

The High Court confirms a causation-based interpretation of EL policy wordings in the landmark trigger litigation decision

Employer's liability trigger litigation test cases

High Court – Queen's Bench Division – Mr Justice Burton – 21 November 2008

The market practice in determining the trigger point for Employer's Liability (EL) insurance policies to respond to mesothelioma claims has now been confirmed by Mr Justice Burton in six test cases. Contracts referring to injuries or diseases 'sustained' or 'contracted' during the policy period are to be construed as 'caused' during the policy period. Insurers are liable to indemnify mesothelioma losses on the basis of inhalation of asbestos by employees which happens during the policy period.

The Background

We reported recently on the trigger litigation test cases in the latest edition of The Angle (Issue Number 31 – Autumn 2008).

The question over the correct trigger for these policies has been debated since the Court of Appeal decision in *Bolton MBC v Municipal Mutual Insurance Co Ltd* on 6 February 2006. In that case the Court of Appeal held that in mesothelioma claims there is no injury at the date of inhalation of asbestos fibres, rather that injury occurs only on the development of a subsequent tumour.

Although the *Bolton* case concerned Public Liability (PL) insurance policies, EL insurers have, since 2006, denied coverage for mesothelioma claims based on the reasoning in *Bolton*. One of the most significant consequences of the stance taken by insurers is the possibility of a black-hole in an employer's Liability

insurance coverage. This would occur in the event that an employer or his insurers are no longer in existence at the date of the tumour or that a change in the EL policy wordings of an employer leaves a gap in cover at the date of tumour.

The Decision

The issue concerned the construction of policy wordings that referred to injuries 'sustained' or diseases 'contracted' during the policy period. Burton J's conclusion was that these policy wordings should be construed to mean 'caused'. This was the previous method of determination used in the market.

The key aspects of Burton J's decision are set out below.

Public Policy

As part of the factual matrix against which he was entitled to construe the policy wordings, Burton J examined the statutory regimes set up by the Workmen's Compensation Acts (WCA) and the Employer's Liability (Compulsory Insurance) Act 1969 (ELCIA).

He found that his construction of the policy wordings fitted most consistently with the public policy considerations that underpinned the WCA and ELCIA namely, that employees should be able to look to insured employers and that there should be continuity of cover even in the event of an employer changing insurers.

The *Bolton* Decision

Burton J also looked at the decision in the *Bolton* case. His conclusion was that the

decision focused on PL insurance and did not consider the factual matrix that was critical to this decision, namely the statutory background set out above. By highlighting these differences, he was able to hold that there was nothing in the *Bolton* decision that meant that he was bound to follow it. He was also quick to ensure that no doubt was cast on the *Bolton* decision by the outcome in these test cases.

Consequences of the decision

It should be noted that leave to appeal this decision was granted by Burton J. It is almost certain that the case will move on to the Court of Appeal for further consideration.

For the time being though, the insurance market's practice of dealing with mesothelioma claims has been approved. This is a favourable decision for employees who suffer the condition. It is estimated that around 12% of those suffering from this disease will now be covered in the light of this decision.

This decision still does not guarantee coverage in each instance. This is due to the fact that the time at which the policy responds has been pushed back which would increase the likelihood of an insurer no longer being in existence in the present day.

For insurers, there are some positives to come out of this decision. It should re-introduce some element of certainty and uniformity across the market in the way that these claims are handled. In theory, reinsurance collections should be easier as there will be less scope for disputes as to which underlying insurance policies should be indemnified.

The decision will also have relevance to other disputes (in particular on claims made under PL policies) in terms of Burton J's conclusions on the development of mesothelioma. These were:

- he agreed with the findings in *Bolton* that there was no injury at the stage of inhalation of asbestos fumes; and
- relying on advances in the understanding of the development of mesothelioma since the time that evidence was given in *Bolton*, he cast doubt on the accepted 'ten-year rule' ie that the tumour becomes fatal ten years prior to death. His view was that it is more likely to be 4 or 5 years prior.

If you require any further information in relation to the way in which these developments impact upon your business please contact Nicholas Bradley, David Breslin, William Sturge or Viran Ram on 020 7379 0000 at Lawrence Graham LLP.

These notes are intended only as a summary of developments and not as a definite statement of the law.

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