22 May 2015 Edition 96

BC LEGAL
BRINGING CLARITY

BC DISEASE NEWS

A WEEKLY DISEASE UPDATE

CONTENTS

Welcome

Welcome to this week's edition of BC Disease News. In the last week it has been indicated that reform of noise-induced hearing loss claims is on the new government's agenda, and Slater and Gordon has said that Quindell will remain a separate entity under its ownership.

This week we present a feature examining this week's decision of the Supreme Court in *Zurich Insurance PLC UK Branch v International Energy Group Limited* [2015] UKSC 33. We consider the judgment, reaction to it, and the implications of it.

Any comments or feedback can be sent to Boris Cetnik or Charlotte Owen.

As always, warmest regards to all.

SUBJECTS

Possible Reform of Deafness Claims – Quindell to Remain Separate Entity Under Slater and Gordon – SRA Warning on Inducements Ban – Master of Rolls Calls for Simplification of CPR – Insurers' Liability in Mesothelioma Claims – *Zurich Insurance PLC UK Branch v International Energy Group Limited*

Reform may be on the way for deafness claims

It has been indicated that reform of noise-induced hearing loss (NIHL) claims may be on the new government's agenda for reform, following comments made by the head of the government's Claims Management Regulator (CMR).[1]

Kevin Rousell told the Modern Claims Conference in London that the area has seen a big increase in activity in recent years in consequence of the regulations applied to it.

'NIHL is subject to the disease claim costs regime which is different to personal injury', he said. 'There seems to be an awful lot of waste in the system. We had lots of it in respect of financial claims such as PPI and we're seeing it happen again with NIHL'.

The prospect of future reform to the NIHL market was echoed by Professor Dominic Regan, an attendee at the conference and leading expert on civil litigation. He tweeted on 19 May: 'Top of agenda for MOJ is reform of deafness claims'.[2]

Elsewhere, Mr Rousell confirmed that reversing the recent court fee rises – which were increased by over 600% in some cases – is unlikely to be a priority for new justice secretary Michael Gove. He said: 'The next five years are going to be just as testing – I doubt we will be going back and reducing court fees – we will have to live with them'.

Quindell to remain separate entity under Slater and Gordon

Quindell's legal services arm will remain a distinct company from its new parent Slater and Gordon once the £637 million takeover is complete, Slater and Gordon has said.[3]

Neil Kinsella, chairman of Slater and Gordon UK, told the Modern Claims Conference that the professional services division (PSD) will be a separate entity from the Australian firm, dealing with volume cases.

Approval for the sale to Slater and Gordon is now awaited from the Financial Conduct Authority.

Kinsella said that the Slater and Gordon approach will not change. 'We've not changed our strategy at all', he said. 'One side of the business would deal with the complex cases and the other with volume and low-level cases in an efficient way…Overall [it offers] scale and the opportunity to learn across the two, [providing] technology and a holistic service and a joined-up service in terms of claimants for low-level or high-volume cases, and in particular in that complex area having resources to take on cases'.

MRO seeks judicial review of MedCo

One of the country's largest medical reporting organisations (MROs) is seeking to challenge the government on account of considering itself prejudiced by the new MedCo portal.[4]

Though an application for judicial review by Speed Medical against the Ministry of Justice (MoJ) was rejected last week by the High Court on the papers, the company yesterday issued a notice to renew its application at an oral hearing.

Since 6 April, a claimant seeking to bring a low-value whiplash claim following a road traffic accident is required to instruct a medical expert from a shortlist generated randomly by the MedCo portal. This list is made up of either one high-volume national MRO (a tier 1 provider) and six other (tier 2) providers, or seven individual medical experts.

Speed is one of the tier 1 providers. In a claim lodged in late March it contended that only including one tier 1 provider in the list was anti-competitive.

However, Mr Justice Leggatt last week rejected the application, saying that as MedCo was not an MRO itself and the decision on the content of search results was made by the MoJ, it could not be reasonably argued that MedCo was abusing a dominant position.

We will update on the progress of this challenge, alongside the ongoing challenge to MedCo on the grounds of inadequate consultation, as we have reported previously.

SRA warns firms on marketing following introduction of inducements ban

The Solicitors Regulation Authority (SRA) has warned personal injury firms about misleading marketing, following the introduction of the ban on the use of inducements.[5]

In a guidance note the regulator said that firms must ensure publicity is accurate, 'including not offering or suggesting or implying that you are offering any inducements in breach of the ban. Doing so is likely to undermine the trust the public places in you'.

The SRA has decided not to introduce any specific rules to implement the ban on inducements, which came into force on 13 April under section 58(2) of the Criminal Justice and Courts Act 2015. The Act defines an offer of a benefit as an inducement if it is 'intended to encourage or is likely to have the effect of encouraging' a personal injury claim.

'Benefits' include money, other property or an opportunity to obtain a benefit, such as through a prize draw. The ban is cast widely, extending under section 58(3) to benefits received by third parties.

The SRA said in its guidance note: 'The primary focus of any action we take is consumer protection and support for the rule of law…A breach of the ban on inducements would be likely to undermine public confidence in the delivery of legal services. It is also likely that offering inducements will evidence a failure to uphold the rule of law and the proper administration of justice...As well as

complying with the law, you should ensure that you behave in a manner that is in your clients best interest, does not call into question or undermine your integrity and that you comply with your regulatory obligations'.

The SRA's guidance note also advised firms on the use of inducements on those areas outside personal injury where they are still allowed: 'You will need to consider the needs and circumstances of each individual client, for example whether they are particularly vulnerable or whether they may have difficulties understanding the information you give them…It is important that you are able to show that clients have made an informed decision, having considered the options available and that you have treated them fairly. A decision to instruct should not be based on your offer of an inducement in exchange for clients' instructions…If you offer an inducement to clients or potential clients, you must ensure that your interests do not conflict with those of your client. You can never act where there is a conflict, or a significant risk of conflict, between you and your client'.

Master of the Rolls calls for simplification of Civil Procedure Rules

The Master of the Rolls has called for further simplification of the Civil Procedure Rules to reduce delays across the justice system.[6]

As a result of dealing with a 'high proportion' of self-represented litigants, Lord Dyson said the profession should be 'prepared to change our way of conducting our litigation in other ways to make it more effective, and reduce costs and delays'.

Lord Dyson was speaking at an event entitled 'Delay too often defeats justice' and highlighted other jurisdictions where civil procedure reforms were taking place.

In Scotland, for example, the Civil Justice Council has embarked on a project for simplifying the rules. With proper resources, said Dyson, 'there is no reason why the joint committee of our Civil Justice Council and Civil Procedure Rules committee could not embark on a similar exercise here'.

England and Wales could also learn from Brazil, the Master of the Rolls said, where a new civil procedure code has been approved and will come into force in December. Article 191 of the new Brazilian code 'allows the parties to modify the procedure as it applies to their claim'.

Dyson said it was 'worth thinking about whether to adopt such a procedure here' to enable claims to be dealt with more expeditiously. He said: 'Provided agreement between the parties is subject to court consent, I can see no objection to allow parties some freedom to manage the litigation'.

Praying in aid of Magna Carta, Lord Dyson, who is chairman of the Magna Carta Trust, said chapter 40 of Magna Carta, which provides 'To no one will we sell, to no one deny or delay right or justice', was as important as it was in 1215, though the main focus of attention tended to be on the prohibition of the sale of justice than the prohibition on delay.

However, Dyson warned that the rush to justice could be 'just as dangerous as a leisurely amble. Tortoises and hares come to mind'. Expanding further, he said: 'If litigation is conducted at breakneck speed, there's a risk that parties will be unable to present their cases effectively and judges will not have sufficient time to produce decisions [that are] sufficiently researched and carefully considered'.

Speaking more generally, Lord Dyson said that all the recent changes had made life more difficult due to the rise in litigants in person and that the courts were doing 'all we can to adapt our processes and train our judges and lawyers on how to deal with cases where they are faced with a litigant in person'. Although the courts were, he said, making progress, there was 'a lot more work to be done', he warned.

Feature: Insurers Only Liable for Proportionate Share of Exposure in Mesothelioma Claims, Supreme Court Rules – *Zurich Insurance PLC UK Branch v International Energy Group Limited* [2015] UKSC 33

Introduction

The Supreme Court has ruled this week in a landmark judgment that an employer's liability insurer which covered an employer for only part of the period during which the employer tortiously exposed a victim to asbestos is liable in a mesothelioma claim only for a pro rata part of the employer's liability to the victim, equivalent to the period of exposure to asbestos covered by the insurer as a percentage of the total exposure.

However, an insurer is liable for 100% of the defence costs, notwithstanding that it did not cover the defendant for the full period of exposure to asbestos.

In this article we consider the judgment of the Supreme Court in *Zurich Insurance PLC UK Branch v International Energy Group Limited* [2015] UKSC 33 ('*Zurich v IEG*'), reaction to it, and its implications in practice.

Legal Background

In the seminal decision of *Fairchild v Glenhaven Funeral Service Ltd* [2002] UKHL 22, [2003] 1 AC 32, the House of Lords decided that a victim can hold liable all employers who negligently exposed him or her to asbestos if the exposure materially increased the risk of harm to the victim. But the House of Lords later decided, in *Barker v Corus UK PLC* [2006] UKHL 20, [2006] 2 AC 572, that

each such employer was only liable pro rata for the period which exposure by it bore to the total of all periods of exposure. Parliament reversed the decision in *Barker* in the UK by the Compensation Act 2006, making each employer liable in full, with rights of contribution among themselves. In *BAI (Run Off) Limited v Durham* [2012] UKSC 14, [2012] 1 WLR 867 (the '*Trigger*' litigation), the Supreme Court held that an employer's liability insurer must indemnify the employer against exposure-based liability incurred under the principle in *Fairchild*.

Issues

Zurich v IEG was an appeal from Guernsey, where there is no equivalent of the 2006 Act. The common laws of England and Guernsey were agreed to be identical in this area. The principal issues were:

(1) whether the reasoning in *Barker* still applied in Guernsey (paragraph [8] of the judgment), and meant that an employer's liability insurer covering an employer for only part of the period during which the employer exposed a victim is liable for only a pro rata part of the employer's liability to the victim ([9]);
(2) if *Barker* did not apply and the position in Guernsey was now the same as in the UK under the 2006 Act, whether such an insurer is liable in the first instance for the whole of the employer's liability to the victim; and
(3) if so, whether the insurer has 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 ([9]).

There were parallel issues regarding such an insurer's responsibility for defence costs incurred in meeting the victim's claim.

Factual Background

For 27 years from 1961 to 1988, Mr Carré was negligently and consistently exposed to asbestos dust by his employer, Guernsey Gas Light Co Ltd ('GGLCL'). He later contracted mesothelioma, from which he died ([10]). Before his death, he sued the Respondent, International Energy Group ('IEG'), as successor in title of GGLCL, and recovered compensation of £250,000 damages and interest plus £15,300 towards his costs. IEG also incurred defence costs of £13,151.60 ([11]). During the 27 years of exposure GGLCL had two identifiable liability insurances, one with Excess Insurance Co Ltd, for two years from 1978 to 1980, the other with Midland Assurance Ltd, for six years from 1982 to 1988 ([12]). The Appellant, Zurich ('Zurich'), as successor to Midland's liabilities, maintained that it was only liable to meet 22.08% of IEG's loss and defence costs, based on the fact that Midland only insured GGLCL for 6/27ths of the 27-year period of exposure ([14]).

At first instance, the trial judge ordered Zurich to meet 22.08% of the compensation but 100% of defence costs. The Court of Appeal reversed that decision, ordering Zurich to pay 100% of both the compensation and defence costs ([15]). Zurich appealed in relation to both compensation and defence costs.

Judgment

The Supreme Court unanimously held that the common law rule of proportionate recovery established in *Barker* continues to apply in Guernsey; it accordingly allowed Zurich's appeal in respect of compensation, restoring the order that it should pay 22.08% of the compensation ([27]-[31], [35] and [100]).

However, it dismissed the appeal in relation to defence costs. There was nothing to suggest that IEG's costs would have been less if the claim had been confined to the six-year period covered by Zurich's (Midland's) policies. More significantly, the costs were incurred by IEG with Zurich's consent, and were covered by the policy wording. There was no reason to construe the policy wording as requiring some diminution in IEG's recovery, merely because the defence costs also benefitted IEG for an uninsured period of time ([36]-[38]). There was no right of contribution in respect of defence costs ([94]-[95]).

The decision on the first issue disposed of the appeal. However, because of the general importance of the other issues, the Supreme Court stated its opinion on them. By a majority of 4-3 the Court concluded that, had the position in Guernsey been the same as in the UK under the 2006 Act, Zurich would have been liable in the first instance to meet IEG's claim in respect of the compensation paid by IEG in full, but would have been entitled, in respect of the 21 years not covered by the Midland insurance, to claim a pro rata contribution from Excess and IEG.

Lord Mance (with whom Lords Clarke, Carnwath and Hodge agreed) gave the leading majority judgment on these issues. Lord Mance said the case illustrated some of the problems arising from the special rule applied in *Fairchild* and *Trigger*, namely that a victim could hold liable all employers who negligently exposed him to asbestos. The rule allowed a person responsible for exposure to select any year during which he could show that he carried liability insurance and to pass the whole liability to the liability insurer on risk in that year, without regard to other periods of exposure. The anomalies of such an approach were self-evident. Firstly, it was contrary to principle for insurance to operate on a basis which allows an insured to select the period and policy to which a loss attached. Further, a liability insurance would cover losses arising from risks extending over a much longer period than that covered by the policy, in respect of which no premium had been assessed or received by the insurer. In addition, an insured was able to ignore long periods in respect of which he had not taken out insurance. Finally, an insured had no incentive to take out or maintain continuous insurance cover.

While an insurer, on the face of it, was liable for all of the victim's loss, the analysis could not stop there. Those anomalies required a broad equitable approach to be taken to contribution. A sensible overall result was only achieved if an insurer held liable in such a situation was able to have recourse for an appropriate proportion of its liability to any

co-insurers and to the insured as a self-insurer in respect of periods of exposure for which the insurer had not covered the insured. The fact that the parties might not have contemplated or made specific provisions about co-insurance and self-insurance was no obstacle to the court doing so. An employer therefore had a right to contribution against any other person who was, negligently or in breach of duty, responsible for exposing the victim to asbestos. After meeting the insurance claim, the insurer would be subrogated to that right to contribution against the other responsible source of exposure. Zurich was also entitled to look to IEG to make a proportionate contribution as a self-insurer ([42]-[43], [52]-[53], [63], [75]-[78], [96]).

Lord Sumption (with whom Lords Neuberger and Reed agreed) gave the leading minority judgment. He was of the view that Zurich was only liable to IEG in the first instance for 22.08% of the full loss, rather than being responsible on the face of it for all of the loss.

Lord Mance also discussed the position under the Third Party (Rights Against Insurers) Act 1930 in the event that IEG had been insolvent. He concluded that it was probable that Mr Carré would in such a case have been able to look to Zurich for his full 100% loss. It would then be for the insurer, here Zurich, to enforce any claim to contribution which it may have against anyone separately, and ordinarily, subsequently ([83]-[93]).

Reaction

Mike Klaiber, disease claims manager at Zurich UK, said in response to the judgment: 'We are delighted that the Supreme Court has found in our favour on all substantive points. This judgment fully endorses our decision to challenge this issue and supports existing claims handling practice that has existed in the insurance market for many years. We believe this landmark ruling is a fair outcome in that insurers will not be required to meet a liability beyond the period for which they accepted a premium and provided cover'.[7]

As to the issue of defence costs, Klaiber said that Zurich accepted the Court's decision. 'We are a bit disappointed but we recognise that that was probably the weaker limb of the arguments that we presented', he said. 'The primary decision, that a solvent employer should pay a contribution for their uninsured years of the compensation claim itself, is the main prize as far as we are concerned'.[8]

Comment and Conclusion

This decision is the latest in a long line of decisions on mesothelioma emanating from the House of Lords and Supreme Court. The *ratio* of the decision – that *Barker* still applies in Guernsey in the absence of the 2006 Act – is of limited interest and importance for most disease practitioners. It is a narrow decision, applying only to the facts in Guernsey. But the decision does at least confirm that it is the view of the Supreme Court that *Barker* remains good law beyond the reach of the Compensation Act 2006, fortifying, for example, the recent decision of the High Court in *Heneghan v Manchester Dry Docks Ltd* [2014] EWHC 4190, which prayed in aid of the *Barker* principle to hold that lung cancer claims ought to be apportioned between defendants according to the extent to which each defendant contributes to the risk of the development of lung cancer.

However, the remainder of the decision – about the position in the event that Guernsey had the equivalent of the 2006 Act – which is important for disease practitioners in England and Wales, is all entirely strictly *obiter dicta*. It is not a binding decision and may, theoretically at least, not be followed by future courts, though it will be strong persuasive authority. Assuming that the decision is followed, what will be its impact in practice? For the victims of mesothelioma there will be no change. They will continue to be able to pick an insurer and require it to answer the claim in full. However, insurers will now be entitled subsequently to seek a contribution from any other insurer, or the defendant itself as a period of self-insurance. That will allow insurers to recoup some of the losses for which they have had to pay despite not receiving a premium for the entire period of loss. The decision represents a rebalancing of interests.

References

[1] John Hyde, 'Slater and Gordon Chief: Quindell Will be "Separate Entity"' (*Law Society Gazette*, 19 May 2015) <http://www.lawgazette.co.uk/practice/slater-and-gordon-chief-quindell-will-be-separate-entity/5048916.article> accessed 20 May 2015.

[2] <https://twitter.com/krug79/status/600620844386283520> accessed 20 May 2015.

[3] John Hyde, 'Slater and Gordon Chief: Quindell Will be "Separate Entity"' (*Law Society Gazette*, 19 May 2015) <http://www.lawgazette.co.uk/practice/slater-and-gordon-chief-quindell-will-be-separate-entity/5048916.article> accessed 19 May 2015.

[4] Nick Hilborne, 'Law Firms and Medical Agencies Launch Judicial Review Over Whiplash Reforms' (*Litigation Futures*, 20 May 2015) <http://www.litigationfutures.com/news/leading-medical-agency-bids-judicial-review-anti-competitive-medco> accessed 20 May 2015.

[5] Nick Hilborne, 'SRA Warns Firms Against Misleading Marketing as Inducements Ban Kicks In' (*Legal Futures*, 14 April 2015) <http://www.legalfutures.co.uk/latest-news/sra-warns-firms-against-misleading-marketing-as-inducements-ban-kicks-in> accessed 18 May 2015.

[6] Monidipa Fouzder, 'Dyson: "We Must Simplify Civil Procedure Rules"' (*Law Society Gazette*, 23 April 2015) <http://www.lawgazette.co.uk/law/dyson-we-must-simplify-civil-procedure-rules/5048399.article> accessed 19 May 2015.

[7] 'Zurich UK wins asbestos claim court battle with IEG' (*Insurance Times*, 20 May 2015) <http://www.insurancetimes.co.uk/zurich-uk-wins-asbestos-claim-court-battle-with-ieg/1413998.article> accessed 21 May 2015.

[8] ibid.

Disclaimer

This newsletter does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to provide an update on issues that may be of interest to those handling occupational disease claims. Specialist legal advice should always be sought in any particular case.

BC Legal is a trading name of BC Legal Limited which is registered in England and Wales under company number 08963320. We are authorised and regulated by the Solicitors Regulation Authority. The registered office is 1 Nelson Mews, Southend-on-Sea, SS1 1AL. The partners are Boris Cetnik and Charlotte Owen. More details on the firm can be found at www.bc-legal.co.uk

Partners: B. Cetnik, C. Owen
Registered Office: 1 Nelson Mews, Southend-On-Sea, SS1 1AL
BC Legal is a trading name of BC Legal Limited which is registered in England and Wales under company number 08963320
We are Authorised and Regulated by the Solicitors Regulations Authority (SRA No 590579)