

Courts' semantic wrangling comes to an eventful end

A commonly used phrase in insurance policies provokes a yawning gap in interpretation

Maryam Taher

TAKE this simple aggregation wording commonly used in insurance policies: "any loss or series of losses arising out of any one event". The phrase may look simple but what lies behind the words is far from simple and has been the subject of several legal battles.

In *Kuwait Airways Corp v Kuwait Insurance Co (KAC v KIC)*, Rix J, at first instance, said that an "event" must be looked at from the perspective of an informed observer placed in the position of the insured (or reinsured). The case arose from the Iraqi invasion of Kuwait, when 15 Kuwait Airways aircraft captured by Iraqis were separately flown out of Kuwait. The KAC spares were either stored in various buildings at the airport or taken by the Iraqis.

Rix J was principally concerned with the question of whether or not the loss of the aircraft was a single occurrence or 15 separate ones. Rix J had to consider the meaning of the ground limit of \$300m "any one occurrence" and its application to the facts of the invasion so far as the KAC aircraft and spares were concerned. He concluded that the loss of all the KAC aircraft and spares arose out of a single "occurrence" namely the successful invasion of Kuwait. Therefore, he held that the ground limit of loss was subject to the qualification "any one occurrence". He also said that the "occurrence" and "event" may well be synonyms. The case ultimately was decided in the House of Lords. However, this part of Rix J's decision was not appealed.

Contrast the case of *Axa Reinsurance (UK) Plc v Field* where Lord Mustill compared the words "arising out of any one event" with "arising out of one originating cause". He held that an event was "something which happens at a particular time, at a particular place, in a particular way". A "cause" on the other hand was less restricted and could be a continuing state of affairs in the absence of something happening. This meant that in the *Axa* case the incompetence of a Lloyd's underwriter was not an "event" giving rise to losses under a number of separate policies, whereas in *Cox v Bankside Members Agency Ltd* [1995] 2 LLR 437, the same negligence was held to be the "originating cause" of such losses. This shows the importance of getting the wording right.

Langley J, in his decision dated July 11 2002, agreed with the statement of Rix J in

the *KAC v KIC* case when deciding *Murray Arnold Campbell Scott v The Copenhagen Reinsurance Co (UK) Ltd (Scott v Copenhagen)*. *Scott v Copenhagen* was a market supported test case on the question of whether or not the loss of the fifteen KAC aircraft to Iraqis and the BA aircraft constituted a "loss or series of losses" arising out of one event for the purposes of the Lloyd's Syndicates Attwoods XL Reinsurances.

Rix J incorporated into his judgment the arbitration award of Michael Kerr QC in 1972, in the supposedly private and confidential *Dawson's Field* arbitration. This decision is now published. The arbitration was in respect of the hijacking of four aircraft at separate locations and at separate times by members of the Popular Front for the Liberation of Palestine. Three of the aircraft were forced to land at an airstrip in Jordan called Dawson's Field. One was then flown to Cairo, Egypt and blown up soon after landing there, and the three at Dawson's Field were also destroyed within five minutes of each other. Michael Kerr QC held that the destruction of the three aircraft at Dawson's Field were losses arising out of one occurrence (contrast this with the loss of the one aircraft taken to Cairo and then blown up).

About "one occurrence", he said whether or not something which produce a plurality of loss or damage can properly be described as one occurrence depends on the position and the viewpoint of the observer and involves the question of the degree of unity in relation to cause, locality, time, and, if initiated by human action, the circumstances and purposes of the person responsible.

Kerr and Rix have treated an "event" or

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"occurrence" as interchangeable in that they "both denote something which happens, a happening".

"In my view there was one occurrence, one event, one happening; the holding up of three aircraft includes proximity, more or less simultaneously, within the time-span of a few minutes, and as the result of a single decision to do so without anyone being able to approach the aircraft between the first explosion and their destruction".

According to Rix J, an "occurrence"... is not the same as a loss, for one occurrence may embrace a plurality of losses. Nevertheless, he said, circumstances of the loss must be scrutinised to see whether they involve such a degree of unity to justify their being described as, or arising out of, one occurrence.

In *KAC v KIC*, Rix J said that the aircraft were all lost on August 2, 1990. There was, in that case unity of time, unity of location, unity of cause and also unity of intent. Therefore, he said, the occurrence, in his judgment, was the successful invasion of Kuwait, incorporating the capture of the airport and with it KAC's aircraft on the ground.

Langley J in *Scott v Copenhagen* said: "If the question is simply asked whether or not the loss of Kuwait Aircraft and spare parts arose from a single event, in my judgment the answer is overwhelmingly yes."

Langley J, emphasised that the four "unities" were present, therefore, agreeing with Rix J.

In *Scott v Copenhagen*, Langley J had to decide whether the same principles applied to destruction of the BA aircraft as those which applied to KAC aircraft. In other words, whether the BA aircraft was ever part of the Iraqi policy of plunder. He did not think that BA aircraft was lost as a result of the invasion. In his words, "I think that had the question been asked on August 2, 1990, 'is the aircraft lost?', the answer would have been: 'I do not know — wait and see.'"

In Langley J's opinion the four unities were also lacking in respect of the BA aircraft. In conclusion, therefore, the circumstances of the loss must be scrutinised to see whether they, in view of the informed observer, involve such a degree of unity to justify their being described as, or arising out of, one occurrence. So the test is whether the degree of unity in relation to cause, location, time and intent is present.

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Fight for the right: activists at BAA's headquarters in August.

AP

Protestors and business in legal balancing act

Val Davies and Helen Masters

A BROAD cross section of companies is now being targeted by environmental protestors, including ports, power stations and Heathrow Airport, the site of the much publicised recent protest by "Camp for Climate Action".

The Heathrow case demonstrates that the court will carry out a balancing exercise between the demonstrators' legitimate right to protest and their rights of freedom of speech on the one hand, and, on the other hand, the protection of the company's business interests and its properties.

Heathrow Airport originally sought an injunction under the Protection from Harassment Act 1997 ("the 1997 Act"). The 1997 Act had been used successfully against animal rights protestors in *Huntingdon Life Sciences Limited v Curtin & Ors* [1997] EWCA Civ 2486, where there had been verbal and physical intimidation of employees of the research company, and the court found that there was "harassment" as defined in the 1997 Act.

However, Mrs Justice Swift refused to grant an injunction to Heathrow Airport under the 1997 Act, in part because there was insufficient evidence that the protestors' conduct would amount to harassment.

Heathrow also had difficulty with the scope of its application in terms of the number of organisations it first sought to injunct and the area of land it sought to protect. This included land in the "vicinity" of Heathrow, such as access roads and the Underground stations.

Nevertheless, the court was prepared to grant an injunction under the common law of trespass and nuisance, as well as for breach of Heathrow's byelaws, in order to protect the airport's private property rights.

The terms of the order were narrowed during the hearing, enabling Mrs Justice Swift to conclude that the injunction she granted was no wider than was necessary to provide proper and effective protection to the airport. She was satisfied that the purpose of the injunction was to prevent unlawful activity occurring at Heathrow, but equally that it would not interfere with the peaceful and lawful activities of those taking part in the Camp for Climate Action.

While companies will be able to obtain protection from the court, they should be aware of the balancing act that the court will conduct between the parties. An applicant should also be mindful of not framing any application wider than is necessary.

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Turbulence in legal market leads to rise in number of mergers

Sandra Speares

THE UK's shipping legal market has been going through a turbulent time, according to the latest edition of the Legal 500 published last week.

The law directory predicts more consolidation in the sector "as specialist firms look to merger possibilities as the only way to halt the flow of partners to larger practices and more lucrative legal sectors".

While not every firm would agree with the comment that recently the "shipping niche appeared to be in decline", there have nevertheless been a number of consolidations in recent times. They include Hill Dickinson's with Hill Taylor Dickinson, Shaw and Croft with HBJ Gateley Wareing, and Constant & Constant's acquisition by TLT Solicitors.

As far as dry shipping work is concerned, Clyde & Co, Holman Fenwick & Willan, and Ince & Co are ranked in the first tier, according to the Legal 500, with Reed Smith Richards Butler in the second and Hill Dickinson and Stephenson Harwood in the third.

Many other firms are also singled out for praise in the dry category, including Barlow Lyde & Gilbert, Bentleys Stokes & Lowless, Clifford Chance, MFB, Norton Rose and Thomas Cooper, which has

expanded rapidly during the course of the year.

Others mentioned in this category include Watson Farley & Williams, DLA Piper and Newcastle-based Mills & Co, who amalgamated with Rayfield Mills during the course of the year. Another move is the departure of Mike Lax and two colleagues from recently rebranded LG to set up a new niche practice that will be handling the *Sovcomflot* litigation.

As far as wet work is concerned, Holman Fenwick & Willan and Ince & Co are ranked number one, with Clyde & Co in the second tier and Hill Dickinson and Reed Smith Richards Butler in the third tier, although other firms mentioned include Bentleys Stokes & Lowless, described here as "punching well above its weight", Shaw and Croft — a division of HBJ Gateley Wareing, Norton Rose, Winter Scott, Clifford Chance and Eversheds. Waltons & Morse is described here as "the only firm that can claim to rival Clyde & Co on the cargo side".

Last year is described as a landmark one for Thomas Cooper, which expanded in Paris with the recruitment of three lawyers from Reed Smith, including the firm's Paris managing partner Lars Lewis.

A new entrant in the wet shipping category is Mills & Co.

In ship finance, Norton Rose, Stephen-

son Harwood and Watson Farley & Williams lead the pack, with Allen & Overy in the second tier and Clifford Chance, Denton Wilde Sapte and Holman's in the third. Other firms mentioned include Ince & Co, Reed Smith, Linklaters, Clyde & Co and Berwin Leighton Paisner, among others.

Outside London, Newcastle-based Eversheds and Mills & Co are recommended, as is Isle of Man-based Cains and Dickinson Cruickshank in banking and finance category. North of the border the shipping recommendations include Dundas & Wilson, HBJ Gateley Wareing, Brodies, and Anderson Strathern, among others.

In the south of England, Clyde & Co's Guildford office leads the pack, with other firms being mentioned including Southampton-based Lester Aldridge, Moore Blatch, Tolcher & Co, Bond Pearce and Havant-based Dyer Burdett.

Shipping firms mentioned in East Anglia include Ipswich-based Birketts, Prettys, and John Weston & Co and Dale Stevens, based in Felixstowe.

In the northwest, Hill Dickinson and Weightmans (both Liverpool based) dominate. Hull-based Andrew M Jackson is described "one of a kind in Yorkshire", with Leeds-based Ford & Warren demonstrating "considerable strength in land-based transport".