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Class actions and multiple plaintiffs — how many claims do they constitute? Bank of Queensland Ltd v AIG Australia Ltd

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In *Bank of Queensland Ltd v AIG Australia Ltd*,[1] the New South Wales Court of Appeal had to determine how many claims had been made against Bank of Queensland Ltd (BOQ) under a civil liability claims made policy with a limit of liability of $40 million for all claims and a retention of $2 million for each claim (the Policy).

Petersen Superannuation Fund Pty Ltd, on behalf of 192 investors (including itself), had brought a class action in the Federal Court against BOQ. The investors had been caught up in a Ponzi scheme run by Sherwin Financial Planners Pty Ltd which utilised BOQ bank accounts. It was alleged that the investors' loss resulted partly from BOQ's failure to protect the investors' interests when it became aware of the Ponzi scheme. Following a court-ordered mediation, BOQ agreed to pay $6 million to the investors to settle the class action.

Subsequently, BOQ sought to be indemnified in respect of the $6 million settlement sum and the costs of defending the proceeding under the insurers' Policy, which provides for a retention of $2 million for each claim.

At trial, AIG Australia Ltd and Catlin Australia Pty Ltd (the Insurers) argued that BOQ's loss arose out of multiple claims and that a retention of $2 million was applicable to each claim. As no single claim exceeded $2 million, it was argued that BOQ had no entitlement to indemnity. Stevenson J agreed and dismissed BOQ's proceedings.

Issues on appeal

There were three issues on appeal. First, whether the class action brought against BOQ consisted of multiple claims or a single claim under the Policy. Second, if the class action consisted of multiple claims, whether these claims should be treated as a single claim under the Policy's aggregation clause. Third, if the class action consisted of a single claim, whether the claim should be treated as multiple claims under the Policy's disaggregation clause.

The Insurers' Policy

The definition of claims under the Policy was a typical one. However, claims were aggregated via a series of related wrongful acts:

> For the purposes of this policy all *Claims* arising out of, based upon or attributable to one or a series of related *Wrongful Acts* shall be considered to be a single *Claim*; conversely where a *Claim* involves more than one unrelated *Wrongful Act*, each unrelated *Wrongful Act* shall constitute a separate *Claim*.[2]

Relevantly, "wrongful act" was defined as:[3]

> (i) act or error or breach of duty or omission or conduct (including misleading or deceptive conduct) committed or attempted or allegedly committed or attempted by or of the *Insured*; or
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> (ii) any act or error or breach of duty or omission or conduct (including misleading or deceptive conduct) committed or attempted or allegedly committed or attempted by or on behalf of another person for which the *Insured* is legally liable[.]

The class action consisted of multiple claims

Macfarlan JA, with whom Bathurst CJ agreed, held that a reasonable businessperson[4] would consider that the class action consisted of multiple claims within the meaning of cl 2.2(i) of the Policy as it involved each investor separately bringing a "suit or proceeding" against BOQ. It did not matter that each investor had the same proceeding against BOQ.[5] What mattered was that it was open to the court under the Federal Court of Australia Act 1976 (Cth) to make separate orders for the benefit of each investor.[6] White JA disagreed with the majority on this point, maintaining that the class action was a single claim brought by one investor on behalf of the other investors.[7]

All members of the court however agreed that the Class Member Registration Forms filed by each investor constituted a "written demand" within the meaning of cl 2.2(ii)[8] and that the class action therefore comprised of multiple claims.

The multiple claims were then aggregated into a single claim

All members of the court agreed that the multiple claims were based on "a series of related Wrongful Acts" within the meaning of cl 2.2 and therefore the claims ought to be aggregated into a single claim.[9] Macfarlan JA

said that BOQ had committed a "Wrongful Act" each time it allowed a request for withdrawal from the bank accounts that were being utilised in the Ponzi scheme,[10] as these were the acts that had allegedly caused loss to the investors. There were therefore multiple "Wrongful Acts".

In considering whether the "Wrongful Acts" formed a "series", Macfarlan JA said that the word "series" added no more than to emphasise that the "Wrongful Acts" had to be "related".[11] The "Wrongful Acts" were wrongful only because of BOQ's knowledge of the fraud and knowledge of fraud allegations had been made in relation to all of the transactions in the class action.[12] This was a sufficient unifying factor for Macfarlan JA despite the Insurers' contention that some transactions had been made before BOQ had acquired knowledge of the Ponzi scheme. The "Wrongful Acts" were therefore "related" within the meaning of the aggregation clause.[13]

In the premises, the third issue did not arise for determination.

Conclusion

This case emphasises that difficulty and doubt still attends the construction and application of aggregation clauses. The conclusion reached by the Court of Appeal was by no means a likely outcome especially in light of the way courts had previously applied similar aggregation clauses since *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd*.[14] It is understandable that Macfarlan JA with whom the rest of the court agreed, considered that the knowledge of the dishonest Ponzi scheme connected the distinct "Wrongful Acts" into a "series of related Wrongful Acts". Nevertheless, Macfarlan JA concentrated on the form and nature of the claims and disregarded the defence of the Insurers that some of the withdrawals had occurred prior to BOQ having knowledge of the dishonest Ponzi scheme. It is possible that if these claims had gone to a final hearing and Insurers had reserved on the issue on a full grant of indemnity, then a different outcome might have been reached dependent upon the findings of fact made at the hearing. However, class actions typically settle prior to a final hearing. In order to prevent unexpected outcomes for insurers, insurers might revisit the aggregation clauses in their liability policies so that multiple claims that can form the basis of class actions are only aggregated when intended to do so.

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Footnotes

1. *Bank of Queensland Ltd v AIG Australia Ltd* [2019] NSWCA 190; BC201906826.
2. Above, at [35].
3. Above n 1, at [35].
4. *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; 325 ALR 188; [2015] HCA 37; BC201509888 at [47]; and *Electricity Generation Corp v Woodside Energy Ltd; Woodside Energy Ltd v Electricity Generation Corp* (2014) 251 CLR 640; 306 ALR 25; [2014] HCA 7; BC201401090 at [35] applied.
5. Above n 1, at [64]–[67] per Macfarlan JA; at [5]–[6] per Bathurst CJ.
6. Above n 1, at [66] per Macfarlan JA.
7. Above n 1, at [114] per White JA.
8. Above n 1, at [68]–[70] per Macfarlan JA; at [7] per Bathurst CJ; and at [115] per White JA.
9. Above n 1, at [104] per Macfarlan JA; at [27]–[28] per Bathurst CJ; and at [120] per White JA.
10. See especially above n 1, at [73] and [84] per Macfarlan JA.
11. See above n 1, at [94] and [95] per Macfarlan JA. The second attribute of the term "series" identified by the High Court in *Distillers Co (Bio-Chemicals) (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1 at 21 per Stephen J with whom Gibbs J relevantly agreed, in that the events should be, in a sufficient degree, similar in nature because they all arose from a similar cause is not applicable here.
12. Above n 1, at [79] per Macfarlan JA.
13. *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2003] 4 All ER 43 which involved an aggregation clause that aggregated "a related series of acts or omissions" was considered; see above n 1, at [95]–[103] per Macfarlan JA.
14. Above; compare with the narrow approach taken in *Beazley Underwriting Ltd v Travelers Cos Inc* [2011] EWHC 1520 (Comm); *Re Morgan; Brighton Hall Pty Ltd (in liq)* (2013) 96 ACSR 232; [2013] FCA 970; BC201313243; and *Marac Finance Ltd v Vero Liability Insurance Ltd* [2014] 2 NZLR 93; [2013] NZHC 2525; BC201365634.