FOIL UPDATE January 2010

Decision in the Pleural Plaques JR

Introduction

Following a 22 day hearing the Court of Session in Scotland has rejected the petition for judicial review presented by insurance companies, challenging the lawfulness of the Damages (Asbestos-related Conditions) (Scotland) Act 2009. The 111 page judgment was delivered by Lord Emslie on **Friday 8 January**.

The Damages (Asbestos-related Conditions) (Scotland) Act 2009 came into force in June 2009, following the decision in the House of Lords in *Rothwell* in 2007, which held that pleural plaques did not amount to 'damage' and therefore could not in themselves form the basis for a successful action in tort. The Act sought to return the law to the position pre-*Rothwell* when pleural plaques were treated by claimants and defendants as a compensatable condition. The Act made pleural plaques actionable both retrospectively and prospectively, dealing with cases already in the pipeline as well as future claims.

The application for Judicial Review was brought on the basis of a breach of the Human Rights Act Art. 6 (right to a fair trial) and Art. 1 of the First Protocol (peaceful enjoyment of possessions); and also on the grounds of irrationality under the common law. It was necessary for the petitioners to first establish locus standi to present the petition on both Human Rights Act and common law grounds, before asking the court to hold that the 2009 Act was unlawful. The petitioners were successful in establishing locus standi for an application on both grounds but, whilst expressing some sympathy for the insurers' position, Lord Emslie rejected their application for judicial intervention under both articles of the Human Rights Act and on common law grounds.

The BBC reported on Friday that the ABI is seriously considering an appeal. The ABI's Director of General Insurance and Health, Nick Starling, was reported as saying:

"We are pleased that the judgment recognises the fundamental right of insurers to challenge legislation made by the Scottish Parliament, although we are disappointed that the judge did not feel able to overturn the law passed by the Scottish Parliament".

"Insurers will now be considering this judgment, and are seriously looking at the grounds for an appeal against it……This is not the end of the road".

FOIL can now confirm that the decision will be appealed.

The Judgment

The judgment opens with general background: a review of the medical evidence, the practice of liability being conceded, the change of approach leading to *Rothwell*, the circumstances in which the 2009 Act came to be passed and the effect of the new legislation. The *Rothwell* case was considered in detail.

Lord Emslie then considered the legislative process which led to the 2009 Act in Scotland. He noted that a draft Bill had been prepared by Thompsons a fortnight after *Rothwell*. He also noted the lack of initial consultation on the Bill and considered the

very different estimates of the likely cost of the proposals put forward by the Government and the insurers as the Bill progressed. The Government initially put the annual cost at £10m for existing cases with a further annual cost of £3.2m, a figure which later rose to an annual cost of £5.5-£6.5m. Insurers put the annual cost at between £76m and £607m with a total cost for Scotland as high as £8.6bn. The Government later conceded that the cost would be higher than previously stated, giving a figure of between £25m and £202m per annum. The Bill was formally passed on 11 March 2009.

The petitioners' locus standi

This question was a "fiercely contested preliminary issue". Victim status under Art. 34 of the Human Right Act is required to confer title on an individual or organisation to pursue challenges before the court.

There is a wealth of authority confirming the general rule that a person claiming to be a victim must be "directly affected" by the measure complained of, or a member of a class at risk of being directly affected. A person only indirectly affected does not qualify unless in exceptional circumstances. Claims and challenges *in abstracto* are not permissible. As Lord Emslie stated "taking all of these considerations into account, it may be said with some confidence that, as construed by the Strasbourg Court, Article 34 focuses attention on the real and practical effects of a challenged measure, act or decision, with the corresponding objective of excluding claims which are remote, academic or theoretical".

Turning to consider the common law position, Lord Emslie considered that the relevant principles governing title to be heard were not dissimilar to those governing claims to 'victim' status under the Human Rights Act, which seemed to him to be a sensible end result when challenges are brought, as in this case, both under the Human Rights Act and common law. Textbook authority states that questions of title and interest to bring a challenge should be approached on a "broad, pragmatic basis". That said, "mere busybodies should not be permitted to take up court time and cause expense to others". There must be some legal status or relationship to serve as a basis for court action. In cases with a public law aspect the relationship might be broader and more general: "Accordingly, where a party's personal, social, political, economic or proprietary interests are demonstrably affected by some real (as opposed to merely academic or theoretical) public law issue or grievance, then as a general rule he will be held to have title to raise proceedings for judicial review in that connection".

At the outset of his decision Lord Emslie makes it clear that he "did not consider that any sound reason had been advanced for denying the petitioners access to this court for determination of the merits of their various grounds of complaint".

The respondents argued that the only parties who could object to the Act were the actual defenders of the pleural plaques claims, the employers, but Lord Emslie considered this approach unduly narrow and technical. He felt that this argument did not take into account the reality of the situation; that many employers would have gone out of business at the time of any claim, that it was insurers' lawyers who would be handling the claims, and insurers who under the Third Parties (Rights against Insurers) Act 1930 could be directly convened as defenders.

Lord Emslie considered arguments raised under the *Ullah* principle, which requires that a court should follow any clear and constant jurisprudence of the Strasbourg court. The respondents argued that in accordance with the *Ullah* principle there could be no decision in favour of insurers where no application involving insurers had come before the Strasbourg court. Lord Emslie noted that there was no adverse decision or hint of jurisprudence adverse to insurers, it was just that insurers had not been the subject of

any particular decision before the court. He was not persuaded that this approach to the *Ullah* principle was soundly based and he rejected the argument.

Finally, the respondents argued that that judicial review was an inappropriate forum for the insurers' complaints and that they should instead be raised in the pleural plaques actions themselves. This argument was rejected by the court.

In conclusion, for all of the above reasons, the preliminary issue of locus standi was determined in favour of the insurers.

The petitioners argued, for their own part, that respondents three to eight (individuals who had or would bring proceedings for compensation for pleural plaques if the Act were allowed to stand), should not be entitled to take part in the proceedings. This argument was also rejected by the court.

<u>The petitioners' challenge at common law</u>

The first question which arose to be considered was whether legislation emanating from the non-sovereign Scottish Parliament was susceptible to challenge on traditional common law grounds for judicial review. The case of *Adams v Advocate General for Scotland and Others* was considered in which the Lord Ordinary set out the common law grounds:

"There are familiar grounds upon which the application for judicial review may be brought at common law. In CCSU v Minister for Civil Service, in a well-known passage...Lord Diplock classified under three heads the grounds upon which the administrative action is subject to control by judicial review. He called these illegality, irrationality and procedural impropriety. He said that by 'illegality' as a ground of judicial review he meant that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. By 'irrationality' he meant what can now be succinctly referred to as 'Wednesbury unreasonableness'. .It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. By 'procedural impropriety' he meant not only basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision, but also failure by an administrative tribunal to observe procedural rules... even where such a failure does not involve any denial of natural justice".

Lord Emslie outlined a distinct shift of emphasis in some circumstances away from Wednesbury principles towards the doctrine of proportionality but he concluded by noting that the common law grounds for judicial review remain available and the question was "can the petitioners competently pursue an 'irrationality' challenge here".

The general rule is that Acts of the sovereign Parliament at Westminster are not susceptible to judicial review on common law grounds and the court had to consider whether Acts passed by the Scottish Parliament should be considered in the same light. After detailed consideration of the constitutional issues Lord Emslie held that the 2009 Act could be subject to judicial review. On the extent of the review, however, Lord Emslie noted:

"...the scope for common law review of an Act of the Scottish Parliament can in my opinion be no wider, and may even be narrower, than the review permitted in respect of United Kingdom subordinate legislation carrying direct parliamentary approval. At best for the petitioners, therefore, and drawing strength from the guidance of the House of Lords in the Nottinghamshire and Hammersmith cases, I conclude, that (in the words of Lord Bridge) the 2009 Act "...is not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity."

<u>The petitioners' challenge under Art.6</u>

In this aspect of the case the petitioners sought to take advantage of a series of Strasbourg decisions to the effect that Art. 6 might be breached where a State interfered, by means of legislation, with a current dispute (a breach of the *Zielinski* principle). It was agreed that, even if successful, this challenge could only impact upon the retrospective nature of the Act, in affecting cases already before the courts.

The petitioners argued that in passing the 2009 Act the Scottish Parliament had interfered intentionally with the judicial determination of several hundred pleural plaques cases which were currently 'sisted' (stayed) awaiting the outcome of Rothwell. They argued that the effect of the interference was to "reconfigure" past indemnity insurance contracts to impose new liabilities for which premiums were never taken.

The respondents argued that there were three reasons why Art 6 was not engaged:

1. The Zielinski principle required "designed" interference with existing litigation, which was not present in this case where the retrospective element was only incidental to its primary prospective purpose.
2. The principle only covered legislation overriding the whole of the subject-matter of the litigation.
3. Art 6 only covered disputes to which a particular claimant was a party and which would determine that party's civil rights and obligations.

Ultimately Lord Emslie reached the decision that the petitioners could not rely upon Art. 6, although he admitted that at times he had felt sympathy for the petitioners' position. On the three arguments raised by the respondents he:

1. Upheld the argument: the Act was essentially a forward looking measure, only a small number of cases would be affected retrospectively and Parliament was entitled to include those cases within the legislation. There was no "designed interference".
2. Rejected the argument: the Zielinski principle was wide enough to cover legislative interference with any material issue within a pending dispute: there was no requirement that all material issues be affected.
3. Upheld the argument: insurers did not have the status of parties in pleural plaques cases – only former employers charged with negligence could be parties.

The petitioners' challenge under Article 1 of the First Protocol

Art 1 of the First Protocol provides:
"That every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest....

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Over the years there has been much debate over what is meant by "possessions". The petitioners argued that their "possessions" had been interfered with in two ways:

- The *Rothwell* decision was an asset of enormous commercial value
- Even if *Rothwell* did not constitute a possession, the insurers' capital assets which would be affected by the overturning of Rothwell were a possession.

They then argued that the 2009 Act could not be justified on public interest grounds. They claimed that there was no public interest in securing compensation for a limited

class of individuals, nor in diverting larger sums to the firm of solicitors (Thompsons) whose special pleading was the driving force behind the Act. The insurers claimed "that the Act was, in truth, an exercise in wanton philanthropy at private rather than public expense. Its effects were confiscatory in nature".

Lord Emslie rejected the argument that the *Rothwell* decision was a possession. He felt that although the insurance industry perceived the decision as a hard-won victory it was a decision reached reluctantly under English law and might not be replicated in future cases. Bearing in mind the lengths that claimants would go to, to distinguish their own cases from *Rothwell*, the petitioners could not claim that *Rothwell* gave them more than a potential freedom from further claims in a Scottish context. In addition Art 1 is framed in terms of some form of proprietary interest: Lord Emslie could not accept that an immunity from claims was a property right.

However, it seemed "obvious" to Lord Emslie that the substantial capital assets of the insurers did qualify as "possessions".

Lord Emslie then considered whether the impact of the 2009 Act upon the insurers' capital assets was sufficient to engage Art. 1. In his view the consequences were simply too remote from the legislation to qualify. It was not the Act that would cause pleural plaques cases to succeed but proof of all the legal and factual requirements for compensation. The claims themselves would be directed towards employers. The Act did not purport to deal with any proprietary rights. In his view any statute is liable to affect someone's economic interests but a line had to be drawn between primary and immediate effects and effects which were only secondary and derivative.

Even if Lord Emslie had found that the Act interfered with the insurers' possessions he indicted that he would still not have found that a violation under Art 1 had been made out. Again, Lord Emslie declared some sympathy with the insurers' position, but he was not convinced that the contentions went far enough to enable them to succeed. In his view:

"On balance, agreeing with the respondents' submissions, it seems to me that the 2009 Act did indeed pursue a legitimate aim in the general interest, and that it cannot be regarded as inflicting any "disproportionate and excessive burden" on the insurance industry. There is, in other words, a reasonable relationship of proportionality between the means employed and the aims sought to be realised".

Lord Emslie examined a number of arguments put forward by the petitioners: the absence of any legitimate aim in the general interest; irrational generosity to a small group who had sustained no harm; irrational submission to the will of Thompsons who sought to gain from the Act; cynical targeting of insurers to fund the exercise; concealment of a second objective of the Bill; massive unresolved uncertainties as to cost; and unsatisfactory and inconsistent explanations advanced by the respondents during the judicial review proceedings. Having considered then all, however, Lord Emslie was satisfied that the Scottish Parliament was justified n passing the 2009 Act "both by reference to legitimate public interest objectives and also by reference to considerations of proportionality and fair balance".

Irrationality under common law

The petitioners submitted that the 2009 Act had no rational basis, that its aims and achievements were "unreasonable, irrational and arbitrary", and that the Government and the Parliament had failed to approach the legislative process in a rational manner. The arguments raised were similar to those raised under the Humans Rights Act, set out in the previous sections of the judgment.

Lord Emslie considered that:

"Allowing to the Parliament a "discretionary area of judgement" especially where political, social and economic considerations are in play, I consider that primary legislation would require to be tainted to a serious and exceptional degree before an application such as the present could be upheld, lesser criticisms and complaints would be inadequate, and in the end I am not satisfied that any sufficient ground for judicial intervention at common law has been made out in this case."

Conclusion

As Lord Emslie notes "there is clearly room for difference of opinion as to whether the Parliament was right to legislate in the way it did, and it remains to be seen whether the 2009 Act will prove to have adverse legal or political consequences in years to come". Whilst the position may be settled, at least for the time being, in Scotland, those legal and political consequences will continue to be considered at Westminster as the Damages (Asbestos-Related Conditions) Bill, affecting England and Wales, progresses through the House of Lords.

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