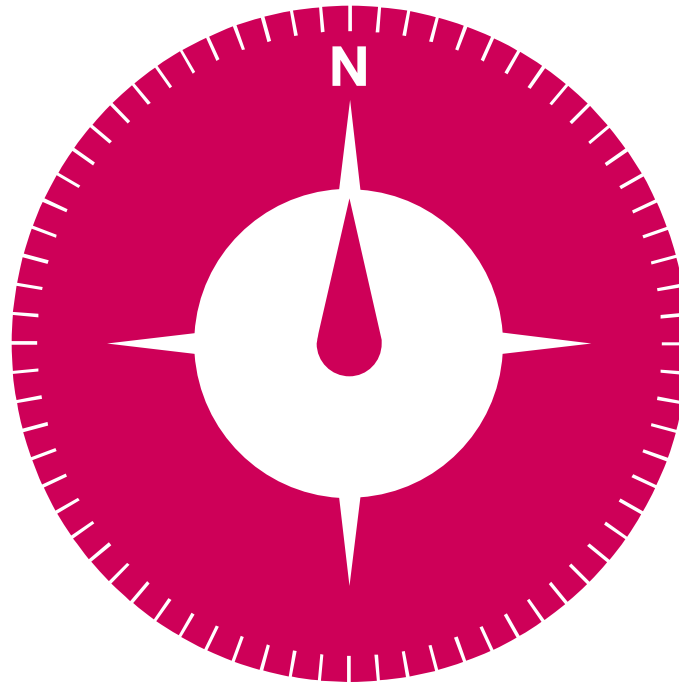


Zurich v IEGL DWF briefing



Go further



Zurich v IEGL Supreme Court 2015°



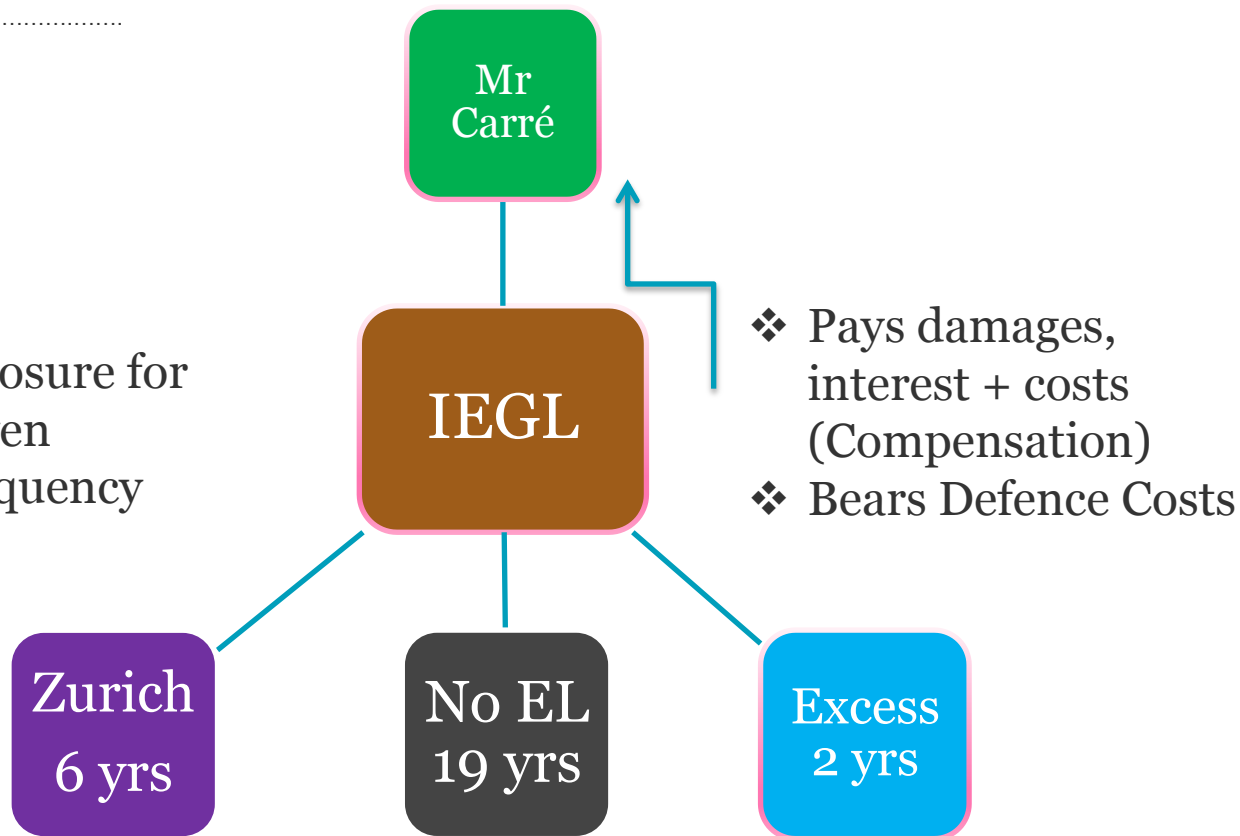
Introduction° - What were the key issues raised in the appeal?



- 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.

IEGL: the facts

Culpable exposure for 27 years – even intensity/frequency



Background to mesothelioma

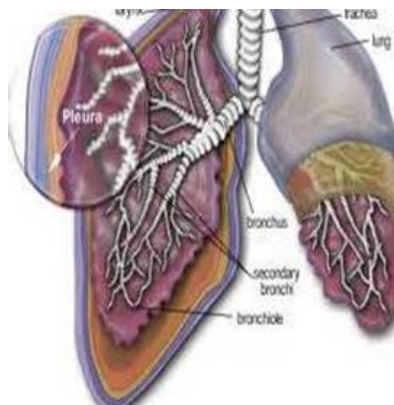


Asbestos

- 1850: beginning of large scale industry
- Magic mineral to killer dust

Mesothelioma

- Cancerous tumour of the lung
- Risk of contraction increases with dose
- But caused only once and severity not dose-related
- The 'rock of uncertainty'

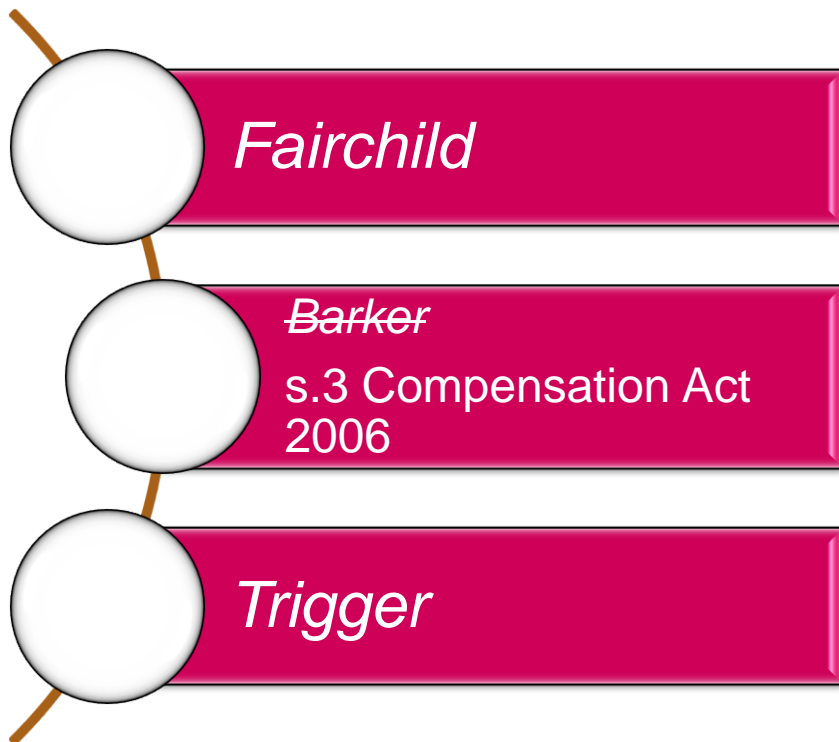


The insuring clause



*“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.**”*

Causation



- Material increase in risk of development of mesothelioma
- Joint and several liability
- Several liability – divisible because of contribution to risk
- Act restores *Fairchild* after 83 days

- Policy coverage - *Trigger*:
 - Exposure trigger
 - Weak or broad causation
 - Cover reflects common law liability



Trigger



Findings

- Even with a damage occurring (sustained) wording, the EL policy at the date of exposure responds to the mesothelioma claim – caused during.
- What does caused mean –
 - Rock of uncertainty
 - Weak or broad causation
- NB. Accepted by run off insurers that causation at common law between claimant and employer reflected in the insuring clause as between employer and EL insurer.

Trigger



IEGL contended

- Trigger established that the gist of cause of action was the mesothelioma not the contribution to risk.
- Trigger = actual causation.
- *Barker* consigned to history.

Zurich v IEGL – Reminder of the issues



- Full indemnity v time on risk contribution.
- Effect of *Trigger*.
- Does *Barker* survive *Trigger*.
- “All sums” point.
- Result of individual case – Guernsey.
- 2006 Act jurisdictions – UK wide.
- Call to equity – *Fairchild* recoupment right.
- Extent of the indemnity as a matter of contract – full or prorated.
- Protection of victims.
- Fairness to insurers, insureds and victims.



Barker lives!

All 7 judges are unanimous that:

1. Barker capable of having wider application.
2. The Act only applies to mesothelioma claims.
3. Barker not overruled by Trigger.

Lord Mance § 25-31

Lord Sumption § 178-179



“All Sums”



“If any person under a contract of service ... with the Insured shall sustain any ... disease caused during any period of insurance ... the Company 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 ...”

All 7 judges are unanimous that:

1. The EL indemnity mirrors the liability arising in that EL year.
2. The “All Sums” principle would mean that insurers took on uncertain risk.

E.g., Lord Sumption § 162

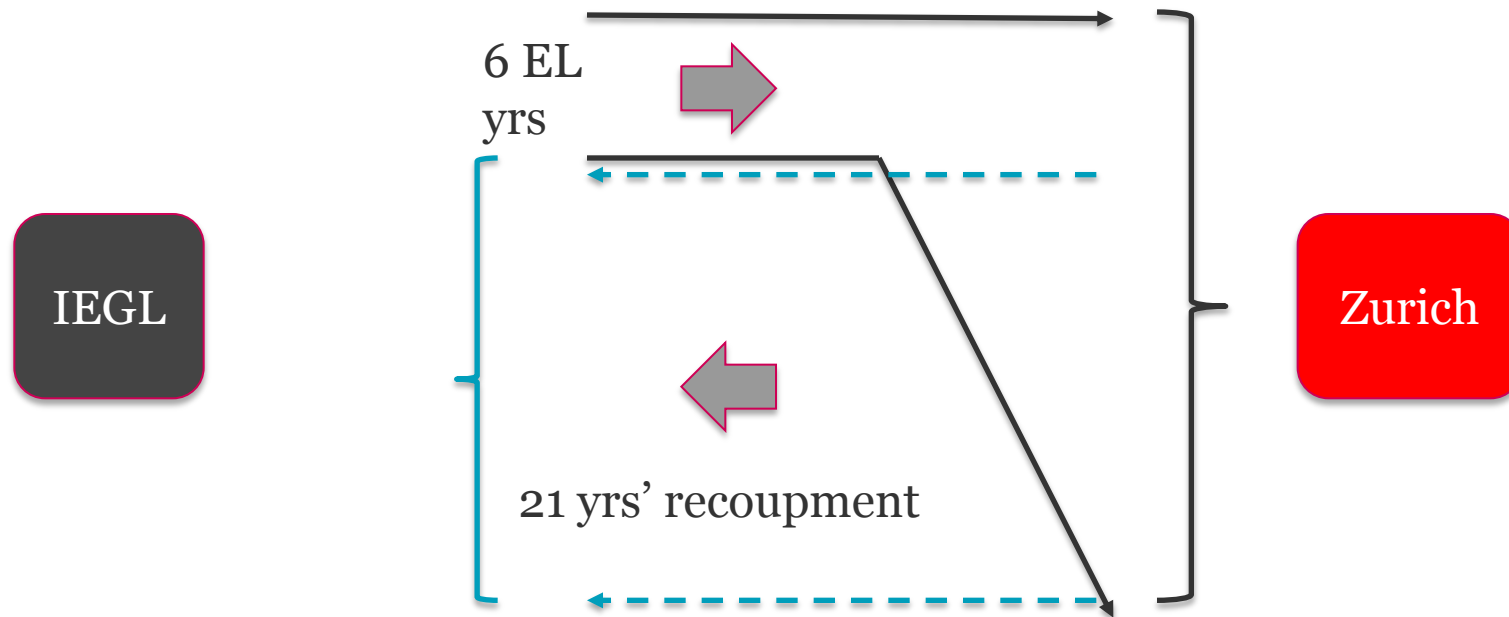
The *Fairchild* recoupment right



- Insurer liable to pay victim in full.
- Contributions between part insurers.
- Contribution from insured in respect of uninsured periods of exposure.
- Does not extend to Defence Costs – special rule of causation does not apply to these.



The *Fairchild* recoupment right



The *Fairchild* recoupment right: recognised on a 4:3 basis



Lords Mance, Carnwath, Clarke and Hodge

- The right should be recognised
- No going back from the logic inherent in *Fairchild* + Act + *Trigger*
- Does not extend to Defence Costs

Lord Mance § 39-82

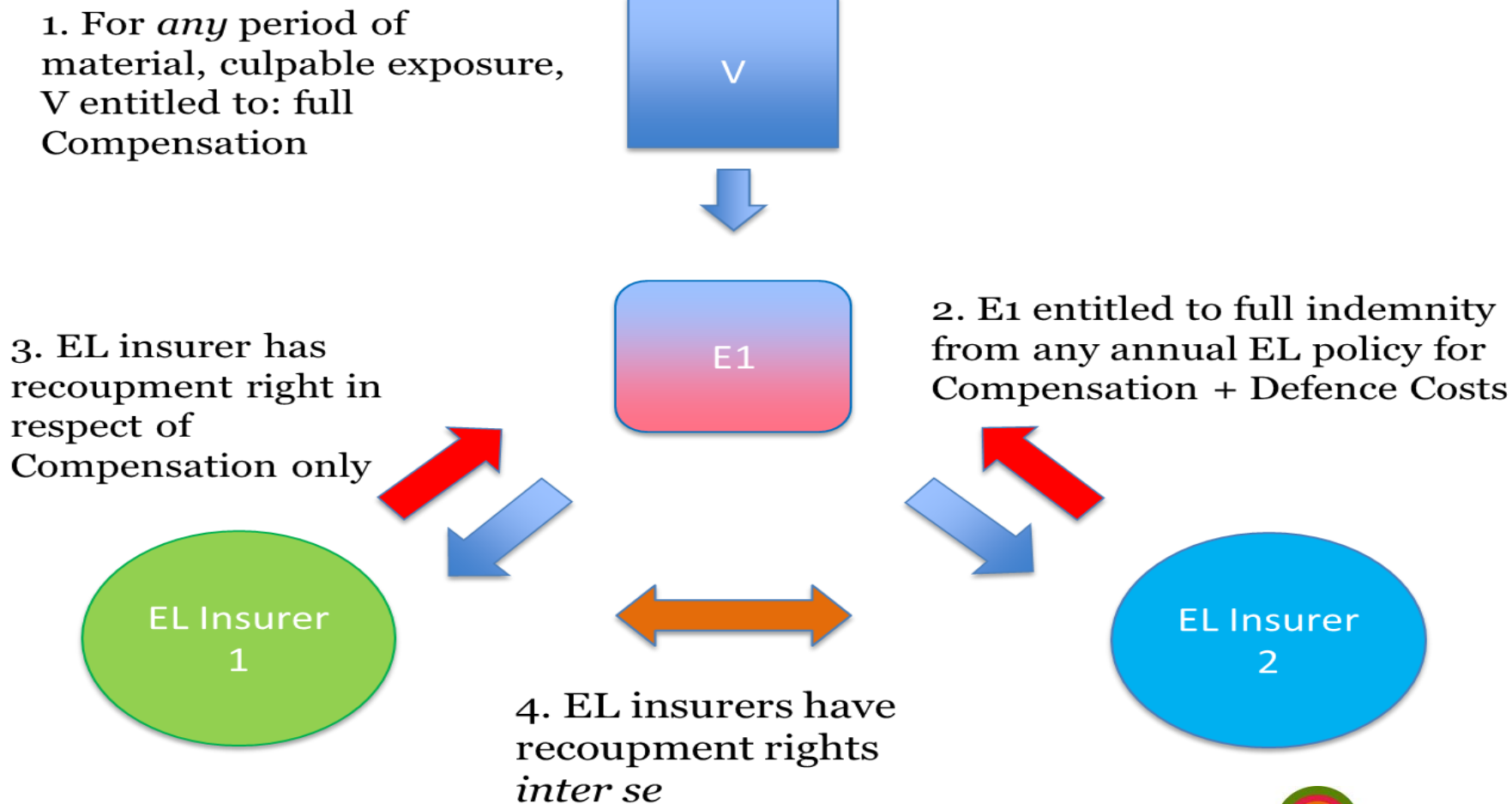
Lord Hodge § 98-111

Lords Sumption, Neuberger and Reed

- The right is too radical
- The proration occurs at policy level
- Does not apply to Defence Costs

Lord Sumption § 148-163

Summary in the Compensation Act world



Wider implications of the *IEGL* Judgment



- (1) Significance of *Barker's* survival
- (2) The implications for the insurance market
- (3) The constitutional ramifications

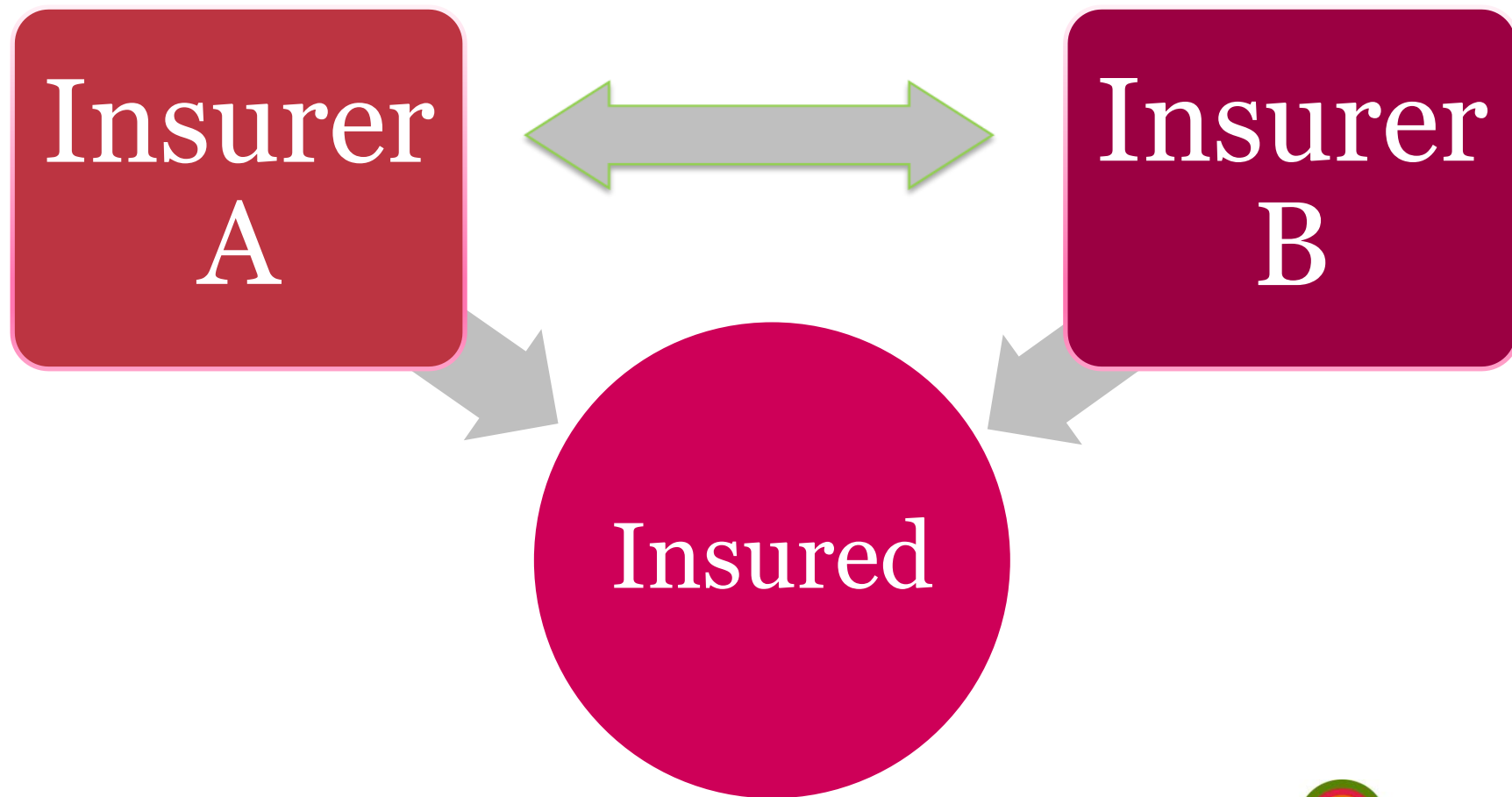


Significance of *Barker's* survival

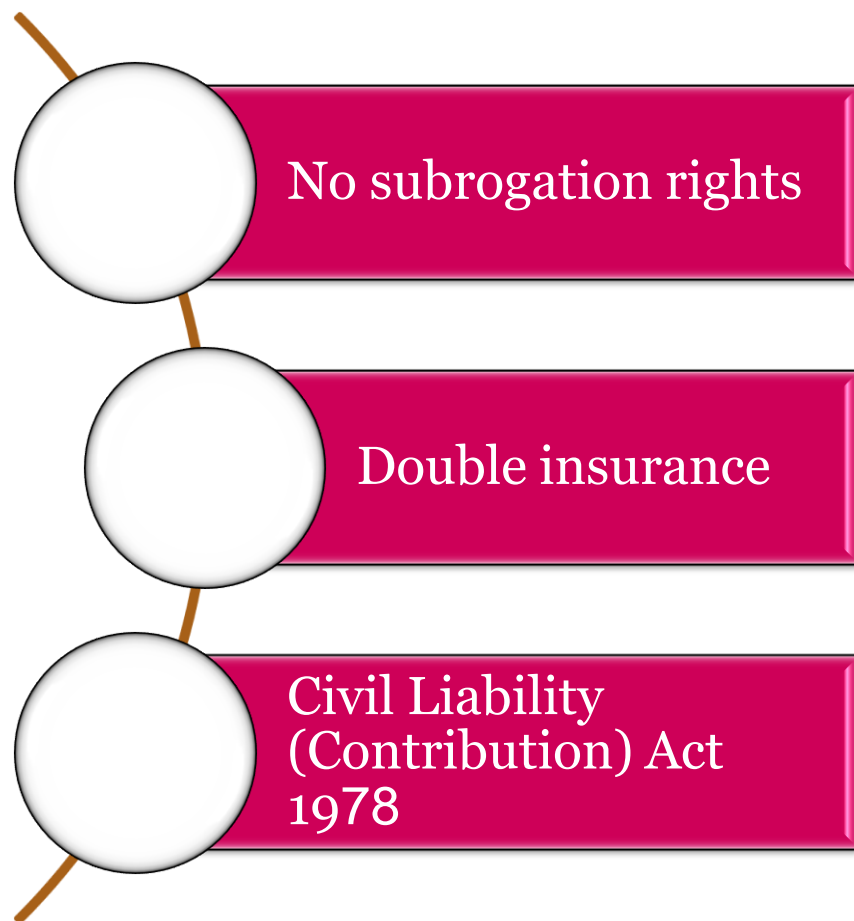


- 1) Proportionate liability of employers (and accordingly also insurers) in jurisdictions in which Compensation Act 2006 does not apply e.g. Channel Islands, Isle of Man - but will they now legislate?
- 2) Proportionate liability for diseases other than mesothelioma within the Fairchild enclave
 - Dermatitis (*McGhee v NCB*)
 - Lung cancer (issue of whose asbestos contributed) - see *Heneghan Jay J* - but will CoA agree Fairchild applies?
 - Bladder cancer (*Novartis v Grimsby*)?
- 3) Fair balance between claimant-friendly rules and defendant-friendly rules

Insurance implications: being paid back



Rights of contribution between insurers



- 1) Will enable “part-insurer” of a single employer to recover from others “part-insurers” (including FSCS where insurer insolvent)
- 2) Extension of principle of double insurance within *Fairchild* enclave to:
 - insurers who do not insure the same period
 - allow sharing on a time on risk basis (rather than pro rata according to number of insurers)
- 3) 1978 Act, if it applies (still open question) unlikely to assist much as will only apply to exposure after 1 January 1979

Rights of recoupment from the insured



- (1) Risk of insolvency of insured employer is on the insurer
- (2) No set-off so as to prejudice victim
- (3) Where insured is solvent, will be responsible for periods where no or no traced insurance
- (4) Restores ABI Guidelines on EL Meso Claims to position pre-IEGL & horizontal spread
 - Will speed up resolution of claims
 - Avoids incentives on insurer to whom claim is presented to dispute indemnity
 - Avoids “spiking”



Outstanding issues



ALLOCATION
- To one policy period (and if so which) or all?

REINSURANCE
- Back to status quo ante?

REACH
- Extent of enclave
- Beyond the enclave?



Constitutional implications - context



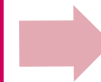
Employee vs. employer (tort)

- (1) *Fairchild* - causation
- (2) *Barker* - quantum
- (3) *Sienkiewicz* – single exposor & environmental exposure



Insured employer vs. insurer (contract)

- (4) *Trigger* – meaning of “injury sustained” and response of “injury caused” wordings



Insurer vs. other insurers and/or insured for uninsured periods (equity)

- (5) *IEGL* – insurer’s rights of recovery



Lessons learned



Lord Hoffmann – extra-judicially

- *Fairchild* a “judicial atrocity”
- Would not have committed it if thought Parliament would intervene



Ellen Terni
[2011] UKSC 10
On appeal from: [2009] EWCA Civ 1199
[2009] EWCA Civ 1211

JUDGMENT

Sienkiewicz (Administratrix of the Estate of Enid Costello Deceased) (Respondent) v Greif (UK) Limited (Appellant)

Knowsley Metropolitan Borough Council (Appellant) v Willmore (Respondent)

Sienkiewicz v Greif

- Lade Hale: “*Fairchild* kicked open the hornet’s nest”/could not be reversed now without Parliament reversing the Supreme Court [167]
- Lord Brown: “The law tampers with the ‘but for’ test of causation at its peril” [186]

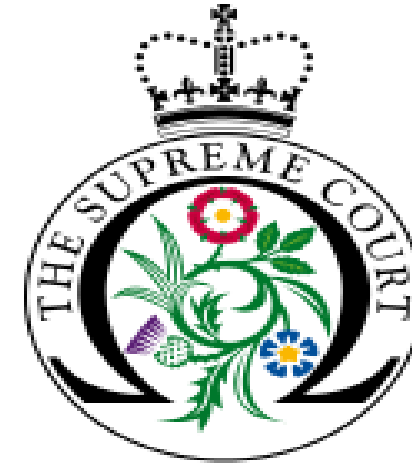


IEGL v Zurich

- *Fairchild* has led to a “juridical version of chaos theory” [191]
- “...unlike Parliament, [the courts] cannot legislate in the public interest for special cases, and they risk sowing confusion in the common law if they attempt to do so” [209]



Implications



Redrawing the demarcation between Parliament and the Courts

- For Courts to apply law in coherent principled way, even in hard cases
- Courts will say if they consider result unfair. Then for Parliament to step in and legislate in the public interest



Values



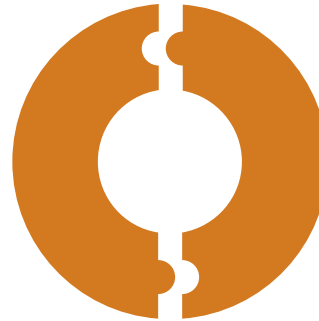
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Our Clients



Our People



Our Community



Our Environment



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