DWF insurance briefings°

September 2015

Go further

Derek Adamson

Partner

Insurance

DD +44 (0)121 200 0437
M +44 (0)7824 814 631
E derek.adamson@dwf.co.uk

Derek has over 36 years' experience in insurance work having trained as a solicitor with Buller Jeffries, qualifying in 1981 and becoming a partner in that firm in 1985. Following Buller Jeffries merger with DWF in May 2012 Derek was appointed National Head of Occupational Health and Casualty Group in DWF.

Derek acts as key account manager to some of DWF's larger insurance clients, taking responsibility for the provision of service. This involves developing relationships, coordinating resources and ensuring delivery of a high quality service. Derek attends regular review meetings with those clients and manages KPI performance and ensuring client satisfaction.

Over the course of his career, Derek has built up extensive specialism in insurance policy interpretation, development of insurance law particularly in connection with mesothelioma claims, legionnaires' disease, commercial product liability, fire and construction work. He has extensive experience of preparation for and advocacy at substantial mediations.

Derek now has two major Supreme Court successes to his name. He led the successful team that acted for Zurich in the EL Policy "Trigger" Litigation in SC (2012) and for the same client in another landmark mesothelioma coverage case, Zurich v IEG SC (2015). The latter broke completely new ground by establishing new equitable contribution/recoupment rights against successive insurers of different periods of exposure to asbestos and insureds in respect of uninsured periods.

Derek was a Deputy District Judge from 1993 until 1998 and has been listed for many years by Chambers directory as the leading individual in defendant personal injury work in the Midlands. The Trigger litigation and the IEG case together with a number of group litigation cases have widened his reputation to a national level.

In May 2014 he gave evidence on behalf of insurers and defence solicitors to the Justice Select Committee of the House of Commons on mesothelioma claims and LASPO. Legal 500 have described him as 'a litigator of the highest calibre'. Clients appreciate his "well-considered advice and strategy." He is "a very good ally to have on your side when the going gets tough," Chambers note that he "brings both enthusiasm, and a marked grasp of the details, to the cases on which he works," while he is also hailed as a "phenomenal litigator" and "very bright, thorough and really goes the full hog."

Zurich Insurance plc UK branch v International Energy Group Limited - Supreme Court 20 May 2015 - [2015] UKSC 33

Introduction° - What were the key issues raised in the appeal?

- Does the ***Barker v Corus*** quantum rule - apportionment of liability according to an employer's period of contribution to risk of developing mesothelioma by negligent exposure to asbestos compared to the overall periods of exposure - apply in Guernsey or, as IEGL contended, did the *Trigger* decision consign *Barker* to history for all purposes?

- If *Barker* does not apply and the position in Guernsey is the same as in the UK where Section 3 Compensation Act 2006 makes each employer liable in full**,** does an insurer for part of the period of exposure have to pay the claim in full or merely on a time on risk or contribution to risk basis?

- If the part insurer does have to meet the whole of the liability to the claimant, does that insurer have pro rata rights to contribution from any other insurer of that employer and/or from the employer in respect of any periods not covered by the insurer?

- There were parallel issues in relation to an insurer's responsibility for defence costs incurred in meeting the victim's claim.

But first, a history lesson - asbestos, mesothelioma and causation

Asbestos use

Asbestos was used extensively as a building material in the UK for much of the 20th century until the mid-1980's. It was used for a variety of purposes but was ideal for fireproofing and insulation. Houses, schools, hospitals, factories and offices of that era would typically contain asbestos within their fabric. Asbestos materials in good condition are safe unless damaged or disturbed when fibres are released into the atmosphere.

Exposure

In this day and age exposure in the workplace is rare and generally inadvertent. However historically due to the manufacture and widespread use of asbestos containing materials exposure has occurred in a wide range of workplaces.

The HSE in its hidden killer campaign suggests that every week 4 plumbers, 20 tradesmen, 6 electricians and 8 joiners die from asbestos related disease. Currently there are 2,000 deaths a year due to mesothelioma alone and this figure is set to increase peaking an estimated 3,250 male deaths in 2028.

Mesothelioma and causation

A problem occurs where there are a number of successive exposures to asbestos with different employers over a period of time.

That the claimant has an asbestos induced mesothelioma is not in doubt; however there is no way of identifying on balance of probabilities the source of the fibres which initiated the malignant process.

It follows in those circumstances, where there are multiple exposures, a claimant could never satisfy the "*but for*" test of causation nor the "material contribution" test (***Wardlaw v Bonnington Castings*** - 1956). In other words, the claimant is unable to establish that any breach of duty caused the tumour and, thus, cannot establish causation in the conventional sense.

It is a basic principle of the law of tort that a claimant will only have a cause of action if he can prove, on balance of probabilities, that the defendant's tortious conduct caused or made a material contribution to the damage in respect of which compensation is claimed. He must show that but for the defendant's tortious conduct he would not have suffered the damage.

The "Special Rule"

The special rule of causation was introduced for mesothelioma claims because of the inability of medical science to attribute the development of the tumour to a given breach of duty. The exposure that initiated the malignant process cannot be identified.

It was this feature of the disease that lead the House of Lords to create a special rule governing the attribution of causation to those responsible for exposing victims to asbestos dust. This was advanced for the first time in ***Fairchild v Glenhaven Funeral Services Limited [2002] UK HL 22*** and developed *in* ***Barker v Corus UK Limited [2006] UK HL 20*****.** Parliament then intervened by s.3 of The Compensation Act 2006 to further vary the rule.

The rule in its current form is:-

> "*When a victim contracts mesothelioma each person who has, in breach of duty, been responsible for exposing the victim to a significant quantity of asbestos dust and thus creating a "material increase in risk" of the victim contracting the disease will be held to be jointly and severely liable for causing the disease*".

The impact of The Special Rule

The significance of the rule is that a claimant needs only trace and sue any one culpable tortfeasor to recover 100% of his damages. Further having regard to the effects of s.3 Compensation Act 2006, it follows that the claimant need only trace any one insurer on risk for any part of the culpable exposure to recover 100% of his damages and costs.

Zurich Insurance Plc UK v International Energy Group Limited [2015] UKSC 33 (" the *IEGL case*")

Introduction

I will work through the case setting out the history of the litigation through the Commercial Court at first instance, the Court of Appeal and the Supreme Court and thereafter look at the implications of the final judgment.

The facts

The basic facts were agreed. IEGL formerly Guernsey Gas, employed the late Mr. Carré between 1961 and 1988. Zurich provided EL cover for the period 1982 – 1988. The only other cover was provided by Excess between 1978 and 1980 but Excess played no part in the litigation and were not sued by IEGL. Throughout the whole of his employment Mr. Carré was negligently exposed to asbestos as a result of which he developed mesothelioma. The claim was settled by his employers for £250,000.00 plus costs.

The only matter in issue was the extent of the insurers' liability to the employer in respect of Mr. Carré's claim. IEGL maintained it was entitled to a full indemnity, Zurich argued they were only liable to contribute that proportion which the policy period bears to the whole period of exposure i.e. 6 years out of 27 (22%). One unusual feature of the case was that in Guernsey, unlike in England and Wales, The Compensation Act 2006 did not apply.

The insuring clause

"*If any person under a contract of service….with the insured shall sustain any bodily injury or disease caused during any period of insurance and arising out of and in the course of his employment by the Insured….., the Company (Zurich) will indemnify the insured against all sums for which the Insured shall be liable in respect of any claim for damages for such injury or disease settled or defended with the consent of the company. The company will in addition pay claimants' costs and expenses and be*

responsible for all costs and expenses incurred with the consent of the Company in defending any such claim for damages."

First instance

Zurich were successful at first instance on the basis that Mr. Justice Cooke found that *Barker* still represented the common law in Guernsey and, therefore, the only ***damage*** to which the policy had to respond was the pro-rata contribution to the risk of developing mesothelioma during the period of insurance, i.e. 22%.

As you will recall the *Fairchild* exception established joint and several liability where there was more than one negligent defendant where the culpable exposure had materially increased the risk of contracting mesothelioma.

Barker had refined the *Fairchild* exception to impose several liability where there was more than one negligent defendant, so a defendant would only be liable to the extent that he had materially increased the risk.

The Compensation Act 2006 had reintroduced joint and several liability for mesothelioma claims in England and Wales but of course that did not apply to Guernsey.

Importantly, Mr. Justice Cooke found that as a matter of English common law the *Barker* approach for apportioning liability on a several basis applied just as much to a single employer situation as to the multiple employer situation – see ***Sienkiwicz v Greif [2011] UKSC 10.*** That meant that Zurich were not liable for the full amount and need only indemnify the insured in proportion to their time on risk.

Mr. Justice Cooke however did suggest that the decision would have been different in England and Wales where The Compensation Act applies. Here, each defendant would be jointly and severally liable.

> "*The reality of the matter is that, if the pure Fairchild of basis of liability applied, whether by virtue of The Compensation Act or otherwise, without reference to Barker, the insurer would be liable for the totality of the damages suffered by [the deceased] because in any policy year, the insured's liability would be for the totality of that damage*".

Court of Appeal

IEGL appealed. Importantly, before the matter came before the Court of Appeal, the Supreme Court had delivered judgment in **The Employers' Liability Policy Trigger Litigation ,i.e. *Durham v BAI(Run Off) Limited [2012] UKSC 14*** ("*Trigger").* Cooke J's decision at first instance was based on an analysis of the cases of *Fairchild, Barker* and *Sienkiewicz*. He concluded that liability in mesothelioma cases was based on "*exposure to risk*" and the extent of the liability depended upon "*the extent of relative exposure to that risk as compared with competing exposures to it*". Therefore, on the correct construction of the insuring clause of the policy terms, Zurich was only liable for the proportion of the total damages attributable to the 6 years when it insured IEGL.

Was that analysis now sustainable having regard to the reasoning of the majority in the *Trigger* litigation case?

IEGL argued that as *Trigger* had established that the gist of the action was the mesothelioma itself not the contribution to risk and also established that the weak or broad causation which the law accepted in such cases was satisfied by a contribution to risk of developing the disease the damage being paid under the policy was for the whole mesothelioma disease, the liability arising in the period of insurance was the same and, therefore, Zurich must pay 100%.*Trigger* had consigned Barker to past history.

The Court of Appeal focused on *Trigger* and the Supreme Court's analysis of the causation issue, namely what was the basis of liability in mesothelioma cases as a result of *Fairchild, Barker* and section 3 of The Compensation Act 2006. Note, however, that the 2006 Act does not apply in Guernsey.

In *Trigger*, Lord Mance held that although scientifically it could not be established that exposure in a given policy year had caused the mesothelioma, following *Fairchild*, the law was prepared to take a more relaxed view of causation. In these extreme circumstances, as a claimant wrongfully exposed could not establish causation in fact in the normal way, the claimant would be regarded as having established during any policy year "*a sufficient weak or broad causal link for the disease to be regarded as caused within the insurance period*". Causation for the purposes of the policy would follow the basis of causation at common law in the tortious claim itself.

The Court of Appeal relying on that statement of principle by Lord Mance held that as far as the law is concerned, the claimant established such weak or broad causation in each and every policy year and was therefore entitled to 100% liability in each year. In turn, the insured was entitled to an indemnity for 100% of the liability to the claimant during each policy year.

Zurich argued that even if as a matter of contract law IEGL were entitled to a full indemnity, they were entitled in equity to a contribution from IEGL in respect of the period during which the deceased was exposed to asbestos but for which Zurich did not insure IEGL. It was inherently unfair that the insurers had taken a premium for only 6 of the 27 years of exposure and in respect of each and every other of the 21 years of exposure IEGL also had 100% liability to the deceased. Accordingly the court should exercise its equitable jurisdiction and require IEGL to contribute on a time on risk basis.

The Court of Appeal rejected such argument on the basis that a party's contractual obligations could not be undermined by a call to equity. The fact that the deceased's exposure to asbestos during the rest of his employment with IEGL was also treated as a cause of the disease was irrelevant insofar as IEGL's right to an indemnity on the policy wording and on the ordinary principles of insurance law were concerned.

Toulson LJ, who gave the leading judgment, felt once it was established there was exposure during any policy period which met the causal requirement for the employer's liability to the deceased and for which IEGL were entitled to an indemnity from Zurich then "*to withhold part of that indemnity from the employer on account of its conduct in other years would be to deprive the employer of insurance coverage for which it paid*".

Aikens LJ agreed but additionally held that the result on the extent of Zurich's contractual liability to IEGL followed as a matter of policy construction. Since the victim had "*sustained*" a disease "*caused during*

any period of insurance", since the insurer had to indemnify "*all sums*" for which the insured had a legal liability that meant payment of the entire liability.

IEGL was entitled to a full indemnity from Zurich in respect of damages, claimant's costs and defence costs.

The Supreme Court – 2014 and 2015

Introduction

The appeal came before a panel of 5 Justices of the Supreme Court over two days in July 2014 and just when the parties were expecting to receive judgment, in October, the Registrar of the Supreme Court wrote seeking clarification of some of the arguments and putting specific questions in writing to the parties. The parties responded and following further submissions, an expanded panel of 7 Justices heard the appeal over two further days in January 2015. Judgment was handed down on 20 May 2015.

The issues

For the benefit of the reader, I set out again the issues:-

- Does the ***Barker v Corus*** quantum rule - apportionment of liability according to an employer's period of contribution to risk of developing mesothelioma by negligent exposure to asbestos compared to the overall periods of exposure - apply in Guernsey or, as IEGL contended, did the *Trigger* decision consign *Barker* to history for all purposes?

- If *Barker* does not apply and the position in Guernsey is the same as in the UK where Section 3 Compensation Act 2006 makes each employer liable in full**,** does an insurer for part of the period of exposure have to pay the claim in full or merely on a time on risk or contribution to risk basis?

- If the part insurer does have to meet the whole of the liability to the claimant, does that insurer have pro rata rights to contribution from any other insurer of that employer and/or from the employer in respect of any periods not covered by the insurer?

- There were parallel issues in relation to an insurer's responsibility for defence costs incurred in meeting the victim's claim.

The Supreme Court's findings

All 7 Justices agreed with Zurich's argument that *Barker* remains good law, that is to say that it remains part of the common law save that, by reason of Section 3 Compensation Act 2006, it does not apply to mesothelioma claims where that legislation is in force. Since that legislation is

not in force in Guernsey, *Barker* remains part of the common law of Guernsey for all diseases including mesothelioma and, therefore, Zurich's obligation to indemnify IEGL in respect of the damages and costs paid to the claimant is limited to an apportionment based on its time on risk, i.e. 6 years out of an overall exposure period of over 27 years.

The apportionment of liability between IEGL (in respect of the uninsured period), Excess (who were on risk for 2 years) and Zurich (6 years) does not apply to Defence Costs as explained further below. All 7 Justices were of that view.

It follows from the above findings that Zurich won the individual case against IEGL, but having regard to the lengthy argument on the question of whether, in respect of claims arising in jurisdictions where the Compensation Act 2006 applies, the Justices dealt at length with the question of whether a pro rota apportionment should apply in respect of claims for mesothelioma arising in those jurisdictions, i.e., the Fairchild recoupment rights issue. This deals with UK claims.

All 7 Justices were satisfied that there should be proration even in jurisdictions to which the 2006 Act applies. They were not unanimous, however, in their reasons for reaching that conclusion. By a majority of 4 – 3, the Justices agreed with Zurich's contention that, although the contractual obligation on a part insurer – an insurer who insured for part of the period of exposure to asbestos giving rise to the mesothelioma – was to indemnify the liability of the employer in full, i.e., pay the claimant in full, there is an equitable right of recoupment - what we called in the case *Fairchild recoupment rights* although none of the Justices used that expression - from the insured in respect of the contribution to risk of developing mesothelioma during the uninsured period of exposure.

The three Justices in the minority would still prorate the claim but they would do so on the basis of the construction of the insuring clause and the policy as a whole. They took the view that, under the contract, the insurer's obligation to indemnify is limited to its time on risk and, although that could mean that a victim could go uncompensated, he/she ought to be able to recover under the Mesothelioma Act 2014 Scheme an award in respect of the uninsured period. Whether or not that is correct does not in the event matter because claims will be dealt with according to the majority approach.

The issues and the judgment

Introduction

There were two main speeches within the judgment. They were provided by Lord Mance and Lord Sumption. Lord Mance represents the majority view on the equitable recoupment right issue and Lord Sumption the minority view on that issue. All 7 Justices were agreed on the *Barker* point and on the Defence Costs point. The Justices who agreed with Lord Mance were Lords Clarke, Carnwath and Hodge. Only one of those, Lord Hodge made a short separate speech of his own. This was by way of amplification of his reasons for supporting and adopting the majority view. Lords Neuberger and Reed agreed with Lord Sumption. They prepared a short speech in support of Lord Sumption, again by way of amplification and explanation of their reasons for supporting the minority view.

Barker

As Lord Mance put it, "*The first main question on this appeal is whether Barker remains good common law, not in the United Kingdom where it has been superseded by the 2006 Act but in Guernsey where no such statute exists"* (paragraph 25).

IEGL contended that *Barker* had been fatally undermined by the 2006 Act and/or the decision in *Trigger.* With regard to the former point, Lord Mance dealt with that briefly by saying that IEGL's argument that, because Section 16 (3) of the 2006 Act provided that, *"Section 3 shall be treated as having always had effect"* meant that Section 3 was simply declaring what the common law *"has always been"*, was wrong. Section 16 deals with *"Commencement"* and the 2006 Act was clearly passed to change a common law rule expounded in *Barker* (Lord Mance paragraph 27).

The more substantive argument was that *Trigger* had essentially overruled *Barker*. During the Supreme Court hearing, IEGL's two leading counsel (Mr Bueno QC and Mr Limb QC) did not speak with one voice. The former expressly stated that, notwithstanding the arguments they were putting forward, they were not asking the Supreme Court to overrule *Barker* whereas Mr Limb QC was rather more hesitant about that.

Whatever the position, their case was that *Trigger* had established that where the period of insurance coincided with the period (or part of the period) of exposure to asbestos, the common law *deemed t*hat the illness/tumour was caused during that period. We had the curious situation during the hearing of IEGL's counsel "*telling"* Lord Mance what he had meant in his judgment in *Trigger*. Not only did he not convince Lord Mance but he did not convince any of the other Justices either that *Trigger* had the effect of consigning *Barker* to history as the Court of Appeal had suggested in this case.

Trigger

It will be recalled that the principal issue in *Trigger* was whether "*sustained"* wordings as opposed to "*caused during"* wordings responded by reference to the date of exposure to asbestos dust or to the date when the onset of mesothelioma or any other long term disease developed or manifested itself. Acting for Zurich in that case, our arguments in that respect were successful and the Supreme Court found that, where the wording referred to a disease contracted or an injury or disease sustained, the reference was to be taken as being to the date when mesothelioma was caused or initiated by exposure, even though it only developed or manifested itself long afterwards (paragraphs 49 – 51 of Lord Mance in *Trigger* and paragraph 19 of this judgment).

However, that was only half the story in *Trigger*. During the Supreme Court hearing in *Trigger*, without any real invitation from or by the parties, Lord Phillips raised what might be called these days "*the elephant in the room"* by asking the fundamental question that, even if the claimants, insureds and Zurich were correct in their contentions on the first point – the trigger was exposure not date of injury/development of the tumour or manifestation – that was only of any use to them if the disease could be said to have been "*caused"* during the period of insurance. Since medical science is unable to identify which particular exposure to asbestos caused (as a fact) the tumour, an insured seeking an indemnity under its EL policy faced the same problem as the claimants in *Fairchild* in establishing liability for mesothelioma.

Lord Phillips took what Lord Sumption here calls the austere approach of saying that in truth, causation could not be demonstrated during the period of insurance and therefore no EL policies at all should respond to mesothelioma claims. The majority in *Trigger*, led by Lord Mance, overcame this difficulty by saying that when analysing the meaning of the word "*caused"* in an EL Policy, "*the concept of a disease being caused during the policy period must be interpreted sufficiently flexibly to embrace the role assigned to exposure by the rule in Fairchild and Barker."*

At paragraph 74 of *Trigger*, quoted at paragraph 140 of this judgment by Lord Sumption, Lord Mance stated that "*in substance, the result was that the same weak test of causation which applied as between the victim and the employer should be employed as between the employer and his liability insurer*".

Thus, IEGL were wrong in their contention that *Trigger* had somehow changed the basis of *Fairchild/Barker* causation, i.e., the exception to the normal rules, into a form of deemed causation the effect of which would mean as the Court of Appeal found here, that causation was established during the policy period and therefore the policy had to respond 100%.

Lord Mance summarises the position as follows:-

"*….causation in a weak or broad sense is unconventional. Barker, as analysed in Trigger, accepted causation in this weak or broad sense and nonetheless held an employer's responsibility to be proportionate to that part for which that employer was responsible of the victim's total exposure to asbestos dust. Trigger cannot therefore be said to affect or undermine the reasoning or decision in Barker"* (paragraph 29).

Accordingly, the unanimous view of the Supreme Court was that *Trigger* had not overruled *Barker* and that *Barker* remains as the common law of England and, therefore, Guernsey.

The "all sums" point

Lord Mance refers to this as the "*all sums*" policy construction issue. He deals with it at paragraphs 32 – 35 and Lord Sumption deals with it at paragraph 162.

It will be recalled that Aikens LJ adopted this point in the Court of Appeal. After concluding in paragraph 53 of the Court of Appeal judgment that the majority in *Trigger* had grounded liability on a weak or broad causal link within the policy period, he went on in paragraph 53 to say, "*once that causal requirement is fulfilled, then the employer will have proved that the mesothelioma…..was caused during any period of insurance. It follows from the policy wording that the insurer is then liable to indemnify IEGL for "all sums" for which the insured shall be liable in respect of any claim for damages for…such disease. In other words, Zurich will be liable to indemnify IEGL for the whole of the damages paid out by IEGL in respect of Mr Carré's claim for damages for contracting mesothelioma, not just a proportion worked out by reference to the period during which IEGL was covered by policies for which Zurich is responsible.*"

Rather like the overruling *Barker* point, it was not entirely clear whether *IEGL* were *really* arguing that this part of Aikens LJ's judgment made any difference. Was he suggesting that, even if *Barker* stood, applying the "*all sums"* provision in the insuring clause would still mean that *IEGL* recovered in full from Zurich? Lord Sumption notes at paragraph 146, that, "*….the Court of Appeal's reliance on the all sums wording of the insuring clause opened up the prospect that insurers might be held liable in full even in the case of* ***divisible diseases*** *where the contribution of the tort to the actual development of the disease was more readily assignable to distinct policy periods."*

On the matter in point, namely mesothelioma claims, Lord Mance stated that the suggestion that the effect of that clause was to make Zurich liable in full anyway, i.e., even if *Barker* was still good law, was clearly contrary to the fundamental principle of indemnity which he set out in paragraph 26 of his judgment in this case based on the old *Godin v London Assurance Co [1758] case.* That is the leading case on double insurance and, in effect, what Lord Mance was saying was that the words "*all sums"* can only refer to the liability which is being indemnified not to liability **beyond that** which is to be indemnified. The net effect is that the clause applies to the liability arising *during the period of insurance.*

Lord Sumption agreed and dealt with the point neatly at paragraph 162 as follows:-

"*I can deal very shortly with the words "all sums" in the insuring clause, on which Aikens LJ relied to support his conclusion. The relevant phrase is not "all sums" but "all sums for which the insured shall be liable in respect of any claim for damages for such injury or disease" i.e. for "injury or disease caused during any period of insurance."* ***The insurance does not cover all sums for which the insured may be liable, but only those which fall within the chronological limits of the risk which the insurer has assumed."***

As we will see, Lord Sumption concluded that, as a matter of construction, the policy only covers a liability to contribute on a time on risk basis and, therefore, the words "*all sums"* would only attach to that proportion of the overall liability.

The outcome of the individual case

Lord Mance concluded at paragraph 35 that "*the appeal must succeed as regards to the compensation and interest paid by IEGL to Mr Carre because Barker continues to represent the common law position which applies in Guernsey. The Court of Appeal was wrong to set aside Cooke J's judgment, which should be restored, on this aspect."*

Defence Costs

I refer to the insuring clause above. It can be seen that the Defence Costs are dealt with separately to the liability to pay the damages. The insurer only has a liability to pay Defence Costs if they are incurred with the consent of the insurer.

Lord Mance took the view that IEGL's liability for and right to recover Defence Costs does not arise under the special *Fairchild* rule or on the basis that Mr Carré was exposed to any risk. It is recoverable under the second sentence of the main insuring clause. He goes on to say "*under the second sentence, it is recoverable on the conventional basis that IEGL can prove that it incurred (as a matter of fact or probability) actual financial loss in the circumstances covered by that sentence. This distinction is important. Once it is shown that an insured has on a conventional basis incurred defence costs which are covered on the face of the policy wording, there is, as the New Zealand Forest case shows, no reason to construe the wording as requiring some diminution in the insured's recovery, merely because the defence costs so incurred also benefitted some other uninsured defendant."* (paragraph 38) The reference in that passage to the *New Zealand Forest* case is to the decision of the Privy Council in ***New Zealand Forest Products Limited v New Zealand Insurance Company Limited [1997] 1 WLR 1237*****.**

Thus, IEGL recovered Defence Costs in full. For the sake of clarity, we are of course referring here to the costs incurred in defending the claim by Mr Carré.

Lord Mance's equitable recoupment rights and Lord Sumption's construction argument – UK claims

It is in the context of the position applying to those jurisdictions where the Compensation Act 2006 is the law that the only division arises between the 7 Justices. Lord Mance and the majority adopt more or less

in full the arguments which we put forward on behalf of Zurich: because of the effects on EL policy coverage occasioned by Section 3's reintroduction of joint and several liability for mesothelioma claims and, in relation to the 'quantum rule', reversal of the financial effect of *Barker,* it was unfair to insist on a full indemnity without concomitant recoupment rights.

Fairness demanded a right of contribution on Zurich's part against Excess (as a part-insurer) and a right of recoupment against IEGL for uninsured periods. "*Uninsured periods*" include those where there may have been EL insurance, but the insured can no longer demonstrate that. Accordingly, there should be an equitable right of recoupment in favour of the insurer whereby the insured would have to contribute a share of the claim based on the contribution to risk of the development of mesothelioma which arose during the uninsured period. In practice, this will simply mean dealing with such claims on a time on risk basis.

We were firmly of the view that this should be the approach adopted because, as a matter of law, the claimant is entitled to be paid in full in respect of each period of culpable exposure and the legal liability to be indemnified was 100% of the claim.

Lord Mance and the majority were prepared to accept this approach even though it is so unconventional: it recognises a contractual obligation to pay in full and then introduces an equitable right over for a contribution on a time on risk basis by the insured who had the benefit of the contractual obligation on the insurer to pay in full.

Lord Sumption and the minority agreed with the overall fairness point on which we relied and which we urged upon each of the courts that have heard this case. Indeed, at one point, he refers to the fact that all 7 Justices disagreed with the Court of Appeal's judgment and specifically, with Toulson LJ's observation that "*awarding less than the whole loss against any one insurer would deprive the insured of the insured coverage for which it paid."* Lord Sumption states at paragraph 155 that, "*this observation seems….to be the reverse of the true position. An employer who has paid a single year's premium has not paid for 27 years of cover, which is what the decision of the Court of Appeal gives him."* He goes on to say, *"I understand every member of this court to be agreed that these consequences are unacceptable."* (paragraph 156)

There is disagreement, however, between the majority and minority, principally on the unconventional nature of the equitable recoupment right. As a matter of construction, Lord Sumption and the minority believe that the policy wording only grants a proportionate indemnity anyway.

Lord Sumption derived support from US jurisprudence and the leading reinsurance coverage case, ***Wasa International Insurance Company Limited v Lexington Insurance Company [2010] 1 AC 180*** where the House of Lords held that "*notwithstanding the ordinary presumption that reinsurance was back to back with the underlying insurance",* the reinsurers' liability was limited to damage caused between 1977 and 1980 as opposed to the entire period for which they had insurance between 1956 and 1985.

Lord Sumption also relied on another reinsurance case ***Municipal Mutual Insurance v Sea Insurance Company Limited [1998] Lloyd's Rep IR 421***. He and the minority lay great store by the fact that a liability policy responds to the specified liabilities of the insured, but only subject to any overall limitations of the policy. One of these limitations is the period of insurance which is a fundamental feature of any such policy. The whole of the insuring clause depends upon the assumption that it is possible to assign the time when an injury or disease was caused to a given period which either is or is not within the period of insurance. Either the damage will be divisible, in which case, parts of it may have been caused

in different periods and must be divided between those periods, or it will be indivisible in which case it will have been caused in a single period (paragraph 151).

Of course, we have the difficulty with mesothelioma that we do not know when it was caused. Lord Sumption overcomes that problem by saying that it can only have been caused once. Conceptually, it is impossible to say that it was caused in every year because it can only have actually been caused once. As Lord Mance retorted (rightly we say) this remark *"moves the terminological goalposts"* (paragraph 49) by reverting to traditional notions that causation in fact can be established in mesothelioma cases.

There is also a disagreement between Lord Mance and Lord Sumption as to the effect of the Civil Liability (Contribution) Act 1978. This is of more relevance as between co-insurers or successive insurers rather than between the insurer and the insured. Lord Sumption believed that the 1978 Act does apply.

A key sentence in Lord Mance's judgment is at paragraph 63 where he stated "*In my view, the principles recognised and applied in Fairchild and Trigger do require a broad equitable approach to be taken to contribution, to meet the unique anomalies to which they give rise."*

Suffice to say that the minority did not agree. Lords Neuberger and Reed believe that it is probably a matter for Parliament. Interestingly, Lords Neuberger and Reed appear to have realised why we adopted what we considered to be our principled approach – even though the minority feel that the arguments we put forward did too much violence to the common law. They refer at paragraph 203 to the events in late 2014 arising from the correspondence from the Supreme Court putting forward what we know now was Lord Sumption's view as to the construction of this insuring clause.

Referring to the majority judgment, Lords Neuberger and Reed state as follows:-

"*Lord Mance's solution has a number of attractions. First, it is more in line with the Parliamentary approach as demonstrated by section 3….because, unlike Lord Sumption's solution, it ensures that every employee whose employer was insured for any period of his employment, can look to any such insurer who is still insolvent for full compensation. Secondly, unlike Lord Sumption's solution, it has been supported by one of the parties to this appeal: despite being raised by the court at a reconvened hearing, Lord Sumption's solution has not been adopted by either party. We suspect that these two points are not unconnected. The insurance market may fear that, if the court adopts the solution favoured by Lord Sumption, Parliament will intervene as it did following Barker."* Indeed, we believe he is correct.

Some specifics as to the recoupment right

As we read Lord Mance's majority reasoning on the recoupment right (see paragraph 78 in particular), Zurich is entitled to a full recoupment from IEGL for the 21 years (out of the 27 years of exposure) for which Midland did not offer insurance. If Zurich exacts that full recoupment, IEGL then has a right of partial indemnity from Excess to 'top up' for the 2 years of Excess insurance. This means that Zurich can choose whether to pursue Excess or IEGL (placing the burden on IEGL if Zurich chooses not to pursue Excess).

However, Lord Hodge (summarising the majority view of which he formed part – see paragraphs 107(b) and 101(ii)) and Lord Sumption (again, summarising the majority view, at paragraph 112) seem to consider that, on Lord Mance's approach, Zurich's recoupment rights against IEGL, on the one hand, and against Excess, on the other hand, are mutually exclusive. On this model, Zurich would be required to pursue both IEGL and Excess to be restored to a fair proportion of liability.

It is our view that Lord Mance's reasoning should win the day and so Zurich's rights are not mutually exclusive. In pragmatic terms, the difference is unlikely to matter – now that, it is hoped, a universally acceptable claims handling protocol will now be resumed, including contributions from FSCS where the insurer is insolvent.

Conclusions and implications

To what extent is the SC decision helpful in clarifying the law in this area? Are there any grey areas or unresolved issues remaining?

It confirms that the *Trigger* judgment was founded on the principles in *Fairchild* and *Barker* and did not establish that, in a mesothelioma claim, a claimant can satisfy the conventional causation test. The weak or broad causation in *Trigger* is a confirmation that causation for purposes of the policy is a reflection of the basis of causation between the claimant and the employer. *Barker* remains good law and, therefore, in jurisdictions like Guernsey where the Compensation Act 2006 has not been enacted, it remains the common law. Thus, the policy responds only to the extent of the contribution to risk during the policy period.

Barker also remains the common law in the UK save that, by reason of the 2006 Act, it has no application to mesothelioma claims.

Since the finding on Barker meant that Zurich won the case, the comments on equitable contribution were *obiter* though they will define the way in which claims will be handled in the UK. In relation to a part insurer seeking contributions from an insurer of a different period and/or from an insured in respect of uninsured periods of exposure, the court has established new equitable rights of recoupment or contribution - a huge legal development. Whilst the ABI guidelines have to date, on a voluntary basis, largely achieved this, IEG called into question the legal basis for securing such contributions.

The court, by a majority of 4-3, established a framework for the handling of all similar claims in the future. Having regard to the public policy that victims must recover damages in full, Zurich's solution to this, as accepted by the majority, was to accept that the contractual obligation under the policy was to meet the claim 100% but that there should be a claim over in equity for contribution from a fellow insurer in respect of different periods of cover/exposure and the insured in respect of uninsured periods of exposure. IEG had contended that this was an affront to established contract law principles but the Court felt the balance of fairness demanded such an approach in this unique situation.

The minority held that the contractual obligation was only to contribute on a time on risk basis. Zurich were concerned that this ultimately could lead to victims being under-compensated although Lord Sumption took the view that that would not be the case as they could secure a contribution under the Mesothelioma Act 2014 scheme. In the event, that will not arise. The majority view which prevailed will guide the manner in which claims will be handled in the future.

Whilst the equitable right to contribution arises in respect of the liability to the claimant's damages and costs – the same pro-rata approach does not apply to Defence Costs which have to be met by the insurer in full. There is no claim over in equity in respect of those. That said, there could be double insurance of the Defence Costs which will lead to sharing between insurers.

In terms of mesothelioma claims, it is not thought there are any unresolved issues although the application of *Fairchild* and *Barker* to asbestos related lung cancer cases remains to be determined and will be considered by the Court of Appeal in ***Heneghan v Manchester Dry Docks (2014)***.

What are the implications of the SC decision for:

(a) Employer's liability insurers and their insureds?
(b) Claimants?

EL insurers now have a legal basis founded on the equitable right of recoupment/contribution for seeking a contribution from insurers of the employer for a different period and also from their insured in respect of uninsured periods. Clearly, if the insured is insolvent, the equitable right of recoupment would be of no benefit but where the insured is solvent, the contribution will be recoverable. Clearly, there will be an impact on the financial provision made by both insurers and their insureds set aside for future claims.

Since the recoupment right arises upon payment of the claim in full by the part insurer, in theory, the EL insurer will have to pay the claim and then seek contributions afterwards. In practice, in many cases, the insurance history will be established before settlement takes place and there should be no reason why contribution should not be made at the time of settlement rather than later.

Insurers will no doubt re-assess the ABI guidelines to see whether any alterations are necessary in the light of the Defence Costs' finding.

As for claimants, their position is protected and they really are in no different a position now. Under the Compensation Act 2006, they can focus their attention on one employer and its insurers if they feel confident they will establish liability against that employer.

What are the implications of the decisions for lawyers? What action, if any, should they be taking in light of this decision?

Some clients may have altered their reserves or provisions in the light of the Court of Appeal judgment in this case. Lawyers for such parties should ask them to re-address their position and satisfy themselves as to the nature of their potential future liabilities. Similarly, the lawyers should review with their insurance clients whether there remain outstanding any cases where contributions can be sought, not least in cases that were left in abeyance pending the outcome of this case.

How does this case/decision fit in with other developments in this area?

I have read one commentator describe this as a stunning victory for insurers. There is no doubt that in a field of landmark decisions, none comes any higher than this. It is very rare for new equitable rights to be established. Although it is accepted that the categories of equity are not closed, the courts are wary of introducing new equitable rights lest it should lead to uncertainty in the law.

Zurich contended that this was a unique situation with an employer held liable where, in fact, it may not have **actually caused** the disease and since that impacted on their insurers, it was vital the Supreme Court sought to achieve a framework that was fair to insurers, insureds and claimants. This solution achieves that because the public policy of ensuring that the victims are compensated is protected but, at the same time, an insurer is not asked to pay compensation arising from liabilities which, in part, **arose**

during periods of employment/exposure for which they did not receive a premium. The court noted that insurers are not the wrongdoers. The wrongdoers are the negligent employers and, therefore, a balance had to be struck to ensure fairness between insurers and their insureds.

The decision fits perfectly with the existing mesothelioma jurisprudence. Victims are protected and insurers and insureds will, in the end, pay their fair shares.

One aspect of the case which concerned the Supreme Court was whether Zurich was correct in acknowledging or, as the court put it, conceding that the employer's liability to be indemnified by an EL policy in a mesothelioma case was the **whole** of the liability. Zurich and the majority in the Supreme Court took the view that that was the effect of Section 3 Compensation Act 2006. The minority did not agree. They held that the contractual obligation was simply to pay on a pro rata basis. A possible concern was that this concession would leave the way open to challenges later possibly in the re-insurance field but that now seems unlikely given the minority view that only a pro rata contribution was covered by the policy anyway.

The one unknown remains the question of the full extent of the *Fairchild* enclave of cases. Will this extend beyond mesothelioma to lung cancer as seemed to be the case in *Heneghan* or indeed bladder cancer?

Further points of interest/observations?

It remains to be seen whether the Channel Islands and the Isle of Man decide to enact an equivalent of Section 3 of the Compensation Act 2006. There is scope for victims in those jurisdictions to receive less than full compensation but, in practice, that was the position anyway given that the Compensation Act had not been enacted and this decision simply confirms that *Barker* remains good law in those jurisdictions for all purposes.

One other feature of the case was the question of whether the use of the words "all sums" in the insuring clause meant an insurer was liable for full compensation even in a **divisible disease case** where the insurer was not on risk for the entire period of exposure. The Supreme Court made plain that an insurer is only liable for injury or disease caused during any period of insurance. "*The insurance does not cover all sums for which the insured may be liable but only those which fall within the chronological limits of the risk which the insurer had assumed"*. In short, the policy only gives rise to liability on a time on risk basis.

In justifying the approach of the court overall, Lord Mance confirmed that the only solution he could find – which was the one put forward by Zurich - was one that involved insurers paying the victims 100% of their rightful compensation but avoiding the unfairness and injustice of those insurers bearing the whole financial burden arising from the wrongdoing of others. This solution was to create a new right of recoupment. He talked of this solution "*representing a fair balance of the interests of victims, insured and insurers".*

Go further°

DWF is the law firm where legal expertise; industry knowledge and leading edge technology converge and connect to deliver solutions that enable our clients to excel. Embracing our diverse skills, we gain a unique and more valuable legal perspective that can empower our clients, giving them a competitive advantage or simply delivering new solutions to old problems.

With over 2,500 people across the UK, we make sure that wherever you are, wherever you aim to be, we will go further to help you get there.

Birmingham / Edinburgh / Liverpool / Milton Keynes
Bristol / Glasgow / London / Newcastle
Dublin / Leeds / Manchester / Preston