IN THE DISPUTES TRIBUNAL **[2010] NZDT 18**

BETWEEN	**AAX**
	FIRST APPLICANT
AND	**AAY**
	SECOND APPLICANT
AND	**ZZF**
	RESPONDENT

Date of Order: 13 August 2010
Referee: Referee Robertshawe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZZF Limited is to pay to AAX and AAY the sum of $1,025.52 on or before Friday, 20 August 2010.

Facts

[1] In 2006, AAX and AAY purchased an insurance policy through HN (a banking corporation) for their property at [a place] (the "Policy"). The Policy was underwritten by ZZF Ltd.

[2] This dispute arises from two claims made under the Policy:

(i) The first claim was made on 2 August 2007 relating to damage done by tenants on or before November 2006 (the "2006 claim"); and

(ii) The second claim was made following a burglary on or about 11 May 2009 (the "2009 claim").

[3] For the 2006 claim, ZZY only paid out under the Policy on one out of seven items for which the claim was lodged. ZZY took the view that the excess under the Policy applied to each item, not the entire claim, and that only the one item that was greater than the excess was recoverable.

[4] For the 2009 claim, ZZY deducted a landlord excess of $550.00, rather than an owner occupied excess of $250.00. Also, subsequent damage was found to the garage that was not included in the original claim.

[5] AAX and AAY therefore brought the following claim against ZZY:

Items not paid out under 2006 claim

Toilet seat and flue repair	$ 100.00
Range hood	$ 350.00
Bathroom heater	$ 125.54

Dresser Mirror	$ 1,051.50	
Vacuum cleaner	$ 257.98	
Cleaning and rubbish removal	$ 142.00	
		$ 2,027.02

Items not paid out under 2009 claim

Additional excess deducted	$ 300.00	
Garage damage not yet claimed	$ 406.00	
		$ 706.00
		$2,733.02 (plus interest)

[6] At the first hearing, ZZY accepted the garage claim of $406.00 and subsequently paid this sum. Prior to the second hearing, AAX and AAY reduced their claim for the 2006 items to $1,844.52. Their total claim was accordingly adjusted to $2,144.52 plus interest.

Law

[7] In interpreting the Policy in relation to the excess, the law of contract applies. The Policy is a contract and is therefore subject to the same general rules of interpretation as any other written contract. In particular, the words of the Policy are to be given their ordinary meaning. The document is to be read objectively through the eyes of a reasonable person to determine the intention of the parties.

[8] Where there is any ambiguity in an insurance policy, the *contra proferentem* rule applies, and the words are to be construed against the party who puts them forward. However, this rule only applies where the words in question are truly ambiguous, and cannot be invoked to create a doubt that does not exist. When the words in question are capable of only one fair and reasonable construction, the *contra proferentem* rule does not apply.

[9] In relation to claims that HN made incorrect representations about the Policy at the time of its sale, the Fair Trading Act 1986, Contractual Remedies Act 1979, and the

Consumer Guarantees Act 1993 apply. If HN, as ZZF Ltd's agent, has made false representations about the Policy, this will give grounds for compensation under these Acts.

Issues

[10] The claim raises the following issues:

(i) In relation to the 2006 claim, should the excess of $500.00 be deducted from each item claimed, or just once from the whole claim?

(ii) If the excess is to be deducted only once, what sum can AAX and AAY claim for the items for which they have not yet received payment?

(iii) In relation to the 2009 claim, should the excess have been $550.00 or $250.00?

Decision

In relation to the 2006 claim, should the excess of $500.00 be deducted from each item claimed, or just once from the whole claim?

[11] I find that the Policy enables AAX and AAY to aggregate all their claims from the tenancy into one claim, thus entitling ZZF to only deduct one excess, not one excess for each item claimed.

[12] I have reached this conclusion for the following reasons.

[13] The Policy covers *accidental loss*. This term is not defined in the Policy. This appears to be an oversight, as the term is italicised, so must have been intended to be defined. However, the term *accident* is defined as "a happening or event that is unforseen and unintended...". An *event* is then defined as: "an event or series of events arising from one source or original cause". Thus, assuming that an accidental loss is a loss that happens by accident, the concept of accident is extended by the definition of event to a series of events, provided the events arise from one source or original cause.

[14] It is a basic proposition of insurance that would be implied into all Policies that an insured is entitled to make a claim for each accident, and that the excess applies to each accident. If this was not the case, then taken to its logical extreme, an insured would only ever pay one excess for the first accident, and then none thereafter.

[15] In accordance with this principle, the Policy in this case states that the excess is deducted from each *claim*. However, because there is no definition of *claim* to expressly limit the aggregation of claims under one excess, and because the definition of *accident* expressly allows aggregation so long as the items being claimed for form part of a series, the Policy can be read as enabling aggregation of related claims to avoid the payment of multiple excesses.

[16] ZZF helpfully presented a number of cases to the Tribunal, along with excerpts from *Australian & New Zealand Insurance Commentary* (CCH), Chs 33-170 and 23-550, D Derrington *The Law of Liability Insurance* (2nd ed, LexisNexis, 2005). Of the numerous cases cited, the most helpful were those which interpreted Policies that had the same, or very similar, aggregation clauses.

[17] Having given full consideration to all the cases and materials provided, I am satisfied that the extension of the definition of "event" in the HN Policy has been interpreted widely, and in such a way that various damage arising from AAX and AAY's tenancy should be considered as a "series" of events arising from one original source. In particular, the word "series" has been held to mean a number of events of a sufficiently similar nature following one another in temporal succession. Events are of a similar nature if they have some characteristic in common: *Distillers Co Bio-Chemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1; *Pacific Dunlop Ltd v Swinbank (1999) 10 ANZ Insurance Cases* 61-439. These two cases related to medical misadventure (thalidomide and coronary pacemakers). The Courts held that all claims arising from each, though different circumstances applied in each claim, formed a "series". The concept of "original cause" enabled the originating common cause to be considered as sufficiently proximate to link each claim into a series.

[18] Further, the term "originating source" has been held to be a broader concept than an "originating event", as "event" does not include a state of affairs (such as a tenancy). The term used in this Policy is "source", not "event". Also, the term "arising from" does not need the same direct and proximate relationship as "caused by": *AXA Reinsurance (UK) plc v Field* [1996] 1 WLR 1026; *Re Brown v GIO Insurance Ltd* [1988] EWCA Civ 177.

[19] In *QBE Insurance Ltd v MGM Plumbing Pty Limited* [2003] QSC 27, a case cited by ZZF in support of its position in this case, it was held that a separate excess was to apply to each defective installation of waterproof membranes in the bathrooms of 47 homes. However, in that case the policy covered "occurrences" which were defined as "an event including continuous or repeated exposure to substantially the same general conditions …". This wording is more limited than the "series" wording in the HN Policy. Moreover, the Court specifically noted that had the policy covered damage from a series of occurrences attributable to one source or original cause, only one excess would have been deductible for the loss arising from all 47 homes.

[20] In *Countrywide Assured Group Plc v Marshall* [2002] EWHC 2082, an aggregation clause limiting claims to occurrences of a series in similar terms to the HN Policy, an excess was held to attach to each separate claim from customers against Countrywide for mis-selling pensions. However, that case was distinguishable from this, as there was an additional "NB" clause in the policy specifically stating that the excess was to apply to each and every claimant for claims arising out of pension transfer activity. This clause was determinative of the matter, overriding the "series" clause in the definition of "claim", but no such "NB" clause exists in the HN Policy.

[21] Having regard to these cases, I am satisfied that those that relate to policy terms similar to the HN Policy support the view that the damage that occurred in this tenancy, taking place as it did over a relatively short space of time (June to October 2006) and arising from a state of affairs that had a common characteristic (the tenancy), and the same original cause (the tenants), formed part of a "series", enabling the AAX and AAY to group them into one claim for accidental loss.

[22] I have had regard to ZZF's argument that the Policy only applies to "sudden" accidental loss, and that this, along with the reference to "single accident" in the definition of "excess", signals an intention to treat each separate event giving rise to a claim as being subject to an excess. A tenant's tenure is something that exists over time, giving rise to the prospect of increasing risk under the Policy for the insurer the longer a tenant stays. ZZF argues that this could not have been intended. However, I cannot disregard the aggregation clause in the definition of "event", which in turn colours the term "accident" and thus the concept of "accidental loss". Each accidental loss must be sudden, but because of the definition of "event", this does not prevent the linking of sudden events in a series, provided there is a common underlying proximate cause. The mention of a single "accident" in the definition of "excess" is in an unrelated context and does not assist either party in their argument. I would also note that this tenancy did not continue over a long period of time, and that the concept of "series" does require a reasonable degree of temporal succession. There is therefore some protection from ZZF against indeterminate liability under one excess.

[23] I have had regard to ZZF's argument that it is a general principle of insurance law that a claim arises as soon as all the elements necessary to make that claim exist. On this basis, each separate event of loss creates its own right to claim, and thus its own excess. However, many policies detract from that general principle by allowing aggregation (either for the purposes of establishing negotiated limits of maximum payout for the insurer, or for the purpose of defining the deductibility of excesses). Where such clauses apply, the general principle of one excess per event is modified as defined by the policy wording.

[24] Finally, I have had regard to ZZF's argument that there are industry standards for resolving difficult questions such as this, and that these have tended to be pragmatic in recognising the exposure of the insurer to unreasonable risks where there is the potential (such as in a tenancy) for claims to be aggregated. I reviewed three cases from the office of the Insurance Ombudsman presented by ZZF to make this point. I am aware that there are up to 90,000 of these policies on issue, and that ZZF is not taking the view on any other policy that claims can be aggregated in this way for tenant damage. I am also aware that if ZZF did allow aggregation, that it has not priced the losses arising from this into its premium. However, none of the Ombudsman cases provided cited the policy terms that applied, so they

were difficult to compare to this case. Also, in resolving this dispute, I am required to have regard to the terms of this policy, not company policy or industry standard. In the presence of any ambiguity, I am required to resolve this in favour of the insured. For these reasons, and given the definitions in this policy cited above, I find that AAX and AAY were entitled to aggregate their losses into one claim. I accept this was never ZZF's intention, and not ZZF's current practice and suggest that ZZF amend its policy to clarify the matter.

[25] AAX and AAY recall being advised by HN at the time they purchased the insurance that they could group claims into one form to avoid multiple excesses. It was difficult for me to make a finding about this, as the relevant conversations were all oral, and with a person who could not now be found. ZZF could not confirm, but did not directly dispute, that this was AAX and AAY's experience. Obviously, if AAX and AAY had been advised of this, then ZZF would be bound to interpret the Policy in this way. However, I need not make findings about this point given that the Policy has been interpreted to accord with this advice.

What insurance can be recovered for the items not yet paid out?

[26] Having made a finding that the remaining items of tenant damage not yet covered under the Policy are not subject to any further excess, I find that ZZF is now liable to pay AAX and AAY the sum of $1,025.52, calculated as follows:

1.	Toilet seat and flue repair	$ 100.00
2.	Range Hood	$ 0.00
3.	Bathroom Heater	$ 125.54
4.	Dresser	$ 400.00
5.	Vacuum cleaner	$ 257.98
6.	Cleaning and rubbish removal	$ 142.00
		$1,025.52

[27] ZZF accepted items 1, 3 and 5, and reached agreement with AAX at the hearing on item 4.

[28] AAX sought up to $599.99 for item 2 (range hood). However, I am satisfied that ZZF established that this damage was more likely to be fair wear and tear, rather than tenant damage, and thus excluded from cover under the Policy. The range hood was up to 15 years old. The assessor's report records motor burn out. However, in contrast to the evidence relating to the bathroom heater and vacuum cleaner, there was insufficient evidence of a link between tenant use and the burn-out. It is noted that even if the range hood had been covered, it would only have been covered at present day value. Given its age, the range hood would have been almost fully depreciated.

[29] AAX sought a further $120.00 for travel costs to collect the new vacuum cleaner. However, there was insufficient evidence that this cost was incurred.

[30] I am satisfied that AAX incurred the cleaning and rubbish removal costs claimed, being accepted as costs incurred as a result of tenant damage in the assessor's report. ZZF accepted that these would be covered if proved.

[31] AAX initially sought interest on the sum claimed. However, he did not pursue this at the hearing, and given that any further payment under the Policy has been a matter of genuine dispute between the parties, I am satisfied that none should be charged.

In relation to the 2009 claim, should the excess have been $550.00 or $250.00?

[32] To claim an excess reduction to $250.00 for the 2009 claim, AAX needed to establish that he advised HN of the change of circumstances from landlord to owner occupancy.

[33] AAX recalls advising HN of this change in January 2009, but HN has no record of this.

[34] AAX produced a diary note showing that he had attended a HN branch on the date that he stated he advised it of the change in circumstances. However, he had insufficient evidence that he had in fact advised HN of the change.

[35] Therefore, I am unable to make a finding that ZZF applied the wrong excess to the 2009 claim.

Conclusion

[36] In summary, I find that AAX and AAY were entitled to aggregate their losses from the tenancy into one claim, and that the sum now payable under the Policy for those losses is $1,025.52.