

Asbestos "Trigger" litigation: implications for the UK insurance/reinsurance market

Durham v BAI (Run off) Limited (In Scheme of Arrangement) and 5 other lead cases [2008] EWHC (QB) [2692]

By now, most people in the market will have read about the judgment handed down on 21 November 2008 relating to the so called "trigger litigation". The litigation concerned six test cases specifically selected so the Court could clarify whether Employers' Liability ("EL") policies are triggered when the victim first inhales asbestos fibres, or when the disease manifests itself years later. The judge, Burton J, held that policies are triggered when asbestos fibres are inhaled, in line with what had been market practice in the UK for years. This decision, if it is not appealed, will have significant consequences for the UK insurance and reinsurance market.

Why is the "trigger litigation" so important?

The simple answer, as often, is money. Asbestos litigation in the UK is only in its infancy, and compensation payable to asbestos victims is expected to reach billions of pounds as it develops. Insurers and their reinsurers will bear the vast majority of those costs, through liability policies issued over the past 50 years or so.

Asbestos: the UK exposure

It is estimated that six million tonnes of asbestos has been imported into the UK throughout the 20th century, with a peak during the mid 1960s, consumption continued until the late 1990s. The use of the two most dangerous types, blue and brown asbestos, was allowed in the UK until 1985 and the use of the less dangerous white asbestos was not banned until 1999. Levels of exposure receded sharply in the 1970s, but people continue to be exposed, as buildings in the UK still contain asbestos in their fabric.

Depending on the asbestos related disease concerned, symptoms may develop between 15 and 45 years after first exposure. The annual number of mesothelioma deaths has risen from 153 in 1968 to about 2000 a year currently. It is estimated that as many die from asbestos related lung cancer each year. Deaths from UK asbestos related disease are estimated to peak between 2011 and 2015. The UK has the highest rate of mesothelioma in the world.

Asbestos: impact on insurers and reinsurers

Insurers and reinsurers have been dealing with asbestos related claims for over 20 years. Estimates of compensation paid to date by the insurance industry vary from £200 - £300 million to £2 billion. Estimates of future costs vary from £3.76 billion to as much as £20 billion.

Asbestos cases in the UK typically involve employees suing employers. If found liable, employers recover from their insurers provided that employer's liability ("EL") insurance is in place. Public liability ("PL") insurance policies may also be impacted, for instance where the entity responsible for exposure was not an employer but an occupier of a building with public exposure (e.g. public authority), or where it was exempt from the requirement to have EL cover.

So far insurers have paid most claims. However, as the problem intensifies (notifications to insurers rose from 2,000 per year in 1990 to 10,000 per year in 2003), increased scrutiny of claims has led to more and more disputes being referred to the courts.

How did the "trigger litigation" come about?

Until recently UK insurers paid compensation on the basis that the EL policy trigger was the year of exposure. Thus if an employee was exposed to asbestos in 1972, insurers who provided the EL cover for the 1972 year paid up. In the context of PL policies, UK insurers usually took the view that the policy trigger was manifestation of the disease. This was essentially because PL policy wordings referred to injuries "occurring" or "happening" during the policy period.

All this changed in 2006 when the Court of Appeal ("CA") gave its judgment in the case of *Bolton Metropolitan Borough Council v Municipal Mutual Insurance and Commercial Union*. In the context of PL policies, the CA decided that

asbestos-related injury did not occur during the time of exposure, but when the first malignant cells mutated. In mesothelioma, this was thought to happen about 10 years prior to the first symptoms.

Whilst PL policies refer to injury "occurring" during the policy period, EL policies tend to cover injuries "caused" or "sustained" during the policy period. The "causation" wording causes little difficulty as it is the inhalation that, ultimately, causes the disease. However, some insurers contented that, following *Bolton*, EL policies containing the "sustained" wording did not respond on the basis of exposure/inhalation, but only once the malignant cells mutate years later. This led to the risk of what Burton J called a "black hole" for claimants. Indeed, by the time malignant cells mutate, the relevant employer may no longer be in business, and there may not then exist a policy against which a claim could be made. Even if the employer is still in existence at that stage, the policy then in force may well exclude cover for previous employers.

What are the key points of the Trigger judgment?

The issues at trial were decided by reference to nine specimen policy wordings which although varied slightly, all essentially required injuries to be "sustained" or the disease to be "contracted" during the policy period. Burton J made the following findings:

- **Medical evidence:** there was no injury by virtue of the inhalation of asbestos fibres. Even if he had found that there was injury at the date of exposure, Burton J specified that injury must mean actionable injury, and in his view any injury caused would not have been actionable at the date of inhalation.
- **Usage:** the practice of paying mesothelioma claims on an exposure basis did not amount to an established "usage" in accordance with legal authorities, not least because such usage must exist at the date of the contract concerned.
- **Employers Liability (Compulsory Insurance) Act 1969 ("ELCIA"):** Burton J disagreed with the claimants that the ELCIA mandated the causation wording, such that the "sustained" wording should be deemed to be compliant by being construed as having equivalent meaning.
- **Construction:** after a lengthy consideration of the words "sustained" and "contracted", and of the factual matrix, Burton J concluded that EL policies with these words responded to claims just as policies would with the "caused" wording i.e. on an exposure basis. In other words, injury is "sustained" when it is caused, and disease is "contracted" when it is caused.
- **Bolton:** Burton J was at pains to point out that *Bolton* did not consider the factual matrix of EL insurance, nor was the CA construing any EL wordings, or analysing the differences between PL and EL wordings. The Judge concluded that there was nothing in *Bolton* which bound his decision making.
- **Five year rule:** although it was not necessary for him to do so, Burton J considered when injury was "sustained", which he took to be synonymous with "occurs". To date (on the basis of medical research as to the speed with which malignant cells were likely to "double" sufficiently so as to produce the first mesothelioma symptoms), injury had been considered to occur 10 years before the onset of symptoms. However, in this case the opinions of two expert biochemists were for the first time brought into play. On that basis, Burton J concluded that injury occurred 5 years prior to diagnosability.

What happens next?

The first and foremost consequence may well be a wave of claims from asbestos victims and their employers who had awaited the result of the "trigger litigation" to seek recovery. However, this will not materialise immediately as defendants have until 5th January 2009 to lodge their appeal, and there are indications that an appeal will be sought.

In any case, whilst the judgment gives finality to many asbestos victims, it leaves some issues unresolved. First of all, how should a PL policy with the "sustained" wording respond, and what about an EL policy with the "occurring" wording? This leads to the wider issue whether the judgment should be considered as establishing a universal rule applicable to all EL policies, or whether the findings only apply to the specific wordings construed by the Court. Parties to the proceedings were careful to select a typical sample of EL wordings in use within the market. However, given the scale of



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asbestos liabilities, even a marginal amount of policies not following the usual template may lead to large sums being in dispute, making litigation a real possibility.

The wordings submitted to the court included no reinsurance policies. Reinsurances use different wordings, covering for instance an "event" or a "loss" rather than an "injury occurring". The judgment is of little assistance to establish whether such reinsurances cover the particular liabilities.

Finally, it is expected that the 5-year finding will impact on PL policies. This finding could also be significant for EL insurers. Previously, it was thought that inhalation of asbestos fibres in the 10 years prior to symptoms arising could not have an effect on the claimant as by that time the tumour was already present. However, in cases of continuous exposure over a period of time damages are assessed on a time on risk basis. Now that the relevant period has been reduced from 10 to 5 years, additional policies and insurers might be brought into the calculation.

Given the likelihood of the case being appealed, it is certainly not the last the market will hear about the asbestos "trigger" litigation. Other sub-issues, as highlighted above, may also lead to a number of incidental cases (some of which may be referred to arbitration) aimed to define further the scope of coverage afforded by liability policies, either at the insurance or the reinsurance level.

December 2008