

THREE LITTLE WORDS - £50M LOST

In *Standard Life Assurance Limited v. Oak Dedicated Limited and others*, the Commercial Court has sounded a warning to those responsible for preparing wordings, highlighting the danger of using anything other than the clearest language where aggregation is concerned.

Facts

The case arose as a result of Standard Life seeking indemnity in respect of mortgage endowment misselling claims. Standard Life faced approximately 97,000 individual claims, most for under £10,000, but a total liability in excess of £100m.

Standard Life sought indemnity from its professional indemnity underwriters pursuant to a professional indemnity and crime insurance placed by its brokers Aon. The policy provided cover of £75m excess of £25m in respect of claims made during a three year period between May 1998 and May 2001. Claims were defined under the policy as:

"...each Claim or series of Claims (whether by one or more than one Claimant) arising from or in connection with or attributable to any one act, error, omission or originating cause or source of dishonesty of any one person or group of persons acting together and any such series of Claims shall be deemed to be one Claim for all purposes under this Policy."

The policy also provided for an excess *"in respect of each and every Claim and/or Loss, the amount is specified in item 4(ii) of the schedule ..."*. Item 4(ii) of the schedule

to the policy provided: *"Excess including costs and expenses: £25m each and every claim and/or Claimant including costs and expenses."* (Our emphasis).

Standard Life maintained that it could aggregate the 97,000 mortgage endowment claims as a single claim as a result of a systemic failure on its part in relation to the sale of endowment mortgages and specifically relating to the ascertainment and recording of the customer's attitudes towards risk. This Standard Life maintained was one "originating cause" for the purposes of aggregation. The judge was not however required to determine this issue, rather he had to decide whether the inclusion of the words *"and/or Claimant"* in the schedule to the policy and in the slip (under the excess section) created a "per Claimant" excess in circumstances where the parties accepted that if this were the case, then it was highly unlikely that any individual Claimant would have a claim or series of claims which would exceed £25m.

Decision

Against a background where if it were accepted there was a "per Claimant excess", there would be little commercial purpose to the policy, Tomlinson J still felt that primarily he had to give weight to the

wording used. Having considered arguments raised by both underwriters and Standard Life, and accepting that both sets of arguments had their flaws, Tomlinson J held that the addition of the words *"and/or Claimant"* to the excess section, indicated an intention on Underwriters part to create "a per Claimant" excess.

Having resolved this issue in Underwriters' favour, the next question the Judge faced was whether Aon had been negligent.

Based on the expert evidence, Tomlinson J held the following to be "uncontroversial" propositions of Aon's duties:

It is the duty of the broker to identify and advise the client about the type and scope of cover which the client needs and, in doing so, to match as precisely as possible, the risk exposures which have been identified within the client's business with the coverage available.

Having identified what cover the client needs, it is the broker's duty to arrange insurance cover which meets those requirements.

If the cover which is needed by the client is not available, the broker must take care to ensure that the precise nature of what is

and is not covered is made clear to the client.

In relation to the preparation of the policy, the broker must be careful to ensure that the policy language clearly encompasses the needs of the client.

The duties of the broker on renewal of an existing policy are no different to the initial placement, and at each renewal the broker must ensure that the cover arranged clearly meets the client's needs in the most appropriate manner.

With reference to the second "uncontroversial proposition", Tomlinson J added that there may well be authority to the effect that *"coverage is only clear insofar as it leaves no room for significant debate. The coverage will be unclear, and the broker in breach of duty, if the form thereof exposes the client insured to an unnecessary risk of litigation."*

In this instance, the judge found that Aon must have appreciated that Standard Life required the excess under their insurance to operate on a "per aggregated claim" basis as opposed to "per Claimant" basis. On that basis, Tomlinson J held Aon negligent. In doing so, he found that Aon could have placed the cover for Standard Life with a straight forward "per claim excess" on terms otherwise no different from those actually achieved in 1998 with the "per Claimant excess".

Comment

Whilst the impact of this particular case may not be widely felt in circumstances where the witnesses gave evidence that they could not recall having seen an excess provision in similar terms in any other policy, the case again highlights the care that is required with policy drafting. Three little words – *"and/or Claimant"* – inserted into the slip and the schedule to the policy had a significant impact on the cover provided to the insured. As a result, at this time at least, underwriters escape liability and the brokers are found negligent.

If you would like any further information, please contact either of the following:

William Allison
DDI: 020 7293 4629
E: wallison@dac.co.uk

Graham Brown
DDI: 020 7293 4082
E: gbrown@dac.co.uk

This publication is not a substitute for detailed advice on specific transactions and problems and should not be taken as providing legal advice on any of the topics discussed.

LONDON

6-8 Bouverie Street
 London EC4Y 8DD

T +44 (0)20 7936 2222
 F +44 (0)20 7936 2020
 DX 172
 E daclon@dac.co.uk

LONDON MARKET

85 Gracechurch Street
 London EC3V 0AA

T +44 (0)20 7936 2222
 F +44 (0)20 7293 4888
 E daclon@dac.co.uk

MADRID

Paseo de la Castellana, 20
 2ª Planta
 28046 Madrid

T +34 91 781 6300
 F +34 91 576 8669
 E dacmadrid@dacsain.com

MANCHESTER

60 Fountain Street
 Manchester M2 2FE

T +44 (0)161 839 8396
 F +44 (0)161 839 8309
 DX 14363 Manchester
 E dacman@dac.co.uk

MEXICO CITY

Av. Insurgentes 950-9
 Colonia del Valle
 Delegación Benito Juárez.
 Código Postal 03100
 México D.F.

T +52 551 107 6056
 F +52 555 687 6849
 E dacmexico@dacmexico.com

ST ALBANS

60 Victoria Street
 St Albans
 Herts AL1 3XH

T +44 (0)1727 893 200
 F +44 (0)1727 797 720
 E dacstalbands@dac.co.uk