

International Energy Group Ltd v Zurich Insurance plc UK
[2016] AC 509, [2015] UKSC 33

Summary

This case dealt with what the position would be if: (1) INS undertook to indemnify an employer (call the employer, 'EMP') against liabilities for personal injury incurred by EMP during the period of the contract of insurance, (2) EMP was held liable under the House of Lords' decision in *Fairchild v Glenhaven Insurance Ltd* [2003] 1 AC 32 to compensate (either in full or – in a case not governed by the Compensation Act 2006 – in part) an employee, C, for mesothelioma that C might have contracted as a result of being negligently exposed to asbestos dust by EMP, and (3) some part of that exposure occurred while the contract of insurance between INS and EMP was in force.

The UKSC held, in line with its earlier decision in *Trigger Litigation* case [2012] 1 WLR 867 that under the liability insurance policy that existed between INS and EMP, INS would be liable to cover the *whole* of EMP's liability to C. The UKSC went on to hold that having covered the whole of EMP's liability to C, INS would be entitled to make a claim in contribution against any other insurers who issued liability insurance policies to EMP during the period that C was negligently exposed to asbestos by EMP, on the basis that EMP could also have called on those insurers to cover his liability to C. If there were any period where EMP negligently exposed C to asbestos dust, but did not carry liability insurance, INS could make a claim in contribution against EMP for the cost of covering EMP's liability to C, on the basis that in the period where EMP was not carrying liability insurance, he was undertaking to self-insure his liabilities.

Lord Sumption dissented. He argued that under the liability insurance policy that existed between INS and EMP, INS would only be liable to cover a *proportion* of EMP's liability to C, so that if EMP (say) negligently exposed C to asbestos dust for 15 years, and during those 15 years, had a liability insurance policy with INS for five of them, INS would only be liable to cover of EMP's liability to C.

Comments

It is to be expected that this decision will give academics specialising in the law of contribution conniptions (particularly when it comes to the idea that INS can bring a claim in contribution against EMP in respect of periods that EMP did not have any liability insurance), and will give rise to complications in the case where *two* employers carrying liability insurance with a variety of insurers are both liable under *Fairchild* to compensate an employee for mesothelioma.

For example, suppose that EMP1 negligently exposes C to asbestos dust for 15 years, and had a liability insurance policy with INS1 for one of those years; and then EMP2 subsequently exposed C to asbestos dust for 5 years, during the whole of which period EMP2 had an insurance policy with INS2. Assuming that C subsequently develops mesothelioma and that the Compensation Act 2006 applies to C's case, C will be entitled to sue EMP1 for 100% compensation for his mesothelioma, and INS1 will be liable in full to cover EMP1's liability to C. If INS1 seeks to recoup some or most of the money that he has had to pay under his liability insurance policy with EMP1, it is unclear who he can sue, and for how much.

Probably the most sensible way of proceeding is for INS1 to use the law on subrogation to take over EMP1's ability to make a claim in contribution against EMP2. Doing this will

allow INS1 to recover 25% of the money that EMP1 had to pay out to C. (INS2 will then be on the hook for the money that EMP2 has had to pay out to EMP1 (or rather, INS1, bringing a claim in EMP1's name).) That leaves 75% of the liability that INS1 had to cover, as a result of EMP1's having liability insurance with INS1 for $\frac{1}{15}$ th of the time that EMP1 was negligently exposing C to asbestos dust. $\frac{1}{15}$ th of 75% is 5%, so INS1 will ideally be looking to recover 70% of the compensation that INS1 had to pay out to C from liability insurers who insured EMP1 during the period that EMP1 negligently exposed C to asbestos dust, or from EMP1 himself, if there was any time during that period when EMP1 did not carry liability insurance.

But what if EMP2 long ago went out of business? If there is no longer an EMP2 to for EMP1 to make a claim in contribution against, could INS1 make a claim in contribution directly against INS2? This seems doubtful as their respective liabilities are to different people. And if INS1, for whatever reason (insolvency of EMP2 and INS2 is the most straightforward possibility), cannot recover from EMP2/INS2 any of the compensation that INS1 has ended up paying out to C, does that effect how much INS1 can make a claim in contribution for from EMP1's other liability insurers, or EMP1 himself?

However, we should not expect any principled answers to these questions, and should not be surprised at the unprincipled nature of the decision in *Zurich Insurance* itself. The decision does to insurers what a combination of *Fairchild*, the Compensation Act 2006 and *Sienkiewicz* did to employers. It basically says, 'Can pay? Will pay!' Lord Sumption's dissent attempts to do for insurers what the House of Lords' decision in *Barker v Corus UK Ltd* [2006] 2 AC 572 attempted to do for employers, which was only to make them liable for a fair proportion of the loss suffered by a claimant suffering from mesothelioma. And it is likely that had Lord Sumption's views won majority support in this case, the decision in *Zurich Insurance* would have been as short-lived as *Barker* turned out to be. As Lords Neuberger and Reed observed (at [203]), a possible explanation of why none of the parties involved in the *Zurich Insurance* case had argued in favour of Lord Sumption's analysis of the scope of INS's liability to EMP under its contract of insurance with EMP was that 'the insurance market may fear that if the court adopts the solution favoured by Lord Sumption JSC, Parliament will intervene as it did following *Barker*.' While Lords Neuberger and Reed said that 'it seems somewhat quaint...to invoke section 3 [of the Compensation Act 2006] as a reason for developing the common law in a certain way rather than another' the truth is that had Lord Sumption's views prevailed, a hole would have been blown in s 3 of the 2006 Act as the effect of Lord Sumption's judgment would have been to ensure that an employer who was in theory liable for 100% of a claimant's loss in a mesothelioma would in practice only be worth suing for the proportion of the claimant's loss that would be covered by those of the employer's liability insurers who were still solvent. So as it was, the majority had little choice but to apply the 'Can pay? Will pay!' attitude adopted towards employers to liability insurers as well, and mess around with the law on contribution in an attempt to ensure that a liability insurer does not end being stuck with 100% of the bill for compensating a claimant with mesothelioma when a contract of liability insurance that they issued was only in force for 5% of the time that the claimant was being wrongfully exposed to asbestos dust. The chain of events set in motion by the House of Lords' decision in *Fairchild* – which seemed so fair at the time, and is seen as such a disaster now (see, in particular, paras [209] and [210] of Lord Neuberger and Reed's judgment, to add to the litany of regrets set out in *Sienkiewicz*) – made the decision in *Zurich Insurance* pretty inevitable.