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ARISING FROM

*Coxe v Employers’ Liability Assurance Company Ltd [1916] 2 KB 629*

The words ‘caused by’ and ‘arising from’ had always been construed as relating to the proximate cause. Policy excluded cover for death “directly or indirectly caused by, arising from, or traceable to … war.” This meant the proximate cause.

*Scott v Copenhagen Reinsurance Company (UK) Ltd [2003] EWCA Civ 688*

"Arising from", when coupled with "one event", should be regarded as a relatively strong and significant link”.

"Arising from” signifies more than simply a "weak causal connection” – a significant causal link is needed.

The capture of the airport was too remote an event to aggregate. War, or the outbreak of war, was the relevant event and was the cause of the aircraft's destruction and hence the loss.

The unities of cause, place, time and intention were an appropriate test even where one event leads to losses at different times.

The main test is one of intuition and common sense in light of the purpose of the clause ie aggregation of one loss with another.

*The Evaggelos TH [1971] 2 Lloyd's Rep 2000*

"Donaldson J held that a provision in the charter whereby the charterers indemnified the owners ‘from all consequences or liabilities that may arise from the Captain . . . complying with their orders’ required the owners to prove that the proximate cause of the loss of their vessel was compliance with such orders. . . .” (Beazley Underwriting Ltd v The Travelers Companies Inc [2011] EWHC 1520 (Comm)).

In the context of a charterparty giving an indemnity, proximate cause had to be shown.

*Orient-Express Hotels Ltd v Assicurazioni Generali SA (UK Branch) (t/a Generali Global Risk) [2010] EWHC 1186 (Comm)*

A New Orleans hotel was insured against business interruption losses "directly arising from Damage". The hotel and the surrounding area were damaged by Hurricanes Katrina and Rita. However, a curfew was also imposed meaning that even if the hotel had been undamaged, it could not have received visitors.
Hamblen J held that the policy required the ordinary "but for" test for causation to apply. Accordingly, the insured could only recover if it could show that the loss would not have arisen had the damage to the hotel not occurred, and it could do that on the facts.

**ARC Capital Partners Ltd v Brit UW Ltd & Anor [2016] EWHC 141 (Comm)**

The phrases "arising from" and "in any way involving" must have different meanings, otherwise the latter phrase would be left "without any real content" (or else the former phrase would serve no purpose if the latter phrase did not require any causal element at all).

Referring to earlier authority, the judge confirmed that "arising from" meant "proximately caused by" or "directly caused by" and went on to find that "in any way involving" therefore meant "indirectly caused by" in this context. In that way, "the two phrases are given recognisably distinct meaning and the clause hangs together as a whole". The clause therefore required some act, error or omission which is "genuinely part of a chain of causation which leads to liability for the claim in question".

**ARISING OUT OF**

**Caudle v Sharp [1995] LRLR 433**

The claim was for the negligent writing of 32 separate contracts of insurance by a Lloyd’s underwriter. The policy wording referred to each and every loss to be aggregated if arising out of one event.

The court found that the words “arising out of” should not be construed in the limited sense of referring to the direct and proximate cause. Some wider test of causation was implied although there must be some restriction with respect to remoteness.

**Beazley Underwriting Ltd v The Travelers Companies Inc [2011] EWHC 1520 (Comm)**

In the context of an indemnity deed (not an insurance policy), "arising out of" required "a degree of causal connection" but not proximate cause.

"I am prepared to accept that 'arising out of' … does not dictate a proximate cause test, and that a somewhat weaker causal connection is allowed. That is to some extent supported by the fact that the loss or liability may arise from a combination of related events, occurrences or matters. Thus the clause may provide indemnity in respect of indirect loss."

**British Waterways v Royal & Sun Alliance Insurance Plc [2012] EWHC 460 (Comm)**

A father and son were killed while operating a tractor as a contractor of the claimant. The policy excluded liability for "liability arising out of the operation as a tool of the [tractor]". In issue was whether at the time of the accident a hedge-cutter attached to the tractor had been in use, in which case the tractor was being operated as a tool. Also in issue, was whether an accident that occurred while driving the tractor away from a hedge (having trimmed that hedge) gave rise to liability that arose out of the use of the tractor as a tool.

Burton J reviewed a number of conflicting decisions on the meaning of "arising out of" at para 43.

He emphasised that the words will have a different meaning depending on the context in which they are used.

And found that a stricter, proximate cause, test applies in the context of an exclusion.

Burton J found that the hedge cutter was not in use at the relevant time and that the proximate cause of the accident was not the tractor’s use as a tool.
This was not an insurance case, but the judge’s comments on one issue are of possible interest to insurers. Eder J was required to interpret the following phrase in a settlement agreement which defined “claims”: “arising out of or in connection with the Action or the invoice…referred to in the Action”.

The judge accepted that the claim which the claimant was bringing did not “arise out of” the Action or the invoice. However, the defendant sought to argue that “in connection with” had a wider meaning, which included matters which were indirectly connected (relying on the earlier decision of *Barclays Bank plc v HMRC* [2007], in which the Court of Appeal concluded that a connection may be indirect for the purpose of the definition in that case).

Eder J cautioned reference to earlier authorities as to the meaning of a particular word or phrase “is often unhelpful and sometimes dangerous”, given the different context in which the word or phrase may have been used. However, he added that: “Here, it is sufficient to say that, as a matter of language, the words “in connection with” are plainly of wider scope than the words “arising out of”. On the facts, he accepted that the proceedings being brought were “connected with” the Action and invoice, and therefore caught by the settlement agreement.

COMMENT: These two phrases commonly appear in aggregation clauses in (re)insurance policies and so Eder J’s general comment that linguistically “in connection with” is wider than “arising out of” is of interest. The use of the word “or” in the phrase is also of probably relevance. It will be recalled that in the recent case of *ARC Capital v Brit Syndicates* (see above under “arising from”), where the phrase in question was “arising from or in any way involving”, Cooke J confirmed that “arising from” meant “proximately caused by” or “directly caused by” and went on to find that “in any way involving” therefore meant “indirectly caused by” in this context. In that way, “the two phrases are given recognisably distinct meaning and the clause hangs together as a whole”.

"He referred me to the consideration of similar provisions including “arising out of or in connection with” in *KMR Ltd v Forsters LLP* [2016] EWHC 583 (Comm) per Sir Bernard Eder at [38]–[40]. In particular, at [40] the judge commented that it is often unhelpful and dangerous to rely upon earlier authorities as to the meaning of a particular word, with which I agree. He went on to state, however, that as a matter of language, "in connection with" was clearly wider than "arising out of", a conclusion with which I also agree."

The policy covered bodily injury “arising out of” use of a motor vehicle - this meant the test was wider and included less immediate consequences “it still excludes the use of the vehicle being causally concomitant but not causally connected with the act in question” (so, where a woman ran across the road and was killed following her car running out of petrol, that was an event “arising out of” her use of the car).

Not much discussion but a sufficient causal link was found where there was both negligent navigation and pollution “arising out of” the consignment of oil.
ATTRIBUTABLE TO

Beazley Underwriting Ltd v The Travelers Companies Inc [2011] EWHC 1520 (Comm)

"In respect of 'Attributable to' Travelers referred me to Lloyds TSB General Insurance Holdings v Lloyds Bank Group Insurance Co Limited [2003] 4 All ER 43 as indicating that it did not mean proximate cause. In that case Lord Hoffman said, at [15]-[16], with reference to Municipal Mutual v Sea Insurance [1998] Lloyd's Rep IR 421: 'The more general the description of the act or event, the wider the scope of the clause. For example, in Municipal Mutual . . . the unifying clause was expressed in very general terms: " . . . all occurrences of a series consequent on or attributable to one source or original cause . . . ". This meant that as long as one could find any act, event or state of affairs which could properly be described as a cause of more than one loss, they formed part of a series for the purposes of the aggregation clause. Hobhouse LJ held that a series of losses caused by theft and vandalism from the port of Sunderland over a period of time were attributable to one original cause, namely the inadequacy of the port's system for protecting the goods of which it was bailee.' Care needs to be exercised in relation to this passage for a number of reasons. First, it was concerned with occurrences attributable to 'one source or original cause', which involves a considerably looser causal connection than proximate cause. Second, the strength of the causal connection required differs according to the context in which the question is asked. Third, clause 2.2 is dealing with loss etc. arising out of events attributable to or arising out of negligent acts. If the loss does not arise out of the relevant event the question of what the event is attributable to does not arise. Fourth, there is no reason why attributable to cannot import a test of proximate cause. In Royal Exchange Assurance v Kingsley [1923] AC 235, 244 the Privy Council referred to loss as being 'directly and naturally attributable to unseaworthiness' when applying a proximate cause test."

IN ALL

IF P&C Ins v Silversea Cruises [2004] Lloyd's IR 696
Silversea Cruises insured 4 ships against BI losses and sustained huge cancellation losses, post 9/11. The limit was "US $5m in the annual aggregate and in all".

Much argument over "in all": all events for each ship or all 4 ships in the fleet? Either $20m or $5m total cover.

Separate insurance policies, but single fleet premium paid.

Fleet aggregate discerned from wording of cover, and difficulty if one ship suffered loss but others profited from it.

IN CONNECTION WITH

Khanty-Mansiysk Recoveries Ltd v Forsters Llp [2016] EWHC 522 (Comm)
See above under "arising out of".

Hockin & Ors v The Royal Bank of Scotland & Anor [2016] EWHC 925 (Ch)
See above under "arising out of".

Standard Life Assurance Ltd v ACE European Group and Others [2012] EWHC 104 (Comm)
The policy provided that “all claims … arising from or in connection with … any one act … or originating cause … shall be considered to be a single third party claim …”. The High Court found that the phrase “in connection with” is extremely broad and indicates that it is not necessary to show a direct causal relationship between the claims and the state of affairs identified as their “originating cause or source”. Some form of connection between the claims and the unifying factor is all that is required.

In this case Standard Life operated a fund that suffered a one-day fall in volume, meaning that a number of customers had claims against it, essentially for mis-selling. The Court found that there was no difficulty in aggregating the claims. The originating cause was that the fund had been marketed as a safer investment than it was, and that had been a continuing state of affairs even though the fund had been marketed in a number of forms and different channels over the years.

RELATED TO

Re S (Restraint Order: Release of Assets) [2004] EWCA Crim 2374

"It was submitted by [Counsel] that there is a difference in meaning between 'related to' and 'connected with', and, that 'connected with' connotes a somewhat wider concept. We are unable to see such a distinction."

RESULTING FROM

Lloyds TSB General Ins Holdings v Lloyds Bank Group Ins Co [2003] UKHL 48

The claim arose from around £100 million of pensions mis-selling claims. The £1 million deductible meant that each small claim would not be covered, unless wording aggregating claims for the purposes of the deductible applied. The clause provided “If a series of third party claims shall result from any single act or omission (or related series of acts or omissions) then all such third party claims shall be considered to be a single third party claim for the purposes of the application of the deductible”. The insured bank asserted that the losses resulted from a systematic failure on its part to institute a proper scheme of training and instruction in accordance with regulatory rules.

On the facts, it was found that the underlying general failure of management to ensure compliance, or to train, was not the cause of the losses, rather, it was the individual mis-selling of the advisors, and their breaches of rules which was the cause of the losses.

SERIES

AIG Europe Ltd v Oc320301 LLP & Ors [2016] EWCA Civ 367

The case concerned two property developments by Midas in Turkey and Morocco, for which it had attracted more than 200 investors. The developments failed when the local Midas companies were unable to complete the land purchases. The investors brought proceedings against a firm of solicitors, alleging that it had wrongly released monies from an escrow account without adequate security being in place to protect their investment. The investors claimed to have lost over £10 million. The solicitors were insured with the insurers under a policy subject to an indemnity limit of £3 million for any one claim. Insurers issued proceedings in the Commercial Court seeking a declaration that the underlying claims should be treated as "one claim" on the basis that all the claims arose from "similar acts or omissions in a series of related matters or transactions" pursuant to clause 2.5(a)(iv) of the Solicitors Regulation Authority Minimum Terms and Conditions.
Teare J interpreted “a series of related matters or transactions” as meaning that the transactions were conditional or dependent on each other. As a result, he held that there could be no aggregation of the claims.

The Court of Appeal has now given its judgment on matters of principle only (rather than making any findings of fact). It has concluded that Teare J went too far when he concluded that the transactions had to be “dependent on each other”. Nevertheless, it found that there still had to be an “intrinsic” relationship of some kind between the matters or transactions, and an outside connecting factor would be insufficient, even if it was common to the matters or transactions.

In reaching that conclusion, the Court of Appeal took into account the circumstances in which the aggregation clause wording in the Minimum Terms had been amended. Taking this background into account as part of the “matrix” against which it construed the clause, the Court of Appeal concluded that there was support in the history for the argument that “a series of related … transactions” was not intended to be interpreted in such a way that any relationship, however loose, would suffice; there had to be some restriction on the concept of relatedness and the most satisfactory approach would, the Court said, be an intrinsic relationship not an extrinsic one. Referring to the Lloyds TSB [2003] judgment, Longmore LJ also took note of the importance of interpreting the aggregation wording against the knowledge of different types of aggregation clauses in existence (for example, broad wording such as “original cause”).

The Court of Appeal gave only a few hints as to factors which may or may not lead to the test being satisfied: it said, for example, that “transactions which all take place with reference to one large area of land in a particular country might be related transactions if they refer to or (perhaps) envisage one another”, and that (on the facts of AIG) if there was a specific requirement that investors’ funds were to be held in a separate designated account for each investor, that might militate against a finding of an intrinsic relationship. However, aggregation decisions are notoriously fact-sensitive, and the Court of Appeal was careful not to fetter the decision of the Commercial Court on the facts. As a result much remains to be seen about how “intrinsic relationship” will be interpreted.

Lloyds TSB General Ins Holdings v Lloyds Bank Group Ins Co [2003] UKHL 48

Facts as above. It was argued that the claims could be aggregated because they were a result of a “related series” of events.

The House of Lords held that the words “related series” could not be intended to open out the widest possible search for a common underlying origin, when the main policy wording was narrowly defined to apply only to those acts or omissions that constituted the cause of the action. The acts or omissions would form a series only if their combined operation resulted in each claim. However, it should be noted that the term “related series of acts or omissions” was in brackets, and thus was to be treated as purely subsidiary. It might be different if the term was freestanding (as was held by the Court of Appeal in this case).

Distillers Co Bio-Chem v Ajax Ins (1974) 130 CLR 1

The Australian High Court ruled that the occurrences were the mishaps which caused the loss or injury and not the loss or injury itself (the taking of Thalidomide by pregnant women, not injuries suffered by the children)

- meaning of ‘series’ is that of a number of events of a sufficiently similar kind following one another in temporal succession
- events should be to sufficient degree similar in nature.
ACT OR OMISSION

*Lloyds TSB General Ins Holdings v Lloyds Bank Group Ins Co* [2003] UKHL 48

Facts as above under "resulting from". The House of Lords held that the relevant "act or omission" for the purpose of the aggregation clause could only be the act or omission that gave rise to the civil liability in question. On the facts, the failure to institute a proper scheme of training and instruction in breach of regulatory rules was not a single act or omission.

*Zurich Professional Ltd v Karim & Others* [2006] EWHC 3355 (QB)

The phrase "dishonesty or fraudulent act or omission" is to be read disjunctively.

"… it seems to me the reasonable person would be surprised if this clause allowed the Insurers to step aside from those within the firm who practised or condoned the specific forgery but not from partners who condoned persistent dishonest handling of money, breaches of the rules, and so forth, which allowed the specific act or omission to take place."

*ARC Capital Partners Ltd v Brit UW Ltd & Anor* [2016] EWHC 141 (Comm)

"Where a professional indemnity insurance covers losses from claims for Wrongful Acts which are defined as "acts or omissions" which include errors and other classes of act which are obviously wrongful, it would be inconsistent to regard the words "act, error or omission" in the Retroactive Date clause as covering anything other than the same ground – namely matters which could in principle create liability under the policy."

CAUSE

*Axa Reinsurance (UK) Ltd v Field* [1996] 1 WLR 1026; [1996] 2 Lloyd’s Rep 233

Lord Mustill:

"a cause is to my mind something altogether less constricted [than an event]. It can be a continuing state of affairs; it can be the absence of something happening. Equally the word 'originating' was in my view consciously chosen to open up the widest possible search for a unifying factor in the history of the losses which it is sought to aggregate."

*Axa v Field* followed on from *Cox v Bankside* (see below), and the issue was whether a "series of events or occurrences attributable to one originating cause" which was the wording in the E&O cover had the same meaning as "series of … occurrences … arising out of one event" contained in the reinsurance cover.
The House of Lords found that “one event” is different from “an originating cause”. An event is something which happens “at a particular time, in a particular place, in a particular way”. By contrast “a cause” can encompass a continuing state of affairs or the absence of something happening. Lord Mustill also stated “the word originating was in my view consciously chosen to open up the widest possible search for a unifying factor in the history of the losses that it sought to aggregate.” The negligence of the managing agents had occurred at different times and whilst the negligent acts could be said to have the same cause, they were not one event.

_Cox v Bankside Members Agency Ltd_[1995] CLC 180

This case concerned losses made as a result of the negligence of three separate underwriters, who worked for the same firm, who wrote substantial excess of loss business in the same area, and sought to recover on their E&O policies.

It was held that “a culpable mis-appreciation in an individual, which leads him to commit a number of negligent acts, can arguably be said to constitute the single event or originating cause responsible for all the negligent acts and their consequences. The same is not true when a number of individuals each act under their individual misappreciation, even if the nature of the mis-appreciation is the same.” The losses, in this case, arose from three separate causes, namely the approach to underwriting of the three different underwriters.

Claims about their negligence could not be aggregated as they did not ‘arise’ from one ‘originating cause’.

Phillips J found that ‘each of the Good Walker underwriters formed his own policy, insofar as he had one, and took his own underwriting decision for his Names, independently and from his own viewpoint. While their actions suffered from similar shortcomings, the individual approaches which resulted in these shortcomings were by no means identical’


The claim was for a loss of equipment caused by a number of independent acts of theft and vandalism from the Port of Sunderland over approximately 18 months. A single limit of indemnity applied to any claim or number of claimants “in respect of or arising out of any one occurrence or in respect of or arising out of all occurrences of a series consequent upon or attributable to one source or original cause.”

The Court of Appeal held that the losses were due to one original cause, that was the inadequacy of the port’s system for protecting the goods of which it was bailee. This was the consistent and necessary factor that had allowed the individual acts of vandalism to occur.

_Countrywide Assured Group v DJ Marshall & Others_[2003] 1 All ER (Comm) 237

The policy defined “any claim” as “one occurrence or all occurrences of a series consequent upon or attributed to one source or original cause”. The limit of the indemnity was £1 million for any one claim. The case concerned pensions mis-selling and on the assumed facts the lack of proper training of the selling agents was held to be the original cause.

It was held that the words “event, occurrence, or claim” describe what has happened, whereas the word “cause” describes why something has happened. “Originating cause” therefore entitles one to see if there is a unifying factor in the history of the claims.

(See also _Standard Life v ACE_ above under “in connection with”.)
Axa Reinsurance (UK) plc v Field [1996] 1 WLR 1026

A "cause" could amount to a continuing state of affairs while the time, place and occurrence of an "event" was particular to it.

American Centennial Ins v Insc [1996] LRLR 407

The clause allowed reinsurer to point to a unifying factor of even a remote kind where there was some causative link between the originating cause and the loss. But there must be some limit to the degree or remoteness.

The losses caused by 14 different officers of a company were not caused by a joint participation or common venture. But where several people reach a common culpable misunderstanding as a result of a joint discussion upon which they subsequently act, it may be possible to find a single originating cause.

EVENT


See above under "cause".

Seele Austria v Tokio Marine Europe Insurance Ltd [2008] EWCA Civ 441

This concerned a Combined Contract Works and Third Party Liability policy and the main issue was whether the particular insured could recover the costs of replacing non-defective property which did not belong to it. But the court also had to consider an issue not decided by the judge at first instance: the application of the deductible, which applied to "the first £10,000 of the costs of each and every occurrence or series of occurrences arising out of any one event". Moore-Bick LJ gave the main judgment and he decided that there was nothing which would qualify as an "event" such that the losses (removal of individual defective window panels) could be aggregated together:

"I do not think that the installation of defective windows can be regarded as an event for these purposes … If they had all suffered from a common defect in design or manufacture which lay at the root of the problem, it might have been possible to argue, despite the number of separate units involved, that the installation of windows with a common defect was an event for these purposes, but as I understand the judge's findings, that is not really the case. It is true that there were defects in the design or manufacture of the termination bars, but it is not at all clear that that of itself was sufficient to cause each of the seals to fail. Rather, the impression one obtains from the findings in … the judgment below is that poor workmanship was really to blame. It seems fairly clear that similar shortcomings in workmanship affected all the windows and I am prepared to assume for present purposes that in each case the same mistakes were made. However, there is no evidence that those mistakes were attributable to a single event, such as giving the workmen wrong instructions which they then conscientiously followed so as to produce a series of similar defects. Again, had that been the case, it might have been possible to argue that giving faulty instructions was the unifying event, but the judge's findings point to the conclusion that the defects were simply the result of poor workmanship repeated over and over again."

Midland Mainline v Commercial Union [2004] Lloyd's IR 22

The words 'occurrence' and 'event': synonymous

- there had to be a sufficient degree of unity to justify the label of an event
the assessment of unity was by reference to time locality, cause and motive

the matter was to be scrutinised from the perspective of an informed observer in the position of the assured; and

the assessment was to be made both analytically and as a matter of intuition and common sense

Issue 1: whether the overall impact of the Railtrack programme was once occurrence or event (thus all ESR losses covered) or whether each ESR was separate

A decision or a plan could not constitute an event or occurrence. Each ESR related to a specific track fault, on a specific length of track for a specific period

Issue 2: However the deductible was fulfilled as it was 'a series of losses arising from a single event' as the Hatfield crash was the 'original causative event'.

*Caudle v Sharp* [1995] LRLR 433

The claim was for the negligent writing of 32 separate contracts of insurance by a Lloyd’s underwriter. The policy wording referred to “each and every loss” to be aggregated if arising out of “one event”.

It was held that the negligent writing of the contracts could not be an “event”. An event was a more definite happening of something at some time. Lord Justice Evans stated that the three requirements of a relevant event were that there was a common factor which could properly be described as an event, which satisfied the test of causation (strictly speaking this followed from the words “… arising out of one event”) and which was not too remote for the purposes of the clause.

Also see above under “arising out of”.

*Kelly v Norwich Union Fire and Life Insurance* [1989] 2 All ER 888

Where a policy of insurance gave an indemnity against “events occurring during the period of the policy” the “events” referred to the happening of any of the specified insured perils not the damage caused as a result.

*Siu Yin Kwan v Eastern Insurance Co* [1994] 1 All ER 213

“Event or events” within the Life Assurance Act 1774, s2 did not include claims by employees against an employer.

*Municipal Mutual Ins v Sea Ins* [1998] Lloyd’s Rep IR 421

If this was simply an “any one event” clause, Ds could say that each act of pilferage or vandalism was a distinct event, but it extends to a series of occurrences consequent on or attributable to one source or original cause.

It was want of care which was the consistent and necessary factor which allow the pilferage and vandalism to occur. The acts of vandalism were a series of occurrences attributable to a single source or original cause.

*Kuwait Airways Corporation v Kuwait Insurance Company SAK* [1997] 1 Lloyd’s Rep 687

The claimant lost 15 planes when the Iraqi army captured Kuwait airport in the Gulf War. The claimant’s war risk policy provided cover in respect of “any one limit, any one location”. The question arose as to whether the capture of each plane constituted a separate occurrence or whether the capture of all 15 planes constituted a single occurrence.
The court held that “an event” and “an occurrence” are not materially different unless the context of the policy requires a different interpretation. Therefore, a number of losses can be described as “an event” if the losses have a sufficient unity of time, cause, place, and intention of the human agents.

**Scott v Copenhagen Reinsurance [2003] EWCA Civ 688**

In this case, the inevitability of war was a “state of affairs” and not an “event”, and it was the war that caused the losses.

Also see above under “arising out of”.

**Budgett v Norwich Union [2003] 1 Lloyd’s Rep 110**

Budgett supplied contaminated sugar to Kerry for use in the production of mincemeat. Budgett admitted breach of contract in that the sugar was not fit for purpose, but there was an issue as to whether Kerry could recover as damages the financial loss it incurred when one commercial customer walked away and another renegotiated its contract. Budgett sought a declaration that its liability insurance would respond to such a claim. This provided indemnity *in the Event of … accidental loss of or Damage to Property*. The indemnity clause provided that “In respect of such an Event the Company will provide indemnity against … legal liability for compensation up to the Limit of Indemnity”.

The judge found that the “event” clause was intended to define the circumstances giving rise to liability in respect of which the insurer would provide an indemnity. In light of the references to “damage” and “property” in the clause, the event must be a physical event. The judge did not find it necessary to decide whether the “event” was the contamination of the sugar or the damage to the mincemeat caused by the contaminated sugar, but favoured the latter as the “event”. On either view the financial loss that Kelly sought to recover from Budgett did not arise “in respect of” that physical event.

**Brown v GIO [1998] Lloyd’s Rep IR 201**

The reinsured had the benefit of a clause in its reinsurance under which it was the sole judge as to what constituted an “event”. In light of Phillips J’s decision at first instance in *AXA Re v Field* (in which he equated “originating cause” and “event”), the reinsured judged that there were three “events”. By the time the matter went to court the House of Lords had overturned Phillips J’s decision in *AXA Re v Field* and the reinsurer argued that it was not bound by the reinsured’s exercise of the “sole judge” clause.

The Court of Appeal decided that the sole judge clause gave the reinsured some leeway and that the underwriter’s judgment on the number of events could not be questioned unless it was unreasonable at the time. But Waller LJ went on to comment:

> “In the instant case, in my view Mr Brown’s view that the overall underwriting of an individual underwriter caused by his negligent approach was an event from which the losses arose, was a reasonable view. It followed the reasoning of Phillips J in relation to originating causes, and has not in fact as yet been shown to be wrong, never mind unarguable.”

On its face this conclusion appears to conflict with *Caudle*, in which (as stated above) the Court of Appeal did not agree that a series of contracts could, of itself, be the “event” from which losses could properly be said to have “arisen”.

The explanation of this potential discrepancy, however, appears to lie in the fact that in *Caudle* (where each contract was considered a separate event) –

(i) those contracts could not be said to be linked together by any common factor that would thereby allow them to be classified as a single, composite “event” – such as, for
example, a governing decision to write these forms of contract. Rather each contract was considered independently, on its merits; and, further,

(ii) (as noted in Brown) actual loss to the Names could properly be said to have "arisen out of" each separate contract that was written – once Outhwaite entered into each contract, the losses on that contract were bound to follow.

By contrast, in Brown (where it was apparently considered reasonable for the sole judge reinsured to classify the totality of contracts as the relevant event) each individual contract was linked by the existence of a flawed underwriting plan that had been actively drawn up and implemented by each of the underwriters in question. Further, losses could not be ascribed to any individual contract in the multitude. As the court commented -

"...it was the failure to plan and appreciate the risks to which the names were being exposed which caused the losses; the entry into any particular contract was not an occurrence giving rise to loss; loss flowed from the totality of the underwriting" (emphasis added).

The court appears to have agreed that because the concept of "losses arising out of one event" "straightaway implies some causative element..." as between the event and the losses suffered, each individual contract which went to comprise the underwriting programme in Brown could not be the relevant "event" – rather, as it was inadequacy in the totality of contracts as a whole that gave rise to the Names’ losses, it was a reasonable exercise of “sole judge” discretion to classify the losses as having "arisen out of" the "event" that was the entirety of the underwriting – that is, the totality of the contracts.

LOSS

*Mitsubishi Electric UK Ltd v Royal London Insurance (UK) Ltd* [1994] 2 Lloyd's Rep 249

This case the issue of what constitutes "one loss" (there was no other aggregation language). The policy in question was a builders' risk policy, which provided for a deductible of £250,000 for "each and every loss in respect of any component part which is defective in design plan specification materials or workmanship".

The claim brought by the insured was in respect of 94 defective toilet modules in one building. Mitsubishi's primary case was that the "component part" for the purposes of the deductible was the defective cementitious board that was used in each of the toilet modules and therefore there was one single defective component part which caused one single loss. Royal London's case, however, was that the board was not "a component part" but that this description properly applied to each of the toilet modules.

The Court of Appeal read the wording of the deductible very narrowly, and highlighted that the deductible is not stated to be in respect of "a component part" but rather "any component part". The Court of Appeal held that the defective component part in question was the cementitious board. Comment was also made on the fact that Royal London relied very heavily in argument on the words "each and every loss" in the deductible, and that those words pointed to the deductible properly applying in respect of each and every damaged module. Hirst LJ however did not accept this argument, stating:-

"If the cementitious board is to be regarded as the defective component part, the basis for treating each module separately in my view falls away. The question becomes a simpler one: has the defective board given rise to multiple claims or to a single composite claim? If the former, the deductible must be
applied to each of the claims. If the latter, it must be applied once. I think that on the present facts the plaintiffs are alleging a single, albeit composite, head of loss and I see no basis for applying the deductible more than once."

**OCCURRENCE**

*Kuwait Airways Corporation v Kuwait Insurance Company SAK* [1997] 1 Lloyd’s Rep 687

The claimant lost 15 planes when the Iraqi army captured Kuwait airport in the Gulf War. The claimant’s war risk policy provided cover in respect of “any one limit, any one location”. The question arose as to whether the capture of each plane constituted a separate occurrence or whether the capture of all 15 planes constituted a single occurrence.

It was held that, unlike “a loss”, “an occurrence” can involve a number of losses. For a number of losses to be described as one occurrence there must be sufficient unity between the losses. When assessing unity, regard should be had to factors such as cause, time, place, and the intentions of the human agents. The matter must be judged from the point of view of an informed observer placed in the position of the insured. In this case, the loss of each plane was: caused by the Iraqi army; at the same time; in the same place; and the intention of the human agents was the same (Saddam Hussein’s intent to expropriate the Kuwaiti airline).

Also see above under “event”.

*Mann and others v Lexington Insurance* [2001] LRLR 179

Widespread losses flowed from the destruction of 67 Indonesian supermarkets by rioting following the resignation of President Suharto. There was evidence that the riots, while separate, were centrally coordinated.

It was held that what had caused the losses were the acts of the rioters over a wide area, at different locations, and over two days. The only unifying factor was the central orchestration, but that was not sufficient to constitute one “occurrence”.

Destruction by centrally-coordinated rioting of 67 Indonesian supermarkets preceding resignation of President Suharto.

’Per occurrence’ not apt to aggregate, being the same ‘occurrence’ as in the deductible.

CA: “What has caused the losses are the acts of rioters over a wide area, at different locations, and over two days.’ Central ‘orchestration’, not sufficient to create one occurrence.

*Aioi Nissay Dowa Insurance Company Ltd v Heraldglen Ltd* [2013] EWHC 154 (Comm)

The Court rejected a challenge to an arbitration tribunal’s findings that the 9/11 attacks on the World Trade Center were more than one occurrence. The relevant clause aggregated “each and every loss or accident or occurrence or series thereof arising out of one event”. The Tribunal evaluated the fourunities (intent, cause, timing and location) in the context of the attacks as follows: although the attacks were the result of a coordinated plot the Tribunal pointed to case law to the effect that a conspiracy or plan cannot of itself constitute an occurrence or event; there were two separate causes as there were two hijackings of two separate aircraft; there were similarities in the timing of the events from the commencement of the flights to the contact with the Towers but so far as timings were concerned there were two occurrences and two events; and the fact that the Towers were located in close proximity to each other and were part of a single property complex did not give rise to a sufficient degree of unity and the two did not stand or fall together. The Tribunal concluded that no unifying factor was sufficiently
compelling to lead them to the conclusion that there were two occurrences arising from a single event in
this context. The Court rejected arguments that the Tribunal made an error of law in reaching their
conclusion. (Although it should be noted that the court's function in this case was not to consider the
law afresh and to impose its own conclusion and it would not interfere with the Tribunal's decision if it is
within a range of permissible decisions).

The US Court of Appeals, Second Circuit, found that the damage caused to the World Trade Center
was one occurrence in World Trade Center Properties LLC v Hartford Fire Insurance (2003) but in that
case occurrence was defined as "all losses or damages that are attributable directly or indirectly to one
cause or to one series of similar causes." In that case the criterion for determining aggregation of losses
was cause, which is of broader reach.


Binders impliedly incorporated WilProp form (Phase I):

Occurrence" shall mean all losses or damages that are attributable directly or indirectly to one cause or
to one series of similar causes. All such losses will … be treated as one occurrence irrespective of the
period of time or area over which such losses occur.

Other insurers had to rely on Travelers form (Phase II):

No definition – ordinary and natural meaning of "occurrence".

New York jury found (December 2004) that there were two events and Silverstein has benefit of two
limits of indemnity.

US Second Circuit upholds jury decisions October 2006.

Rodan International v Commercial Union [1999] 1 LRIR 495

Rodan supplied soap powder to a company called Newbrite, who arranged for it to be packaged into
cartons and then sold it on. The powder supplied by Rodan was defective, in that it caused the cartons
to stain, which in turn led to the powder becoming caked.

Rodan's product liability insurance (with Commercial Union) stated that CU would indemnify Rodan
against "all sums which the Insured shall become legally liable to pay for compensation and claimants'
costs and expenses in respect of any Occurrence to which this cover applies." “Occurrence” was
declared as product liability including "loss of or physical damage to physical property not belonging to
the Insured or in the charge or under the control of the Insured …"

The Court of Appeal agreed with the judge at first instance that the "occurrence" was the damage
caused to the container, together with the damage to the product itself (holding, however, that the policy
would not respond if the only damage was to the product itself). The Court of Appeal, like the judge at
first instance, also held that there was only one occurrence.

Pilkington v CGU [2004] LRIR 891

This case concerned the glass panes manufactured by Pilkington and installed in the roof of the
Eurostar terminal at Waterloo station. A small number of panels fractured once installed, but no
physical damage or injury resulted. However the station was closed during investigations, and safety
features were installed to prevent any fractured glass falling and injuring anyone in the station.

Under the insuring clause, CGU agreed to indemnify Pilkington against "all sums which the Insured
shall become legally liable to pay for compensation and Claimants' and [sic] costs and expenses in
respect of any Occurrence to which this Policy applies”. “Occurrence” was defined as “Loss of or physical damage to physical property not belonging to Pilkington…caused by…[the] commodity article or thing supplied…by” Pilkington.

The Court of Appeal held that for Pilkington to be able to recover under its products liability policy, there would have to be some physical damage or injury caused by the glass panels (and not merely damage to the panels themselves). There was no such damage and accordingly there was no "occurrence". The court rejected Pilkington’s argument that physical damage had occurred to the building merely because substantial work was required to extract and repair the defective panels, even if this work was undertaken in order to avert damage.