MARSH

May 2015

# CLIENT ADVISER

## CLARITY AROUND APPORTIONMENT OF DAMAGES ON MESOTHELIOMA CLAIMS: INTERNATIONAL ENERGY GROUP LIMITED V ZURICH INSURANCE PLC

The Supreme Court has handed down judgment and decided that insurer's liability for a mesothelioma claim involving an employee is proportionate to its time on risk. However, an insurer is liable for 100% of the defence costs even if it did not cover the defendant for the full period of exposure to asbestos.

### BACKGROUND

International Energy Group (IEG) settled a mesothelioma claim made by Mr. Alan Carré which its operating company, Guernsey Gas Light Company Ltd (Guernsey Gas), had employed for 27 years.

IEG then sought to recover the full amount of compensation from Zurich Insurance Plc UK (Zurich). Midland Assurance Ltd (Midland) had insured Guernsey Gas for six out of the 27 years and Zurich has acquired the insurance liabilities of Midland.

The issue in dispute was whether IEG was entitled to indemnity from Zurich amounting to the full amount of its outlay in respect of Mr. Carré's claim or whether IEG was only entitled to a proportion of the outlay equivalent to the portion of the claimant's employment for which Zurich had been on risk

### THE HIGH COURT

Before the High Court, Zurich claimed it was only liable for a proportion of the victim's compensation equivalent to the portion of the claimant's employment for which it had been on risk.

On 24 January 2012, the judge found that IEG was entitled to a full indemnity only in respect of its costs of defending Mr. Carré's claim. Zurich was successful in defending its coverage claim but only because Guernsey law governed the claim and the judge found that the principles of Barker v Corus UK Ltd [2006] would apply.

The judge made clear that, under English law, IEG's claim against Zurich would have been successful because the UK Compensation Act 2006 provides that an employer found liable to an employee in relation to a mesothelioma claim is jointly and severally liable for the entire damage caused to the employee.

The Judge dismissed Zurich's alternative argument that it would have been entitled to contribution from the policyholder stating that the targeted insurer has a right of contribution from other triggered insurers but not from the policyholder itself.

IEG appealed against the rejection of its claim for a full indemnity. Zurich cross appealed by challenging the judge's award of a full indemnity in respect of IEG's defence costs and also the judge's rejection of its alternative argument.

### THE COURT OF APPEAL

The litigation was appealed to the Court of Appeal which reached a decision on 6 February 2013.

It was held that, when a solvent insured is liable in damages to his employee for mesothelioma, it is entitled to a full indemnity from its insurer irrespective of whether it was guilty of breach of duty outside the terms of insurance as well as in it.

## THE SUPREME COURT

Zurich appealed to the Supreme Court which handed down its judgment on 20 May 2015.

The Supreme Court found that Zurich's obligation to indemnify IEG in respect of the compensation paid to the claimant was limited to that proportion for which the insurer was on cover in relation to the total period of exposure to asbestos with IEG. That is to say, the indemnity would be apportioned on a time-on-risk basis (in this case, six years out of a total exposure of 27 years).

However, the Supreme Court dismissed the appeal in relation to defence costs. It was held that Zurich must give a full indemnity in respect of defence costs even though it did not cover IEG for the whole period of exposure to asbestos.

## THE EFFECTS OF THE SUPREME COURT'S DECISION

The decision is very positive for insurers and brings clarity to the question of apportionment of damages in mesothelioma claims:

- Where insurance does not cover the whole period of asbestos exposure, insurers can seek a contribution from a solvent policyholder.
- Where the policyholder is insolvent, insurers will pay the whole claim. Claimants will always get full compensation where there is a solvent insurer in place for at least a proportion of the overall exposure period.

The judgment reaffirms the importance of companies understanding their full historic employers' liability (EL) insurance to avoid gaps and therefore the risk of self-funding. It also underlines the importance of liquidating dormant companies where possible in order that full indemnity is paid by the traced insurer(s).

## WHAT SHOULD YOU CONSIDER?

Companies should establish whether they have traced EL insurance coverage dating back at least 50-60 years for each of their subsidiaries (including acquisitions).

In addition, companies should identify whether they have dormant companies which can be liquidated thereby reducing the risk of claims against those companies.

## HOW CAN WE ASSIST YOU?

With Marsh's skills, resources, and experience in the field of disease liabilities and insurance archaeology, we are very well placed to meet the needs and requirements of any company with such liabilities; and not only in relation to short-term benefits but in relation to lasting corporate solutions.

Our specialist insurance archaeology department can assist with tracing historic insurance coverage and unravelling complex corporate histories while our occupational disease claims practice can diligently manage your claims to ensure optimum results are achieved.

For further information, please contact:

BILL KIRKHAM
Occupational Disease Claims
Marsh's Claims Consulting Practice
bill.kirkham@marsh.com

IAN PELHAM
Marsh Risk Consulting
Insurance Archaeology
ian.pelham@insolutionsworld.com

The information contained herein is based on sources we believe reliable and should be understood to be general risk management and insurance information only. The information is not intended to be taken as advice with respect to any individual situation and cannot be relied upon as such.

In the United Kindom, Marsh Ltd is authorised and regulated by the Financial Conduct Authority.

Copyright © 2015 Marsh Ltd All rights reserved

GRAPHICS NO. 15-0588