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Court considers mesothelioma and recovery of success fees

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Personal Injury analysis: Harminder Bains, partner and asbestos mesothelioma claims expert at Leigh Day, explains why the successful legal action taken by the Asbestos Victims Support Groups Forum against the government and the insurance industry has important implications for victims of mesothelioma and their dependants.

Original news

R (on the application of Whitson) v Secretary of State for Justice [2014] EWHC 3044 (Admin), [2014] All ER (D) 24 (Oct)

The claimant chairman of the Asbestos Victims Support Groups Forum (the Forum) sought judicial review of the defendant Secretary of State's decision to bring into force the Legal Aid, Sentencing and Punishment of Offenders Act 2012, ss 44 and 46 (LASPO 2012) of in relation to mesothelioma claims. The Administrative Court, in allowing the application, held that the Secretary of State had not conducted a proper review of the likely effect of the LASPO 2012 reforms on mesothelioma claims, as required by LASPO 2012, s 48(1).

What key issues did this case raise?

On 4 December 2013, the government announced that it would proceed to remove the s 48 exemption from LASPO 2012 and therefore apply ss 44 and 46 to mesothelioma cases. This would mean that mesothelioma victims or their dependents would no longer recover the success fee or the costs of the after the event (ATE) insurance premium from the unsuccessful defendants. If the government were successful, mesothelioma victims could pay up to 25% of their compensation.

What were the arguments raised?

The Forum challenged the decision because, under s 48 of LASPO 2012, ss 44 and 46 were not to be brought into force in relation to proceedings in respect of mesothelioma until the Lord Chancellor had:

- o carried out a review of the 'likely effect' of those sections in relation to such proceedings, and
- o published a report on the conclusion of the review

It was difficult to understand how the Lord Chancellor could possibly think that there had been a proper review of the likely effect of LASPO 2012 when the consultation closed only six months after the implementation.

The government did not, could not, explain why mesothelioma was no longer a special case. The factors which the government accepted, at least in Parliament if not in private, that mesothelioma was a special case for exemption of mesothelioma from LASPO included that:

- o mesothelioma claimants were not, and could not sensibly be seen as part of the 'compensation culture' against which the Jackson reforms were directed
- o mesothelioma victims who have just months to live should not have to shop around to find the best deal
- o mesothelioma victims because of their disease are already reluctant to claim because of their rapid deterioration in health, and to be advised that they would have to pay costs or pay the other side's costs out of their damages would be a 'massive additional hurdle'
- o mesothelioma victims were already at a special disadvantage because their damages fell to be reduced if insurers could not be traced for periods of exposure
- o a 'one-size-fits-all' approach was peculiarly inapposite for the special case of mesothelioma which was particularly complex because of the long latency period between exposure and disease onset, and the requirement for expert evidence to prove exposure

What was the 'secret agreement' between the government and the Association of British Insurers (ABI)?

The ABI intervened in the judicial review proceedings as it supported the government. It was suspected by some that the government's decision was based on a result of a 'secret deal' having been made between it and the ABI. It was believed that the ABI and the government, in return for payment for the Mesothelioma Act 2014 and the Diffuse Mesothelioma Payment Scheme, agreed there would be a lifting of the s 48 exemption to fund such a scheme.

While the judicial review was proceeding, the Justice Committee undertook an investigation into the appropriateness of the government's decision to remove the s 48 exemption. As a result of the Justice Committee's investigation on 13 May 2014, James Dalton, on behalf of the ABI, was forced to provide a copy of the secret agreement headed 'Mesothelioma Heads of Agreement between Her Majesty's Government and the Association of British Insurers dated 13 July 2012'. It stated:

'This document is confidential and remains the property of the ABI. Neither the contents of this paper nor the document itself may be disclosed to a third party, including under a request under the Freedom of Information Act without prior written consent from the ABI.'

On 1 August 2014, the Justice Select Committee published its report and criticised the government over its approach to compensation for victims of mesothelioma and said that the government's approach had been maladroit and that a promised review to the effects of LASPO 2012 had not been conducted in an even handed manner. It stated:

'We are concerned that the government has not been transparent or open, either with us or with other interested parties, about the fact that its overall policy in relation to mesothelioma has been shaped in accordance with an "agreement", however informal and elastic, which it had reached with employers' liability insurers. It is hard to see how a balanced and informed public debate can take place when a prior agreement has been reached between two of the principal parties to that debate, and that agreement is not known to others participating in the debate, including victims.'

What did the judge conclude?

On 2 October 2014, William Davis J gave judgment in the judicial review following a two-day hearing in July 2014. He agreed with the Forum in that the government had not conducted a proper review of the 'likely effect' of the LASPO 2012 reforms in mesothelioma cases and therefore the Forum succeeded. He made a finding that the Lord Chancellor had acted 'unlawfully'. This was the second such finding against the Lord Chancellor within a fortnight.

What are the implications of this judgment?

By the Forum taking legal action against the government and the entire insurance industry--a modern-day David versus two Goliaths, it has successfully prevented victims of mesothelioma and their dependants from having to pay legal costs which had previously been paid by the unsuccessful defendants.

Are there any areas or unsolved issues remaining?

The Justice Select Committee said that the government's approach had been 'maladroit'. MPs also expressed surprise over a secret deal. The government needs to provide an explanation as to why a secret deal was made and disclose any other secret deal which has been made with the ABI.

Harminder Bains represented the Asbestos Victims Support Groups Forum UK in its judicial review against the government's plans to remove the s 48 LASPO 2012 exemption.

Interviewed by Kate Beaumont.

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