnity**
>
> (a) With the exception of clauses 3.1, 3.2 and 3.3, the limit of **Insurers'** liability under this **Insurance** shall be the sum specified in the **Schedule** for any one **Claim**.
>
> (b) The liability of **Insurers** shall in no circumstances exceed the **Limit of Indemnity** specified in the **Schedule** even where **Insurers** are liable to indemnify more than one **Insured**.
>
> (c) For the purposes of the **Limit of Indemnity**
>
> (i) All **Claims** against any one or more Insured arising from:
>
> (a) one act or omission;
>
> (b) one series of related acts or omissions;
>
> (c) the same act or omission in a series of related matters or transactions;
>
> (d) similar acts or omissions in a series of related matters or transactions;
>
> and
>
> (ii) All **Claims** against any one or more Insured arising from one matter or transaction will be regarded as one **Claim**."

I will refer to the four subparagraphs of clause 6.1(c)(i) as "Limb 1", "Limb 2" and so on.

16. The limit of indemnity specified in the Schedule is £2 million for any one claim (which was the minimum required by the MTC). The aggregation clause in clause 6.1(c) of the Policy follows the provisions of the MTC, which provides at clause 2.5 as follows:

> "**One claim**
>
> The insurance may provide that, when considering what may be regarded as one *claim* for the purposes of the limits contemplated by clauses 2.1 and 2.3:
>
> (a) all *claims* against any one or more *insured* arising from:
>
> (i) one act or omission;
>
> (ii) one series of related acts or omissions;
>
> (iii) the same act or omission in a series of related matters or transactions;
>
> (iv) similar acts or omissions in a series of related matters or transactions
>
> and
>
> (b) all *claims* against one or more *insured* arising from one matter or transaction will be regarded as one *claim*."

It can be seen that the four limbs of clause 2.5(a) are identically worded to Limbs 1 to 4 in clause 6.1(c)(i) of the Policy.

17. The definition of Claim in the Policy is found in clause 1.7. This provides, so far as material, as follows:

> "**Claim** means a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages.
>
> For these purposes, an obligation on an **Insured Firm** and/or any **Insured** to remedy a breach of the Solicitors' Accounts Rules 1998 (as amended from time to time), or any rules (including, without limitation, the SRA Accounts Rules 2011) which replace the Solicitors' Accounts Rules 1998 in whole or in part, shall be treated as a **Claim**, and the obligation to remedy such breach shall be treated as a civil liability for the purposes of clause 2, whether or not any person makes a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages as a result of such breach …"

Again this follows the definition of claim in the MTC.

Payments under the Policy

18. As I have already referred to, DCG promptly notified its insurers in January 2016. The evidence as to how HDI has dealt with matters since comes from Ms Jovana Vasiljevic of HDI's solicitors and is as follows. (Since the applications below were for summary judgment the facts have not been found but it was accepted that for present purposes these facts are to be assumed to be true.)

19. When the notification was received it was treated by HDI as being a deemed claim of a shortfall in DCG's client account to which one indemnity limit applied. No claims from clients had in fact then been received. But under the SRA Accounts Rules 2011 the obligation on a firm of solicitors that discovers a breach of the rules is to remedy the breach promptly on discovery.

20. At the time the SRA intervened in the practice, there was some £3.5 million in DCG's client account, of which some £1.8 million was identified as being related to Mrs Box's cases. Those sums were frozen. That meant the clients could not use their monies, and if a client could prove that monies were held in client account for them, then HDI would (with the approval of Mr Gill and Mrs Wilding) advance funds to enable them to be repaid (or to complete a conveyancing transaction or the like). By May 2017 HDI had advanced over £1 million in this way. But Gordons, acting as the intervention agents, then released nearly the same sum from the client account which was paid to HDI and virtually reconstituted the £2 million indemnity limit. Ms Vasiljevic continues:

> "[HDI] then used the indemnity limit to pay claims as presented, quantified and agreed with the result that the £2 million indemnity limit has now been exhausted."

21. It was explained to us by both Mr Pooles QC and Mr Kendrick QC that this was in accordance with the usual practice, which is that insurers will pay out a claim once it has been adjudged, or agreed, to be a valid claim covered by the policy and will continue to pay out claims in full until the limit of indemnity is reached, even if it is known that there are other claims pending which (on the assumption that the limit of indemnity is reached before they are established) will receive nothing. Mr Kendrick QC accepted that to the eyes of an equity lawyer it might seem odd that a finite amount of money should be dealt with in this way rather than being shared pari passu among all those with a claim on it, but told us that this point had been resolved long ago in the course of the Lloyd's litigation: see *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437. We heard no argument on the point, and were not taken to the decision, but it does appear that this court there upheld the "first past the post" principle over that of rateable distribution.

22. The practical consequence is that if HDI is right that the claims can all be aggregated so that they form a single claim then the limit of indemnity

has already been reached. This means that any further claims, including those of the claimants in the two actions before us, will be uninsured, and the claimants will be left to seek to recover from Mr Gill and Mrs Wilding personally (subject to such defences, including limitation, as they may have). It need hardly be said that, assuming the claims are good ones, that is likely to be disastrous either for Mr Gill and Mrs Wilding, or for the claimants, or indeed both.

The Bishop's action

23. The Bishop's action was brought by claim form issued in Leeds dated 25 September 2018. It is not necessary to detail the claims that are brought but in summary the claimants (the Bishop and the LDBF) sue both in their own right and as successors to the Bishop of Wakefield and certain Wakefield diocesan entities respectively, on the basis that Mrs Box acted for them in numerous transactions including conveyancing transactions and the administration of funds, and misappropriated or failed to account for large sums of money, investments and other assets. They seek an account on the footing of wilful default against DCG and Mrs Box, and payment of the amount found due. The total claim is about £2.5 million and interest.

24. It may be noted that the claims are not limited to monies said to have been paid into DCG's client account. Over £500,000 is claimed in respect of a fund called The Bishop of Wakefield Fund. Transactions in relation to this fund were recorded in a red ledger kept by Mrs Box and found in DCG's offices. Mr Gill's evidence however was that only a relatively small proportion of this money passed through DCG's client account. A further claim for almost £800,000 is based on a number of funds that are said to have been held for the Bishop of Wakefield and invested with Churches, Charities and Local Authorities Investment Management Ltd ("CCLA"). There is no evidence that monies from the CCLA funds were held in, or passed through, DCG's client account.

25. The claimants also joined HDI and sought against it a declaration that HDI was not entitled to aggregate their claims with the claims of other clients of DCG defrauded by Mrs Box.

26. By application notice dated 2 October 2019 the claimants applied for summary judgment on a number of their claims. For present purposes the relevant one is the claim for a declaration that HDI was not entitled to aggregate.

The Scholefield action

27. Mr Scholefield, a retired Fire Brigade Officer, died on 20 September 2007. By his will dated 15 July 2005 he appointed Mrs Box and Mr Gill to be his executors, and probate was granted to them on 22 November 2007. Mr Gill in practice however left the administration of the estate entirely to Mrs Box.

28. After leaving a number of pecuniary legacies to individuals and charities (which came in total to some £32,000), Mr Scholefield left the residue of his estate equally to four named charities, who are the four claimants in the Scholefield action.

29. In April 2008 Mrs Box made an interim distribution to the four claimants of some £42,000 each, representing their share of the proceeds of Mr Scholefield's house. In November 2008 she made a final distribution to them accompanied by estate accounts showing assets (other than his house) of some £78,000, consisting of some policies and modest investments. After payment of the pecuniary legacies, his funeral expenses and debts, and DCG's bill, the final distribution amounted to a further £9,000 odd each. In all the four claimants received just over £206,000 in respect of the residuary estate.

30. So far as the claimants were concerned they had no reason to query that until Gordons contacted them in November 2017. An investigation of DCG's files then revealed that Mr Scholefield had in fact had a much more extensive portfolio of investments than the estate accounts showed. The pleaded case is that his estate was worth over £711,000; that after allowing for the pecuniary legacies and legitimate expenses, the residuary estate should have been some £660,000; and that the claimants should have received between them a further sum in excess of £450,000 which it appears that Mrs Box stole.

31. Again it is to be noted that not all the sums claimed passed through DCG's client account. The pleaded claim is that some £410,000 was paid into the client account; but over £300,000 was not. The supposition is that Mrs Box simply realised the assets (as she would have been in a position to do as executor) and diverted the proceeds to herself.

32. The claim form was issued in London on 15 May 2019. As with the Bishop's action, HDI was later joined and appropriate declarations sought against it. The action was later transferred to Leeds so that it could be heard alongside the Bishop's action, and the claimants issued an application for summary judgment against HDI for a declaration that it was not entitled to aggregate the claimants' claim with claims by other parties affected by Mrs Box's activities.

The judgment

33. The applications for summary judgment were heard together by the judge in Leeds. He handed down the judgment on 28 October 2020. Much of the judgment is taken up with the

claimants' application in the Bishop's action for summary judgment for an account and interim payment, with which we are not concerned. It is not until para 169 of the judgment that the judge starts to consider the aggregation issue. He does so by reference to the terms of clause 2.5 of the MTC rather than clause 6.1(c) of the Policy; I have already said that I think the latter is technically what falls to be construed but since the relevant parts of the aggregation clause are the same in each case it makes no difference to the analysis.

34. At para 185 he records that Mr Pooles QC's argument for HDI was limited to a contention that the claims fell within Limb 1 (claims arising from one act or omission) or Limb 2 (claims arising from one series of related acts or omissions); HDI's pleaded defence in each action had also relied on Limb 4 (claims arising from similar acts or omissions in a series of related matters or transactions), but Mr Pooles QC did not pursue that. At para 197 the judge considers, and rejects, the argument based on Limb 1, concluding at para 208 that Mrs Box's actions over a number of years could not be seen to be one act; each theft must be a different act although they may be taken with a view to accomplishing one ultimate objective.

35. At para 211 he turned to Limb 2 and the question whether the claims arose out of one series of related acts or omissions. Much of the ensuing discussion is taken up with consideration of two judgments on aggregation clauses in the House of Lords and Supreme Court respectively, namely *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2003] Lloyd's Rep IR 623; [2003] 4 All ER 43, and *AIG Europe Ltd v Woodman* [2017] Lloyd's Rep IR 209; [2017] 1 WLR 1168, and the parties' respective contentions based on them. These cases also formed the basis of much of the argument before us and I give the details below.

36. The judge gave his conclusions on the issue at paras 262 to 273. At para 263 he concluded that the thefts from the claimants in the Bishop's action and in the Scholefield action did not have a sufficient interconnection or unifying factor with any other claims to bring them within Limb 2; and at para 264 that the aggregation clause therefore did not permit aggregation of the claims of the Bishop and the LDBF on the one hand with those of the Scholefield claimants on the other, or the claims of either with claims of other clients whose claims had already been satisfied. At para 265 he rejected the contention that Mrs Box's dishonesty was the proximate cause of the loss; what caused the losses were the individual thefts. These were not related: being committed by the same person and perhaps concealed by the same process was not enough (at para 266). He then rejected a contention that the matter, being fact sensitive, should go to trial, concluding at para 272 that it was unrealistic to conclude that there was any basis on which evidence could produce a sufficient unifying connection between the thefts from the Bishop and the LDBF on the one hand and the Scholefield claimants on the other, or with thefts from other clients whose claims had been satisfied.

37. Finally at para 273 he left open the question whether it was open to HDI to aggregate the claims of the Bishop with those of the LDBF, or to aggregate the claims of the Scholefield claimants with each other. This was not a point raised before us, in the case of the Bishop's action because Mr Halpern QC recognised that it was unsuitable for summary judgment, and in the case of the Scholefield claimants because it made no difference to them as their combined claim was less than £2 million.

38. The judge made orders in each action on 1 December 2020. These included declarations that HDI was not entitled to aggregate the claims of the claimants in each action with the claims of the claimants in the other action or with any other party whose claims against DCG had already been made or satisfied, or otherwise treat the claims as falling within one claim for the purposes of the limit of indemnity under the Policy. The judge gave HDI permission to appeal, on the basis that the question whether aggregation was possible was one of general importance on which there was no direct authority.

Grounds of appeal

39. Two grounds of appeal have been advanced by Mr Pooles QC, which can be summarised as follows:

(1) The claims aggregated because they arose out of a series of related acts or omissions.

Alternatively:

(2) The claims amounted to one claim under the definition in the Policy.

Ground 1 – series of related acts or omissions

40. Mr Pooles QC does not seek to revive the argument that all the claims arose out of one act or omission within the meaning of Limb 1. But he submits that they are all "Claims arising from … one series of related acts or omissions" within the meaning of Limb 2.

41. This submission requires an analysis of the decisions in *Lloyds TSB* and *AIG*.

Lloyds TSB

42. In *Lloyds TSB* the insured were a number of companies in what was then the TSB group which

had been involved in the pensions mis-selling debacle in which large numbers of members of occupational pension schemes were persuaded to transfer to personal pension schemes without receiving adequate advice. The TSB companies between them received about 22,000 claims of mis-selling. The claims were for relatively small amounts, the largest not exceeding £35,000, but in all the TSB companies had paid out over £125 million in compensation.

43. They were insured under a bankers composite insurance policy which covered a variety of risks. The relevant insuring clause was in a section of the policy dealing with liability to third parties arising from breaches of common law or statutory duties by employees. It indemnified the companies, among other things, in respect of liability for any third-party claim for damages which was for financial loss:

> "caused by a breach on the part of the Assured or an Officer or Employee of the Assured of the provisions of the Financial Services Act 1986 …"

That included breaches of regulatory rules made under the Act, including the LAUTRO (Life Assurance and Unit Trust Regulatory Organisation) rules which applied to the TSB companies.

44. The claims fell within this clause. But they were subject to a deductible of £1 million "each and every claim". If this applied to each claim separately, the TSB companies would receive nothing as no individual claim came anywhere near £1 million. They relied however on an aggregation clause in the following terms:

> "If a series of third-party claims shall result from any single act or omission (or related series of acts or omissions) then, irrespective of the total number of claims, all such third-party claims shall be considered to be a single third-party claim for the purposes of the application of the Deductible."

They contended that the mis-selling claims either resulted from a single act or omission, or from a related series of acts or omissions.

45. Before Moore-Bick J ([2001] Lloyd's Rep IR 237) they succeeded on the basis that all the claims resulted from the breach or breaches by the TSB companies of their duties under the LAUTRO rules to train their employees and monitor their performance, and that this was either a single act or omission, or a series of acts or omissions. On appeal to this court however ([2002] Lloyd's Rep IR 113), the court held that the act or omission had to be something which constituted the cause of action: it could not be something more remote. The failure to train or monitor the employees did not by itself give rise to any liability: that only arose if the employees contravened the code, which they did each time they failed to give the members of the schemes best advice. But the court nevertheless dismissed the appeal on the basis that the claims arose from a series of acts or omissions, which were related because they had a single underlying cause of common origin, or because the omission was the same omission on each occasion.

46. The insurers' further appeal to the House of Lords was allowed. Both Lord Hoffmann and Lord Hobhouse gave reasons for allowing the appeal, and the other three members of the House (Lords Nicholls, Millett and Walker) agreed with both of them.

Lord Hoffmann's analysis

47. Lord Hoffmann accepted (at paras 14 to 15) as a fair description Moore-Bick J's statement that the purpose of an aggregation clause was to enable two or more separate losses to be treated as a single loss when they were linked by a unifying factor of some kind. But he pointed out that the nature of the act or event that the clause treated as a unifying factor depended on the precise choice of wording. If a clause referred, for example, to occurrences of a series "consequent on or attributable to one source or original cause" (as in *Municipal Mutual Insurance Ltd v Sea Insurance Co Ltd* [1998] Lloyd's Rep IR 421), or to claims "arising from one original cause" (as in *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437), that was much wider than a clause that referred to claims "arising out of one event". The former for example enabled losses from theft at a port to be aggregated on the basis of the inadequacy of the port's system for protecting the goods of which it was a bailee, or losses under a number of separate policies which a Lloyd's underwriter had written to be aggregated on the basis of his incompetence being the originating cause; whereas such incompetence could not be said to be an event enabling aggregation in the latter case: see at paras 15 to 16.

48. Lord Hoffmann then gave his reasons for agreeing with the Court of Appeal that on the wording of the aggregation clause, it could not be said that the claims all arose from one act or omission. His views on this sufficiently appear from para 23 where he said:

> "The language of the aggregation clause, read with the definition of 'act or omission', shows that the insurers were not willing to accept as a unifying factor a common cause more remote than the act or omission which actually constituted the cause of action. An act or omission could qualify as a unifying factor in respect of more than one loss only if it gave rise to civil liability in respect

of both losses. In the present case, the act or omission which gave rise to the civil liability in respect of each claim (failure to give best advice to that investor) was different from the acts or omissions giving rise to the other claims."

49. Pausing there, I do not think there is any difficulty in applying that to the present case. The position would appear to be directly analogous. Mrs Box over many years stole client money by paying it towards her credit card or tax or mortgage liabilities or the like. Each time she did so she committed a theft which was a separate act, different from the other thefts. It could not therefore be said that all the claims arose out of "one act or omission". Indeed I did not understand Mr Pooles QC to dispute this on the appeal, and that no doubt explains why he has not sought to appeal the judge's conclusion on Limb 1.

50. Lord Hoffmann then considered whether, as the Court of Appeal had held, the claims could nevertheless be aggregated as resulting from a related series of acts or omissions. It is simplest to cite his conclusions almost in full, as follows:

"25. This result seems to me paradoxical. It means that the parties started by choosing a very narrow unifying factor: not 'any underlying cause', not 'any event' or even 'any act or omission', but only and specifically an act or omission which gives rise to the civil liability in question. Having chosen this as the opening and, one must assume, primary concept to act as unifying factor, they have then, by a parenthesis, produced a clause in which the unifying factor is as broad as one could possibly wish. It is sufficient that all the claims have a common underlying cause or (on the view of Longmore LJ) the breaches of duty are the same, which I take to mean sufficiently similar. In my opinion this construction is allowing the tail to wag the dog. I do not think that it is reasonable to understand the parties as having intended the parenthesis to stand the rest of the clause on its head.

26. When one speaks of events being 'related' or forming a 'series', the nature of the unifying factor or factors which makes them related or a series must be expressed or implied by the sentence in which the words are used. It may sometimes be necessary to imply a unifying factor from the general context. But the express language may make such an implication unnecessary or impermissible.

27. In the present case, the only unifying factor which the clause itself provides for describing the acts or omissions in the parenthesis as 'related' and a 'series' is that they 'result' in a series of third-party claims. In other words, the unifying element is a common causal relationship. But that common causal relationship is, so to speak, downstream of the acts and omissions within the parenthesis. They must have resulted in each of the claims. This obviously does not mean that it is enough that one act should have resulted in one claim and another act in another claim. That provides no common causal relationship. It can only mean that the acts or events form a related series if they together resulted in each of the claims. In this way, the parenthesis plays a proper subordinate role of covering the case in which liability under each of the aggregated claims cannot be attributed to a single act or omission but can be attributed to the same acts or omissions acting in combination.

28. The Court of Appeal was unwilling to accept that the clause itself provided the unifying factor to justify the use of the words 'related' and 'series'. They appear to have thought that it was in practice unlikely that acts or omissions having a common causal relationship with a series of claims would occur. So the Court of Appeal sought the unifying factor outside the clause, by implying a reference to a common underlying cause upstream of the acts or omissions in the parenthesis, or some similarity between them. The clause itself says nothing about such unifying factors. Not only that; the narrow formulation of the primary concept, 'single act or omission', suggests that it was anxious to avoid them. In my view, such an implication of an unstated unifying factor is impermissible …"

51. Mr Pooles QC's argument is that Mrs Box's thefts were a series of acts and omissions which are related because they all they formed part of an extended course of dishonest conduct on multiple occasions over many years. He accepted that this was a fact-sensitive question: if a solicitor had committed a theft in 2002, and then an unrelated theft in 2015, it might be very difficult to suggest that they formed a series of acts. But here there was nothing to suggest that there had been any break in Mrs Box's dishonest conduct: all her thefts were underpinned by the dishonest way in which she had treated the firm's client account.

52. The fact that many of Mrs Box's thefts were from the firm's client account gives rise to a particular question which I deal with below, but as I have explained it appears that not all her thefts were, and if one puts that particular point on one side for the moment, there is I think no doubt that if what Lord Hoffmann says about the aggregation clause in *Lloyds TSB* applies to the aggregation clause in the Policy Mr Pooles QC's submission cannot succeed. Let us take the case of two thefts which have nothing to do with the client account such as a theft from the Bishop of Wakefield

Fund recorded in the red ledger, and a theft from Mr Scholefield's estate by Mrs Box selling an investment and diverting the proceeds to herself, neither involving any money passing through the client account. In one sense I agree that these can be said to be related by Mrs Box's dishonesty: they are both examples of her helping herself to money entrusted to her by clients in the course of a long and apparently continuous course of dishonest conduct. But on the basis of what Lord Hoffmann says, this is not enough.

53. It is plain from what he says at para 26 that before a series of acts or omissions can be said to be related, one has to find a unifying factor, and that the relevant unifying factor has to be identified, expressly or impliedly, in the wording of the clause. At para 27 he identifies, from the language of the clause, the unifying factor as being that the acts or omissions should have resulted in a series of claims, or in other words caused a series of claims. But:

> "This obviously does not mean that it is enough that one act should have resulted in one claim and another act in another claim … It can only mean that the acts or events form a related series if they together resulted in each of the claims."

In other words 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. He expresses the same point in his conclusion at para 29 where he says:

> "Each of the claims did not arise from a 'single act or omission'. Nor did each of them arise from a 'related series of acts or omissions'. Each arose from a separate contravention of [the LAUTRO rules]."

54. Applying that to the example I have given from the present case, that requirement would only be satisfied if each of the Bishop's claim and the Scholefield claimants' claim arose from the combination of both thefts. But this would obviously not be so: the Bishop's claim would arise from the theft from the Bishop of Wakefield Fund and have nothing to do with the quite separate theft from the Scholefield estate, and conversely with the Scholefield claimants' claim. Neither claim would therefore arise from a related series of acts.

55. It is therefore necessary for Mr Pooles QC to persuade us that what Lord Hoffmann said did not apply to the present case. He relied on two differences. The first is what can be called the parenthesis point. This was that Lord Hoffmann repeatedly referred to the fact that the words "or related series of acts or omissions" were in parenthesis, and should therefore not be allowed to overturn the primary part of the clause. In the Policy however the two parts of the clause that correspond to that in *Lloyds TSB* were separated out and given equal importance as Limbs 1 and 2. That, he suggested, changed the effect of the clause back to the view this court had taken of it in *Lloyds TSB*.

56. There is no doubt that the parenthesis point is one that Lord Hoffmann makes: see para 25 where he refers to the tail not being allowed to wag the dog, and to the parenthesis not being intended to stand the rest of the clause on its head; and again at para 27 where he refers to the parenthesis playing a proper subordinate role; see also para 28 where he refers to the "single act or omission" as the primary concept.

57. But I do not see that the parenthesis point can bear the weight that Mr Pooles QC sought to put on it. Lord Hoffmann's disagreement with the Court of Appeal is not based solely, or even primarily, on the relative weight to be given to the two parts of the clause. It is primarily based on the analysis in para 27 that the only unifying factor that can be identified from the clause is the requirement that the claims should all have resulted from, or been caused by, the series of acts or omissions. That analysis would be precisely the same whether the relevant words were inside a parenthesis or not. The same is true of the clause in the Policy where all the claims have to be claims "arising from … one series of related acts or omissions", Mr Pooles QC accepting in terms that there was no relevant difference between "result from" and "arising from".

58. The parenthesis point was I think part of Lord Hoffmann's explanation why he considered the Court of Appeal's decision to be paradoxical. He had explained that the choice of words in the aggregation clause was of critical importance to the width of the clause, and tended to be keenly negotiated. He had explained that the wording "one act or omission" gave the clause a much narrower scope than, for example, "one original cause". He had agreed with the Court of Appeal that the words "one act or omission" did not permit aggregation on the basis of breaches of the requirements to train and monitor employees as these were not acts or omissions which gave rise to claims. But to him it then seemed bizarre to suggest that the part of the clause in parenthesis nevertheless permitted aggregation of claims resulting from separate acts connected only by some unifying factor "upstream", as this would be to make a nonsense of the carefully circumscribed limit of the main part of the clause. Undoubtedly the fact that the words were in parenthesis lends force to this point; but even without parenthesis I think the point remains a good one. What is the point of selecting "one act or omission" rather than "one original cause" for Limb 1 if one is then going in effect to allow an

underlying cause to be a unifying factor for a series of acts in Limb 2?

59. But quite apart from this, as I have said, the substance of Lord Hoffmann's analysis is that found in para 27 where for the reasons he there gives 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. That conclusion is not dependent in my judgment on the parenthesis point, and applies equally to a clause, such as that in the Policy, where the two limbs are split out and given equal weight.

60. Mr Pooles QC's other point was that in *Lloyds TSB* the insuring clause was very narrowly drawn by reference to particular causes of action, and the aggregation clause mirrored that. By contrast, the insuring clause in the Policy, as required by the MTC, provided very wide cover against any form of civil liability whatever its basis, so long as it arose out of "Private Legal Practice in connection with the Insured Firm's Practice": see clause 2.1 (set out at para 13 above).

61. I do not think this is a material distinction either. It is true that one of the points made by Lord Hoffmann in *Lloyds TSB* is that the Court of Appeal had drawn attention to the definition in that policy of "act or omission" which was tied to the insuring clause and hence had to be something which constituted the cause of action (see at para 20). That is a factual distinction with the Policy here which contains no equivalent definition. But I do not see that this point makes any difference to Lord Hoffmann's analysis of how the unifying factor is to be identified from the language of the aggregation clause, or affects his overall conclusion. In the present case the effect of Limbs 1 and 2 of the aggregation clause is that the claims have to result from either one act or omission, or from a series of related acts or omissions. It is accepted by Mr Pooles QC that Mrs Box's dishonesty is not itself an act, and that the acts or omissions are her individual thefts. The question is whether they are sufficiently related to be a series for the purposes of the clause; and that question turns on what the relevant unifying factor is. That, according to Lord Hoffmann, is to be found in the language of the aggregation clause. I do not see that the narrowness or otherwise of the insuring clause changes this.

62. In my judgment therefore neither of the points relied on by Mr Pooles QC are sufficient to distinguish Lord Hoffmann's analysis in *Lloyds TSB*. I think it is directly applicable to the aggregation clause in the Policy, and as I have already said on that analysis the claims here do not fall within Limb 2 of the aggregation clause of the Policy as it cannot be said that each of the claims arises from a series of Mrs Box's thefts.

63. The conclusion that what Lord Hoffmann said is applicable to Limb 2 of the aggregation clause in the Policy (and to Limb 2 in the aggregation clause in the MTC) is not a new one. The reaction of the market to the decision in Lloyds TSB is recounted in the Court of Appeal's decision in *AIG* (*AIG Europe Ltd v OC320301 LLP* [2016] Lloyd's Rep IR 289) at paras 28 to 30 per Longmore LJ. *AIG* concerned the aggregation clause in clause 2.5 of the MTC in the same form as that with which we are concerned, although the particular limb relied on in that case was Limb 4, and the actual question was whether the claims arose from similar acts or omissions in a series of related matters or transactions.

64. The history given by Longmore LJ indicates that when *Lloyds TSB* was decided (in July 2003) the then version of clause 2.5 of the MTC read as follows:

> "The insurance may provide that all claims against any one or more insured arising from the same act or omission or from one series of related acts or omissions will be regarded as one claim for the purposes of the limits contemplated by clauses 2.1 and 2.3."

Longmore LJ commented that there was "an obvious similarity" between this clause and that in *Lloyds TSB*, and that the decision seems to have caused consternation to the professional indemnity insurers of solicitors (at para 28). At para 29 he quoted from the *Law Society Gazette* for 27 January 2005, which included the following:

> "The qualifying insurers had assumed that the wording of clause 2.5 would enable them to treat as one claim multiple claims arising not only from a series of related acts but also from a series of similar acts. The House of Lords' decision in [*Lloyds TSB*] has established that the qualifying insurers' assumption was wrong.
>
> The House of Lords' decision has given clarity to the phrase a 'related series of acts or omissions' which is found in many aggregation clauses. The qualifying insurers are seriously concerned that the decision in the Lloyds TSB case has narrowed the effect of the aggregation clause in the minimum terms and conditions (clause 2.5) to an unacceptable extent. They sought an amendment of clause 2.5 to put them back in the position they thought they were in before the Lloyds TSB case. The qualifying insurers maintain that if some action is not taken to mitigate their exposure, there will inevitably be some disruption in the marketplace in relation to firms' ability to obtain insurance at an affordable cost."

The article then explains how the Law Society Council agreed the reworded definition of one claim that is now found in the MTC. It can be seen that not only did the market assume that the decision in *Lloyds TSB* applied to the then wording of clause 2.5 of the MTC, but Longmore LJ himself thought the wording was obviously similar.

65. On further appeal to the Supreme Court the only judgment was given by Lord Toulson, with whom the other members of the court agreed. At para 15 he said this of the aggregation clause in clause 2.5 of the MTC:

> "Clause 2.5 of the MTC authorises the aggregation of more than one claim when each claim arises from acts or omissions falling within any one of sub-clauses (a)(i) to (iv). Sub-clause (i) ('one act or omission') requires no further explanation. Sub-clause (ii) ('one series of related acts or omissions') was interpreted in [*Lloyds TSB*] by Lord Hoffmann as confined to acts or omissions which 'together resulted in each of the claims': para 27. Lord Hobhouse of Woodborough was prepared to go somewhat further by including the scenario of the misselling of a pension scheme, by means of the same misleading document, to a succession of people who brought a series of claims. The other three judges expressed no view on the point of difference between Lords Hoffmann and Hobhouse."

66. Mr Pooles QC said that that was not necessary to the decision in *AIG*, nor indeed formed part of the reasoning which was concerned with Limb 4 rather than Limb 2; it was just a very brief summary of some of the history. That I accept; but nevertheless it remains the case that Lord Toulson evidently also took the view that what Lord Hoffmann said in *Lloyds TSB* was applicable to Limb 2 in the MTC.

67. For reasons already given, I agree, and subject to three further points, that is sufficient to dispose of Ground 1 of the appeal.

Lord Hobhouse's analysis

68. The first point is whether Lord Hobhouse's analysis in *Lloyds TSB* leads to any different conclusion.

69. Lord Hobhouse begins his analysis in the same way as Lord Hoffmann, to the effect that there was no "single act or omission": there were as many acts and omissions as there were third-party claims (at para 43). So the question is whether there was a related series of acts and omissions. He gives his conclusion on this point at para 52. Two factors were relied on to provide the connection. One was that the employees' failure to give best advice was in each case of a very similar or identical nature. But Lord Hobhouse thought this proved too much: it would lead to the aggregation of individual acts of negligence by individual employees on the basis that they had a similar character. The other was that the acts arose from the same underlying origin. But Lord Hobhouse thought this would not do either as it would require:

> "exactly the type of reclassification and redrafting of the clause which the authorities demonstrate is not permissible."

This last point seems to me to be the same as the point made by Lord Hoffmann that the parties had chosen a narrow type of aggregation clause, based on an act or omission, rather than a wide type of clause based on an original or underlying cause, and that in those circumstances "related series of acts and omissions" should not be interpreted widely as this would be to subvert the narrow ambit of the provision.

70. There is however one point on which they gave different views. At para 46 Lord Hobhouse says this:

> "The second basis of aggregation provided for in the clause is third party claims resulting from a 'related series' of acts or omissions … Here again one can visualise a situation which might be capable of leading to aggregation under this part of the wording. Suppose a 'consultant' prepares a document which misrepresents the merits of the pension scheme he is endeavouring to sell and gives that document to a succession of people; the people who buy into the scheme as a result of having been given the misleading document by the 'consultant' could each have a claim against the assured employing that 'consultant'. Each act of giving the misleading document to a person would be a distinct act. But they could together form a 'related series of acts' from which a 'series of third-party claims' had resulted. But here again, this was not the way the assureds put their case, no doubt for the same reasons as before and because it was not in fact what happened. They however rely upon the use of the word 'ensure' and the assumed fact that all the acts of mis-selling arose from the same underlying origin or were of an identical or a very similar nature."

Lord Hoffmann was not inclined to agree. He said at para 28:

> "I would reserve my opinion on the example given by my noble and learned friend Lord Hobhouse of Woodborough of the salesman who presents the identical document to a number of customers in succession. I would not be inclined to accept that these acts are a series just because they are very similar, although I can see it might be said that the relevant single act or series of

> acts can be described as the distribution of the document and the method of distribution (sending it simultaneously to a number of people, showing it to them in succession or reading it to them at a meeting) is causally irrelevant."

It can be seen however that although they disagree neither actually expressed a concluded view on the point. They did not need to do so as those were not the facts.

71. Mr Pooles QC suggested that it was difficult to identify the ratio where the other members of the House agreed with both Lord Hoffmann and Lord Hobhouse and their analysis was not entirely on all fours with each other. But I think the conundrum is more apparent than real. The essential point on which they agreed, and which was dispositive of the appeal, was that it was not sufficient for acts and omissions to be a related series that they had the same underlying origin or cause; that would be to give the words in parenthesis a wide meaning that would be inconsistent with the narrowness of the "single act or omission" wording. Applying that to the present case it is not sufficient that Mrs Box's thefts had the same underlying origin or cause in her dishonest treatment of clients' money.

72. Admittedly it appears that their reasons for agreeing on this are not quite the same. On Lord Hoffmann's analysis it is because the claims did not each result from the series of acts. On Lord Hobhouse's analysis it seems that he envisaged that it might be possible to have a series of related acts or omissions where the same document had been given to a succession of people; since in that case each claimant's claim would arise from the particular occasion when the document was given to him or her, I think it must follow (although Lord Hobhouse does not spell this out) that he thought it might be possible to bring the case within the words in parenthesis even if each claim could not be said to result from the series of acts, but from one act in the series. But even on Lord Hobhouse's view, what might make the series a related one is that the very same act (giving the client a document) is repeated with more than one client. I do not see that Mrs Box's thefts are analogous. They are not the very same act, repeated a number of times. They are no doubt similar acts, all flowing from her dishonesty; but this is not enough to make them a series of related acts for the purposes of aggregation.

73. In those circumstances I do not think it matters that Lord Hobhouse's analysis is not in all respects the same as Lord Hoffmann's. On either view, unless *Lloyds TSB* can be sufficiently distinguished, which for the reasons I have given I do not think it can be, Ground 1 of the Appeal cannot succeed.

AIG

74. The second point is whether there is anything in *AIG* which affects the position.

75. *AIG*, as I have already referred to, was, unlike *Lloyds TSB*, a decision concerned with solicitors' indemnity insurance and specifically the aggregation clause in clause 2.5 of the MTC. But the particular part of the clause which fell to be construed was Limb 4 (similar acts or omissions in a series of related matters or transactions), which gives rise to rather different considerations from Limb 2. The claims were brought against a firm of solicitors by investors in two different overseas developments, one near Izmir in Turkey and one at Marrakech in Morocco. In each case the claims were based on the allegation that the solicitors had released the funds collected from the investors to the developers without adequate security. The acts or omissions alleged were therefore similar, and the question was whether the matters or transactions were related. Lord Toulson's view on the facts (as they appeared at that stage) was that the claims of each investor should be aggregated with the claims of the other investors in the same development (on the basis that they arose in a series of related transactions) but not with the claims of the investors in the other development.

76. Mr Pooles QC sought to derive some assistance from Lord Toulson's statement at para 22 that for transactions to be related, there must be "some interconnection" between them, and suggested that the interconnection between Mrs Box's thefts was that they all arose out of her dishonesty. But the question whether matters or transactions are related, which was the question in *AIG*, is obviously a different question from whether acts or omissions form a related series, which was the question in *Lloyds TSB*, and I do not read anything said by Lord Toulson as casting doubt on or qualifying what was said in *Lloyds TSB*. On the contrary, at para 18 he said, when discussing the requirement in Limb 4 for there to be a series of related matters or transactions:

> "Looking at the matter broadly, it is easy to see the reason for such a limitation. If insurers were permitted to aggregate all claims arising from repeated similar negligent acts or omissions arising in different settings, the scope for aggregation would be so wide as to be almost limitless."

That strongly suggests that he thought that Limb 2 would not allow the aggregation of all claims arising from repeated similar acts of negligence either; and there is no reason to think the position would be any different with repeated similar acts of dishonesty.

77. In those circumstances, I do not think that *AIG* affects the position.

The client account point

78. The third point is the one I mentioned earlier about the client account.

79. The point is this. Many (although, as I have said, not all) of Mrs Box's thefts were thefts from DCG's client account. DCG received client money from many different clients. Such money when received by a firm of solicitors is held on trust for the client, so this gave rise to a multitude of separate trusts. It would normally be the duty of a trustee of more than one trust to keep the assets of each trust separate, but the relevant rules permit solicitors to pay client money into a single general client account, and DCG, in common with other solicitors, did so. That money therefore belonged to many different clients but was held in a single mixed account; solicitors are required to keep accounts of the amount owing to individual clients which they do by maintaining a ledger for each client; and they are also required to reconcile the sums shown on each ledger with the total in the account on a regular basis.

80. Now if instead of paying client money into a general client account DCG had in fact kept each client's money separate, it would in principle be easy to identify whose money had been stolen every time Mrs Box committed a theft. It would depend on which account she had dipped into. To take an analogy used in argument, if each client's money was in the form of gold coins in a separate box, it would depend on which box of gold coins Mrs Box had raided on each occasion. Each client's claim would then result from the particular theft of that client's money.

81. But when the money is in a mixed account it is not so obvious whose money has been stolen each time there is a theft. This is analogous to a single box containing gold coins belonging to all the clients of the firm: if Mrs Box dips into the box and helps herself to a handful of coins, whose are they? Various possible answers suggest themselves: the answer might be given by the tracing rules, or the losses might be shared pari passu. In practice however the fraudulent solicitor will need to cover their tracks by making an entry in one of the client ledgers so that the totals still reconcile. This can be done for example by creating an entry in a client ledger showing a fictitious payment out. We were told that where this is done, the practice is to regard that particular theft as allocated to that client. I have some doubts about this, as it seems surprising that a solicitor stealing client money from a mixed account can decide for him or herself which client to allocate the loss to, but it is not necessary to pursue this.

82. In the course of argument Phillips LJ raised the question whether the true analysis is not as follows. Each client, as a beneficiary under a trust, is entitled to an account of what has become of his money, and payment of the amount found due on the taking of the account. If a client asks for his money and is paid he will have no claim. But if he asks for his money and is not paid, that will be because there is a deficiency on client account. That deficiency will not be attributable to any one particular theft, but to the cumulative effect of all the thefts that have taken place from the client account. In this way it could perhaps be said that each client who has a claim against the firm does indeed have a claim which arises from all the acts of theft taken together. Hence Lord Hoffmann's requirement for Limb 2, that the claims all arise from the same series of acts, might be satisfied after all.

83. This is an interesting argument which raises a number of quite difficult points. Some of these were briefly touched on in argument but we did not hear anything like full argument on them. I have considered whether in the circumstances, particularly as this was an application for summary judgment for a declaration, we ought to allow the appeal and direct the matter to proceed to trial so that the facts can be fully explored, and the argument fully ventilated. But I have come to the conclusion that this would not be appropriate. This was not the argument presented below, nor the argument articulated in the Grounds of Appeal or skeleton argument, nor the argument advanced to us orally by Mr Pooles QC. Nor did he apply to take it as a new point, in which case the respondents might well have objected and we would have had to consider whether to permit him to do so in accordance with well-known principles. Rather, Mr Pooles QC's argument, as I have sought to explain, was that what Lord Hoffmann said in *Lloyds TSB* was to be distinguished, and that the claims fell to be aggregated under Limb 2 on the simple basis that they all arose from acts that were related by Mrs Box's dishonesty. His argument did not depend on the thefts having all taken place from client account, and this does not seem to be the case in fact. In those circumstances I do not think we ought to decide the appeal on a basis which was neither advanced by the appellant nor one which the respondents had come prepared to meet.

Conclusion on Ground 1

84. Having considered and rejected Mr Pooles QC's attempts to distinguish Lord Hoffmann's analysis in *Lloyds TSB*, and the other points above, I conclude that Ground 1 fails.

85. I only add that it is not necessary in those circumstances to deal in any detail with the policy considerations that underlie the MTC. In *Swain v The Law Society* [1983] 1 AC 598 Lord Brightman said at page 618B to C of the insurance scheme

then in force, which had been made by the Law Society under section 37 of the Solicitors Act 1974, that it was:

> "not only for the protection of the premium-paying solicitor against the financial consequences of his own mistakes, the mistakes of his partners and the mistakes of his staff, but also, and far more importantly, to secure that the solicitor is financially able to compensate his client. Indeed, I think it is clear that the principal purpose of section 37 was to confer on The Law Society the power to safeguard the lay public and not professional practitioners, since the latter can look after themselves. This is underlined by the position of section 37, which is one of a group of three sections, the other two of which are plainly enacted in the interests of the lay public. So, there is no doubt at all in my mind that the power given to The Law Society by section 37 is a power to be exercised not only in the interests of the solicitors' profession but also, and more importantly, in the interests of those members of the public who resort to solicitors for legal advice."

As this makes clear, the protection of the public was the primary purpose of the power in section 37. Although the then scheme of compulsory insurance was rather different from that now in place, there is no reason to think that this does not equally apply to the making of the 2013 Rules and the MTC. Mr Halpern QC showed us a number of provisions of the MTC which were plainly designed for the benefit of the public. It is not necessary to detail them.

86. Against this background Mr Learmonth QC submitted that a decision in favour of Mr Pooles QC's argument would fail to satisfy this objective. He said that an ordinary member of the public such as Mr Scholefield who proposed instructing a firm such as DCG could, if prudent, inquire about the level of insurance cover carried by the firm and, on being told that the minimum was £2 million per claim, take comfort from the fact that the value of his transaction to be effected with them would be well under this limit. If however Mr Pooles QC were right, he could find that his claim was aggregated with those of many other clients of the firm, stretching back over many years, of whom he knew, and could know, nothing.

87. Mr Learmonth QC advanced this point persuasively and eloquently. Mr Pooles QC pointed out that as insurance is provided on a claims made basis, a client could never know when he instructed a firm of solicitors which future year any claim might fall into or what cover the firm might then carry, but I do not think this was a complete answer to the point. But in the light of the conclusions I have already come to, it is unnecessary to consider it further.

88. Nor is it necessary to consider the specific criticisms of the Judgment which Mr Pooles QC advanced; these all depended on his argument being accepted.

Ground 2

89. Ground 2 is that there is in any event only one claim as defined in the Policy. Mr Pooles QC relies on the wording in the second paragraph of the definition (see para 17 above) as follows:

> "For these purposes, an obligation on an **Insured Firm** and/or any **Insured** to remedy a breach of the Solicitors' Accounts Rules 1998 (as amended from time to time), or any rules (including, without limitation, the SRA Accounts Rules 2011) which replace the Solicitors' Accounts Rules 1998 in whole or in part, as a **Claim**, and the obligation to remedy such breach shall be treated as a civil liability for the purposes of clause 2, whether or not any person makes a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages as a result of such breach …"

90. By rule 7.1 of the SRA Accounts Rules 2011 (which were the rules in force at the relevant time) any breach of the rules had to be remedied promptly; this includes replacement of any money improperly drawn from a client account. By rule 7.2 this duty rested not only on the person causing the breach but on all the principals in the firm. It was therefore the duty of Mr Gill and Mrs Wilding, on discovery that money had been taken from client account by Mrs Box, promptly to replace it. The second paragraph of the definition of Claim permits innocent partners such as them to make a claim on their insurers for the money required to do so even before any clients know that they have cause for complaint, let alone assert a claim. Indeed if the client account is fully restored in this way, there will never be a claim by the clients who will all be paid in full.

91. Mr Gill notified insurers that he and Mrs Wilding had dismissed Mrs Box as they found out she had been misappropriating client monies. Mr Pooles QC's argument is that in so doing they were treating the shortfall in client account and the need to make it good immediately as a deemed claim under the Policy, and that (to cite from his written submissions):

> "The innocent partners, having recovered the Limit of Indemnity in respect of the deemed claim regarding the shortfall, are not entitled to seek to extend their protection beyond the limit of indemnity by treating subsequent claims

concerning the deficiency beyond the Limit of Indemnity as separate claims."

92. I can deal with this Ground very shortly. There are a number of answers that could be given (and/or were given by the respondents) but to my mind the most conclusive answer to Mr Pooles QC's argument is that given by Mr Kendrick QC. This is that the same set of facts may sometimes enable two or more claims to be made by the insured on insurers. In the present case, Mrs Box's thefts gave rise both to the right of the innocent partners to claim the amount needed to remedy the shortfall in the client account, and to a separate claim to indemnify them against liability to third parties, namely the clients. What actually happened (see para 20 above) is that although HDI initially advanced funds to pay particular clients, these sums were almost all repaid by Gordons, and it then paid out individual claims by clients up to the £2 million limit. The innocent partners are now facing claims from other clients such as the Bishop and the LDBF, and the Scholefield claimants. The question is whether, assuming those claims are established, the partners have a right to indemnity for those claims. That turns on whether those claims are to be aggregated either with each other or with other claims which have already been paid out. The fact that the innocent partners might have received (but did not in fact receive) payment in respect of a deemed claim for the shortfall in client account is therefore neither here nor there.

93. I agree. In my judgment Ground 2 is not made out either.

94. I would therefore dismiss the appeal.

Lord Justice PHILLIPS:

95. I agree.

Lord Justice MOYLAN:

96. I also agree.