20 May 2015

PRESS SUMMARY

Zurich Insurance PLC UK Branch (Appellant) v International Energy Group Limited (Respondent) [2015] UKSC 33
On appeal from [2013] EWCA Civ 39

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Sumption, Lord Reed, Lord Carnwath, Lord Hodge

LEGAL BACKGROUND

Mesothelioma is caused by exposure to asbestos. This appeal concerns the special rules of liability and causation for claims by victims of mesothelioma developed in and since the House of Lords' decision in *Fairchild v Glenhaven* [2002] UKHL 22**.** That case decides that a victim can hold liable all employers who negligently exposed him or her to asbestos. But the House later decided in *Barker v Corus* [2006] UKHL 20 that each such employer was only liable pro rata to the period which exposure by it bore to the total of all periods of exposure. Parliament reversed *Barker* in the UK by the Compensation Act 2006, making each employer liable in full, with rights of contribution among themselves. In *Trigger* [2012] UKSC 14 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

The present appeal is from Guernsey, where there is no equivalent of the 2006 Act. The common laws of England and Guernsey are agreed to be identical in this area. The principal issues are: (1) whether the reasoning in *Barker* still applies in Guernsey **[8]**, and means 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]**, and (2) if *Barker* does not apply and the position in Guernsey is 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 are parallel issues regarding such an insurer's responsibility for defence costs incurred in meeting the victim's claim.

FACTS

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 ("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"), as successor to Midland's liabilities, maintains that it is 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]**. The trial judge ordered Zurich to meet 22.08% of the compensation but 100% of defence costs. The Court of Appeal ordered Zurich to pay 100% of both the compensation and defence costs **[15]**. Zurich appeals in relation to both compensation and defence costs.

JUDGMENT

The Supreme Court unanimously holds that the common law rule of proportionate recovery established in *Barker* [2006] UKHL 20 continues to apply in Guernsey; it accordingly allows Zurich's appeal in respect of compensation; but it dismisses the appeal in relation to defence costs **[35** and **100]**. The judge's order is therefore restored.

The other issues do not in these circumstances arise, but, because of their general importance, the Supreme Court states its opinion on them. By a majority of 4-3 the Court concludes that, had the position in Guernsey been 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 pro rata contribution from the Excess and IEG **[96]**. Lord Mance (with whom Lords Clarke, Carnwath and Hodge agree) gives the leading majority judgment, and Lord Sumption (with whom Lords Neuberger and Reed agree) the leading minority judgment. Lord Hodge gives a separate judgment, as does Lord Neuberger and Lord Reed.

REASONS FOR THE JUDGMENT

(1) All members of the Court agree that the common law rule in *Barker* remains unaltered in Guernsey where the 2006 Act does not apply. **[27-31]**. Only 22.08% of IEG's loss is thus attributable to the period of the Midland insurance for which Zurich must answer **[35]**.

(2) The defence costs are different. They would have been incurred in defending the claim whatever the total period of exposure by GGLCL. They were incurred with insurer's consent, in defending a claim for damages for injury or disease "caused" during the Midland insurance period within the meaning of the main insuring clause. Under the rule in *Fairchild*, as applied in *Trigger*, mesothelioma is "caused" in any period in which exposure occurs which materially contributed to the risk of contracting mesothelioma **[36-39]**.

(3) Had Guernsey had an equivalent to the 2006 Act, IEG would have been liable to Mr Carré for his full 100% loss whether it had exposed him to asbestos for actual 27 years or only for the 6 years of the Midland insurance cover. But it would be anomalous if Zurich had to answer for the full 100% loss without any defence or right of recourse. In this situation, the majority holds that, although Zurich must in the first instance answer for the full 100%, Zurich has equitable rights to contribution pro rata from any other insurer (such as Excess) able to contribute and, in respect of any period where there is no such insurer, from IEG itself. **[42-54]**, **[63]** and **[77-78]**. The minority considers that Zurich is only liable to IEG in the first instance for 22.08% of the full loss **[180-187].**

(4) Lord Mance's judgment also discusses the position under the Third Party (Rights against Insurers) Act 1930 had IEG been insolvent, and concludes that it is probable that Mr Carré would in such a case have been able to look to Zurich for his full 100% loss **[97]**.

References in square brackets are to paragraphs in the judgment