

# AGGREGATING FACTORS: NSW COURT OF APPEAL FINDS THAT ONE DEDUCTIBLE IS TO BE APPLIED TO MULTIPLE CLAIMS MADE UNDER AGGREGATION CLAUSE INVOLVING REPRESENTATIVE PROCEEDINGS

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The NSW Court of Appeal has recently overturned the Supreme Court's decision finding that 192 individual claims made against the Bank of Queensland (BOQ) could be aggregated to constitute a single claim and therefore a single deductible will apply.

## IN ISSUE

The critical issue at trial was whether the commencement of a representative action constituted multiple claims or whether it involved a single representative claimant who brought multiple claims on behalf of itself and others within the meaning of the Policy.

## THE BACKGROUND

In our previous article, we set out the relevant background to the NSW Supreme Court's decision, which can be viewed [here](#).

In summary, BOQ sought indemnity from its insurers pursuant to a policy issued to BOQ (Policy) in relation to A\$6 million which it agreed to pay to settle a class action brought by Petersen Superannuation Fund Pty Ltd on behalf of itself and other clients of Sherwin Financial Planners (Representative Proceedings). The Policy was subject to a single retention of \$2 million.

## FIRST INSTANCE DECISION

The court found that, although there was only one 'suit or proceeding' (Representative Proceeding) against BOQ, there were 191 other 'claims' made against BOQ, arising from the completion of individual Class Member Registration Forms. The court held that those 'claims' could not be aggregated because they did not arise out of one or a series of related wrongful acts.

As each 'claim' was less than the retention applicable under BOQ's insurance policy, the ultimate effect was that BOQ was effectively uninsured in respect of its settlement of the class action.

## COURT OF APPEAL'S DECISION

The issues on appeal comprised the following:

1. whether the institution of the Representative Proceedings and other steps taken by or on behalf of the investors constituted multiple claims or a single claim under the Policy (Issue 1);
2. if there were multiple claims, were those claims to be treated as a single claim by reason of an aggregation clause in the Policy (Issue 2); and
3. if there was a single claim, was the claim to be disaggregated by reason of a disaggregation clause in the Policy (Issue 3).

In a unanimous decision, the Court of Appeal overturned the trial judge's decision and held that the representative claims should be considered a single 'Claim' for the purpose of determining what deductible was payable pursuant to the Policy. The Court of Appeal summarised its reasons as follows:

1. In relation to Issue 1:
  - a. there were multiple claims as a reasonable businessperson would, taking each investor separately, consider that the Representative Proceeding was a "*suit or proceeding*" brought by that investor within the meaning of the Policy;
  - b. the Representative Proceeding constituted only a single claim under the Policy because it was a "*suit or proceeding*" brought by Petersen on behalf of the investors, rather than a "*suit or proceeding*" brought by the investors; and
  - c. The Forms submitted by the investors each constituted a claim within the meaning of the Policy.
2. In relation to Issue 2 and Issue 3, the multiple claims arose out of, or were based upon, or attributable to, one or a series of related wrongful acts and should therefore be aggregated, with the result that only one retention was applicable in respect of all the claims.

## IMPLICATIONS FOR YOU

It must be borne in mind that any aggregation clause in a particular policy must be considered in accordance with its terms and the context in which it appears. Insurers and brokers should therefore be vigilant when formulating aggregation clauses in light of this decision as class actions may render a single deductible payable rather than separate, multiple deductibles under a policy. Whether the decision may have been different had the investors brought the claim themselves remains to be seen.

[Bank of Queensland Limited v AIG Australia Limited \[2019\] NSWCA 190](#)

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