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Case No: CO/966/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/10/2014

Before :

THE HONOURABLE MR JUSTICE WILLIAM DAVIS

BETWEEN:

THE QUEEN
(oao TONY WHITSTON, Asbestos Victims Support Groups Forum UK)

Claimant

- and -

SECRETARY OF STATE FOR JUSTICE **Defendant**

ASSOCIATION OF BRITISH INSURERS **Interested Party**

Jeremy Hyam and Kate Beattie (instructed by **Leigh Day**) for the **Claimant**
Shaheed Fatima and Jason Pobjoy (instructed by **The Treasury Solicitor**) for the Defendant
James McClelland (instructed by **DAC Beachcroft** for the **Interested Party**

Hearing dates: 29 - 30 July 2014

Judgment Approved by the court for handing down (subject to editorial corrections)

Mr Justice Davis :

Introduction.

1. The Claimant is the Chairman of the Asbestos Victims Support Groups Forum, an unincorporated association which represents ten different asbestos victims support groups throughout the United Kingdom. The Forum acts as a representative body for those afflicted with asbestos related diseases in respect of legal and political issues arising from such diseases. The most pernicious asbestos related disease is diffuse mesothelioma, a rare form of cancer. The cancer usually develops in the outer lining of the lungs. It generally does not become apparent until many years after exposure to asbestos, a feature which at least in the past has led to real problems when mounting a claim against those responsible for the exposure. Once the cancer does become symptomatic its progression is rapid. Most sufferers survive for less than 12 months from the onset of symptoms. Yet the effects of the disease over the period from the onset of symptoms to death are hugely painful and debilitating. This combination of factors means that litigation in relation to mesothelioma is unusual in comparison with many other types of litigation involving personal injury or industrial disease.

2. On the 1st May 2012 the Legal Aid Sentencing and Punishment of Offenders Act 2012 ("LASPO") was given Royal Assent. The Act dealt inter alia with the awarding of costs in civil proceedings. The provisions with which this claim is concerned – Sections 44 and 46 of LASPO – came into force on the 1st April 2013 in respect of almost all types of civil proceedings. Those provisions prevent the recovery of success fees and insurance premiums paid by successful claimants from unsuccessful defendants. How that was different from what had obtained prior to the 1st April 2013 and the context of the changes made to the costs position in civil proceedings will be considered hereafter. However, the provisions were not to apply at that point to proceedings relating to any claim for damages in respect of diffuse mesothelioma. Section 48(1) of LASPO provided as follows:

> "Sections 44 and 46 may not be brought into force in relation to proceedings relating to a claim for damages in respect of diffuse mesothelioma until the Lord Chancellor has (a) carried out a review of the likely effect of those sections in relation to such proceedings, and (b) published a report of the conclusions of the review."

3. In December 2013 the Lord Chancellor decided to bring into force Sections 44 and 46 of LASPO in relation to mesothelioma claims, the decision being announced by way of a written ministerial statement by the Parliamentary Under-Secretary of State for Justice. The Claimant now applies for judicial review of that decision with the permission of Mrs Justice Thirlwall granted on the 12th May 2014. The Claimant's case is that this decision was unlawful. The principal basis of his case is that the Lord Chancellor did not carry out a review sufficient to comply with the requirements of Section 48(1). He also alleges that he had a procedural legitimate expectation which

the Lord Chancellor failed to meet. The Lord Chancellor (or the Secretary of State for Justice as he has been identified in these proceedings) asserts that he carried out a review as required by Section 48(1) and that his decision was not unlawful or otherwise impugnable. The Association of British Insurers ("the ABI") has appeared as an interested party in the proceedings. In almost every case in which a claim is made for damages for mesothelioma the effective defendant is an insurance company. Insurers have an obvious interest in any costs provision of the kind reflected in Sections 44 and 46 of LASPO. The ABI supports the Defendant's case that his decision was lawful.

The factual background

4. The Legal Advice and Assistance Act 1949 introduced a system of legal aid provision in civil proceedings. From the introduction of the system in 1950 any civil litigant had a means tested entitlement to legal aid subject to the proposed claim having sufficient prospects of success. The precise scope of the scheme was varied from time to time but, in relation to claims for damages for personal injury, it continued to operate until the introduction of the Access to Justice Act 1999. In 1995 conditional fee agreements were first permitted in relation to civil litigation in England and Wales. They were intended to make it more practicable for those who did not satisfy the means tested requirement for legal aid – a significant majority of the population by this point – to have access to legal assistance in bringing a civil claim. Essentially the way in which such agreements operated was that the lawyer would not charge the litigant any fee unless the claim was successful. In that event the lawyer would charge a success fee, that fee being in addition to the lawyer's base costs and being expressed as a percentage of those costs. Although not a necessary part of a conditional fee agreement, it was commonplace for litigants who entered such an agreement to take out a policy of insurance to cover the risk of having to pay the costs of the other side and the costs of their own disbursements (such as experts' reports). This was known as After the Event insurance ("ATE"). From 1995 until 2000 the success fee charged and the ATE premium were borne by the litigant even if successful in the proceedings. Those sums would be deducted from the damages recovered.

5. The Access to Justice Act 1999 made fundamental changes to the position, particularly in relation to claims for personal injury. The practical effect of the 1999 Act was to remove legal aid provision in such claims (save for claims in relation to clinical negligence). In order to ensure that this did not very seriously affect the access to justice in such cases and that personal injury cases still could be funded, the 1999 Act also changed the position in relation to success fees and ATE. From 2000 success fees and the ATE premium were recoverable from the unsuccessful party. Thus, the unsuccessful party in personal injury proceedings would have to pay the award of damages, the recoverable costs of the successful party, the success fee payable by the successful party and any ATE premium paid by the successful party.

6. As these provisions of the 1999 Act bedded in and their effect became apparent, the view spread that the costs of civil litigation were increasing in a manner unjustified by the nature of the claims to which the costs related. This view was not restricted to those adversely affected by the level of costs. It was also held by some of the judges trying the claims and assessing the costs. In November 2008 the then Master of the Rolls appointed Lord Justice Jackson to conduct a review of the costs of civil litigation. Lord Justice Jackson carried out initial investigations between January and April 2009. He published what was described as a Preliminary Report on the 8th May 2009. The foreword to this report said as follows:

> "The first step is to marshal the available evidence, to identify the issues for consideration and to set out the relevant factors and competing arguments. Four months have been allotted to this task, namely January to April 2009. This preliminary report is the product of investigations which I have carried out during those four months, with considerable assistance from the assessors and the other persons who are thanked in chapter 1.
> Today marks the beginning of the second phase of the Costs Review, namely the consultation period. I hope that this report will be of assistance to all who wish to participate in the consultation exercise. The facts set out in this report and the appendices have been gathered from many sources. They are not intended to support any particular conclusion. On the contrary I hope to ascertain, with the assistance of consultees, where those facts lead us. The data in the appendices, including the results of the four week judicial survey, will have to be analysed in greater detail than has been possible so far. The focus of attention over the last four months has been upon collecting the data rather than reaching conclusions."

This explains why the Preliminary Report (in its printed form) was in two volumes and ran to 660 pages together with 30 appendices, the appendices being published as a CD-Rom for ease of reference. The consultation was to occupy the following three months. Lord Justice Jackson received written submissions from hundreds of individuals, firms and representative bodies. He met many individuals or groups and conducted public meetings.

7. Lord Justice Jackson completed his Final Report in December 2009. It was published in January 2010. This report covered a mere 557 pages. The explanatory foreword was terse and to the point.

> "In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice."

Lord Justice Jackson concluded that the recoverability of success fees and ATE premiums had had "unfortunate unintended consequences" and that this regime as introduced by the Access to Justice Act 1999 had been one of the main drivers of excessive costs. He recommended that success fees and ATE premiums should cease to be recoverable from unsuccessful opponents in civil litigation. That recommendation was of general application. Clearly it applied to personal injury proceedings.

8. The review conducted by Lord Justice Jackson was vast in its scope. He and his assessors considered detailed evidence from many sources in relation to various types of civil proceedings. Having done so he did not identify any class of proceedings to which his recommendation should not apply. Equally (so far I am aware) he did not explicitly review the position of claims for damages for diffuse mesothelioma. I have not been directed to any part of either of the reports published by Lord Justice Jackson in which he referred to such claims. No evidence has been placed before me to suggest that he gave particular consideration to such claims. The factual material contained in the appendices to his Preliminary Report includes a considerable amount of detailed analysis of claims made in proceedings. I am not aware of any specific material in the analysis which related particularly to claims involving diffuse mesothelioma. The absence of particular analysis of mesothelioma claims by Lord Justice Jackson does not represent any criticism of his monumental work. However, it is relevant when considering what was required of the Lord Chancellor by Section 48 of the Act.

9. In November 2010 the Ministry of Justice issued a consultation paper entitled **Proposals for Reform of Civil Litigation Funding and Costs in England and Wales**. It was concerned with the potential implementation of the recommendations of the Final Report of Lord Justice Jackson. Although Lord Justice Jackson had described his proposals as "a coherent package of interlocking reforms", the consultation paper did not consider the entirety of that package. It covered what was described in the ministerial foreword as "the priority recommendations for Government". Those were defined as the recommendations on the abolition of recoverability of success fees and ATE premiums with the associated reforms in relation to damages.

10. At paragraphs 42 to 73 the consultation paper rehearsed the issues in respect of recoverability of success fees from the unsuccessful party. At paragraphs 63 et seq the paper identified the recommendation of Lord Justice Jackson, namely that such recoverability should be abolished. At paragraph 64 the paper said this:

> "Sir Rupert is convinced that if recoverability were abolished then success fees and ATE insurance premiums would become subject to market forces. Claimants would shop around for lower success fees and ATE insurance premiums."

The paper read as a whole plainly indicates that the Government at that point accepted the merits of that argument. However, the paper went on to identify concerns about the abolition of recoverability. At paragraph 70 certain types of case were identified in which simple abolition might be problematic. One type of case was a claim for industrial disease. Options to mitigate the impact were put forward. They included retaining at least some element of a recoverable success fee in specific categories of case.

11. The proposal that ATE premiums should not be recoverable was considered at paragraphs 74 to 94 of the consultation paper. Again the thrust of the consultation document demonstrated an acceptance that the proposal was the proper way forward subject to the outcome of the consultation. This was in the light of the proposal for qualified one way costs shifting i.e. a system whereby a losing claimant in a personal injury claim would only pay the winning defendant's costs in limited circumstances akin to those applicable to a legally aided claimant. The consultation paper considered the possibility of retaining recoverability of ATE premiums to insure against the risk of claimants having to meet their own disbursement costs in cases where they were unsuccessful.

12. The consultation period ran from November 2010 to February 2011. In the event the Government decided to implement the success fee and ATE premium reforms proposed by Lord Justice Jackson and did so in what eventually became the Legal Aid Sentencing and Punishment of Offenders Act 2012 ("LASPO"), the Bill being introduced in the House of Commons in June 2011. The Bill contained very many provisions and, as the title might suggest, most of them had nothing to do with civil litigation funding and costs in England and Wales. Many were controversial for other reasons unconnected with the subject matter of this claim. It was not until November 2011 that the Bill reached the House of Lords. It was there that the issue of recoverability of success fees and ATE premiums became significant.

Parliamentary consideration of success fees and ATE premiums

13. By the time that the Bill was under consideration by the House of Lords the proposed provisions in relation to success fees and ATE premiums were in Clauses 43 and 45 of the Bill. When enacted the provisions formed part of Sections 44 and 46 of LASPO. The relevant parts of each section are as follows, these being the provisions under consideration by the House of Lords:

> "S. 44 .....A costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement.
>
> S. 46 .....A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2)."

The Committee stage in the House of Lords was protracted. One sitting in Committee was on the 30th January 2012. On that date there was a debate in relation to amendments to Clauses 43 and 45. The amendments, proposed by Lord Alton, sought to exclude the operation of those Clauses from cases in respect of diffuse mesothelioma. The evidence does not make clear whether the proposed exclusion went beyond that i.e. to exclude other diseases. However, the debate centred on mesothelioma.. At the conclusion of the debate Lord Alton withdrew the amendments. This was not because he and those who supported him were convinced by the contrary arguments. Rather, it was to enable further discussion between Lord Alton and the Ministry of Justice. Lord Alton warned that he would return to his amendments at the Report stage in the House of Lords "if we are unable to make progress on this issue".

14. The relevant debate at the Report stage in the House of Lords occurred on the 14th March 2012. The day before the debate there had been discussion between Lord Alton and Lord McNally, the Minister of State at the Ministry of Justice. This discussion had not resolved the issue to the satisfaction of Lord Alton. Therefore, in the debate he proposed amendments to Clauses 43 and 45. The relevant amendments appear to have related to claims for any respiratory disease, not just mesothelioma. That is how they were described by Lord McNally in the course of the debate. Equally, the debate concentrated on the possible effect of removing the recoverability of success fees and ATE premiums in claims for diffuse mesothelioma. It was that disease to which the amendments essentially were directed. At the conclusion of the debate there was a division of the House and the amendments were agreed.

15. The Bill as amended in due course returned to the House of Commons. Lord Alton's amendment was overturned by the House of Commons. There followed what is commonly referred to as Parliamentary ping pong in respect of the amendment. The House of Lords restored the amendment. Insofar as the evidence before me shows, the amendment to Clauses 43 and 45 now was restricted to claims for diffuse mesothelioma. On the 24th April 2012 the Bill returned to the House of Commons. Jonathan Djanogly, the Parliamentary Under-Secretary of State for Justice, told the House that he had met with various interested parties, including Lord Alton, and that the Government had decided not to commence Clauses 43 and 45 (as they still were) in relation to mesothelioma claims when all other claims became subject to the new success fee and ATE premium regime. Rather, an amendment was put forward, the amendment being what is now Section 48 of LASPO (see paragraph 2 above).

The meaning of Section 48 and the use of external aids for statutory construction

16. The Claimant argues that Section 48 was enacted in recognition of the fact that cases involving mesothelioma constituted a "special case". He asserts that the meaning of Section 48 is that the review was required in order to produce a rational justification for the removal of the exemption of mesothelioma cases from the operation of Sections 44 and 46. This argument is said to be supported by consideration of what was said in the course of Parliamentary debates.

17. The Defendant (supported by the Interested Party) argues that Section 48 was a pragmatic exclusion of mesothelioma claims from the operation of Sections 44 and 46 pending a review into whether there was any proper or justifiable reason for so excluding them. Insofar as it is appropriate to refer to Parliamentary material, the Defendant contends that this supports his argument. However, his primary submission is that such reference is inappropriate, the meaning of Section 48 being plain and unambiguous.

18. In Pepper v Hart [1993] A.C. 593 the House of Lords identified the circumstances in which the rule excluding reference to Parliamentary material as an aid to statutory construction could be relaxed. Three conditions had to be met. First, the legislation was ambiguous or obscure or would lead to absurdity. Second, the material relied on consisted of statements by a Minister or promoter of the Bill together with other material necessary to understand those statements. Third, the statements relied on were clear. These conditions were discussed by the House of Lords in R v Secretary

of State for the Environment Transport and the Regions ex parte Spath Holme [2001] 2 A.C. 349. I have been referred to two passages in particular. First, Lord Bingham of Cornhill at page 392:

> "Unless the first of the conditions is strictly insisted upon, the real risk exists, feared by Lord Mackay, that the legal advisers to parties engaged in disputes on statutory construction will be required to comb through Hansard in practically every case (see pp. 614G, 616A). This would clearly defeat the intention of Lord Bridge of Harwich that such cases should be rare (p. 617A), and the submission of counsel that such cases should be exceptional (p. 597E)."

Second, Lord Nicholls of Birkenhead at page 399:

> "This constitutional consideration does not mean that when deciding whether statutory language is clear and unambiguous and not productive of absurdity, the courts are confined to looking solely at the language in question in its context within the statute. That would impose on the courts much too restrictive an approach. No legislation is enacted in a vacuum. Regard may also be had to extraneous material, such as the setting in which the legislation was enacted. This is a matter of everyday occurrence.
>
> That said, courts should nevertheless approach the use of external aids with circumspection. Judges frequently turn to external aids for confirmation of views reached without their assistance. That is unobjectionable. But the constitutional implications point to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity. Sometimes external aids may properly operate in this way. In other cases, the requirements of legal certainty might be undermined to an unacceptable extent if the court were to adopt, as the intention to be imputed to Parliament in using the words in question, the meaning suggested by an external aid. Thus, when interpreting statutory language courts have to strike a balance between conflicting considerations."

19. I am quite satisfied that the terms of Section 48 are not obscure or ambiguous within the meaning of the decision in Pepper v Hart (supra). At first sight it is an odd provision. It does not give any indication as to what should occur after the review has been concluded or whether the outcome of the review should determine the bringing into force of Sections 44 and 46 in relation to mesothelioma claims. However, Section 48 sets out in clear terms what is to be done by the Lord Chancellor. He must carry out a review of the likely effect of removing the recoverability from the unsuccessful party of success fees and ATE premiums in claims for damages for diffuse mesothelioma. Whilst the section does not inform the reader as to the intended consequence of the review, that is not something which is necessary for a proper understanding of what the Lord Chancellor has to do. The setting in which Section 48 was enacted is something to which I must have regard as explained in Spath Holme (supra). So it is that I have considered the history of civil litigation funding, the report of Lord Justice Jackson, the Government response to that report and the course of the Act through Parliament. But the meaning of Section 48 is sufficiently clear for any recourse to extraneous Parliamentary material to be

unnecessary and unlawful. The precise nature of the review required is not set out in the legislation. That does not create an ambiguity. Rather, it leaves a discretion to the Lord Chancellor as to how he is to conduct the review. Implicit in the requirement placed on the Lord Chancellor is that the review should be a proper review sufficient to identify the likely effect of the LASPO changes on mesothelioma claims. All parties to these proceedings agree that this is the ordinary and natural interpretation of Section 48. It is inconceivable that Parliament would have required a Minister of the Crown to conduct a statutory review otherwise. Even if it were thought that recourse to Parliamentary material was necessary or appropriate to determine beyond that what was meant by "a review", such recourse would not provide any assistance in relation to that determination. At no stage prior to LASPO being given Royal Assent on the 1st May 2012 did any Minister explain what form the review would take or its ambit. When Section 48 (as it now is) was introduced on the 24th April 2012 by Jonathan Djanogly he was asked what kind of review was anticipated. Mr Djanogly said that "we have not thought through the exact procedures of the review". Lord McNally on the 25th April 2012 in the House of Lords said that "I cannot say much more at this early stage about the precise terms of the review but it will be a proper and appropriate one".

20. In the skeleton argument filed on behalf of the Defendant, the issue as to the meaning of Section 48 was expressed thus:

> "……is s.48 a pragmatic exclusion of mesothelioma claims pending a review/report into whether there is any properly justifiable reason for excluding mesothelioma claims from such reforms (as the SSJ contends) OR is s.48 a principled exclusion of mesothelioma claims pending a review/report into whether there is any properly justifiable reason for including mesothelioma claims in such reforms (as the Claimant contends)?"

In my view Section 48 is neither of these things. The section requires a review of the likely effect of the provisions of Section 44 and 46 in relation to claims for damages for diffuse mesothelioma. It means no more and no less. To ascribe a particular motivation for the review required by Section 48 is not justified by the terms of the section and is not necessary to understand the duty placed on the Lord Chancellor.

Legitimate expectation

21. Before moving to consider what the Lord Chancellor did by way of a review and whether it was sufficient to meet the requirements of Section 48, it is convenient to consider the Claimant's argument that what was done failed to meet the legitimate procedural expectation of those affected by the review. That is because the argument depends upon the relevance, admissibility and meaning of what was said by Crispin Blunt, a Ministerial colleague of Jonathan Djanogly, during a debate in the House of Commons on the effect of legal aid reform on mesothelioma cases. Although the debate was said to relate to legal aid reform, in reality it was a debate about the possible effect of Sections 44 and 46 of LASPO on such cases. The first point to note is that the debate took place on the 26th June 2012 which was nearly two months after LASPO had been given Royal Assent. The debate included contributions from various members of the House of Commons about the nature of mesothelioma and how Sections 44 and 46 might affect cases involving the disease. Some members posed the question: what form will the Section 48 review take? Mr Blunt, at the

conclusion of the debate, said: "I can give a commitment that we will consider all the factors raised today when we come to set the review's terms of reference....the review will occur against the backdrop of a substantially changed conditional fee arrangement market, so we will of course consider the effect of those changes as part of the review".

22. The Claimant relies on the judgment of Laws L.J. in R (Bhatt Murphy) v The Independent Assessor [2008] EWCA Civ 755. He argues that what was said by Mr Blunt amounted to an "unequivocal assurance" that the review to be carried out under Section 48 would encompass all the factors discussed in the debate on the 26th June 2012. I am satisfied that nothing said by Mr Blunt gave rise to any legitimate expectation of the kind contended for by the Claimant. What he said was far from an "unequivocal assurance" as to the nature of the review. At best he said that the Government would consider what had been said in the debate when setting the terms of reference of any review.
23. The Defendant and the Interested Party contend that the "legitimate expectation" argument as now put by the Claimant was not part of his grounds and emerged only in his skeleton argument filed some 10 days prior to the hearing. They argue that the Claimant requires leave and that I should not give leave in the light of the very late stage at which the point has been raised. Since I do not consider that the argument has any substantive merit, the issue of leave is academic.

The Review

24. On the 18th December 2012 Helen Grant, the successor to Jonathan Djanoly as Parliamentary Under-Secretary of State for Justice, announced a consultation on proposals to reform the way in which mesothelioma cases were dealt with both pre-action and after issue of proceedings. She also said that "as part of that consultation we will carry out the review required under Section 48....We intend to publish the outcome of that review next autumn". In the event there was slippage of the timetable. The consultation document was not issued until July 2013. It was entitled "Reforming mesothelioma claims – a consultation on proposals to speed up the settlement of mesothelioma claims in England and Wales".

25. As the title of the consultation document suggested, it was concerned principally with proposals relating to how mesothelioma claims should be progressed. A pre-action protocol was proposed. It was proposed that there should be a fixed costs regime. It was indicated that both existing legislation and proposed legislation would assist those with mesothelioma where the potential defendant either could not be traced or was insolvent. The Ministerial Foreword then said this:

> "Finally, this consultation also covers the review, in accordance with section 48 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), of the likely impact on mesothelioma claims of the conditional fee agreement (CFA) reforms which came into effect on 1 April 2013 if those provisions are now commenced for these types of case."

The Foreword concluded with further reference to the desirability of quick and fair settlement of mesothelioma claims to ease the suffering of victims. It said that the Government believed that the proposals – which had to mean the proposals for a pre-

action protocol and the like rather than a reference to the review which did not involve proposals as such – would help to achieve this. Then this: "The proposals in this paper may not be the only ones. We are keen to hear your views on our proposals and any further ideas you may have to help the victims of this dreadful disease and their dependents." The Defendant has argued that the content of the Ministerial Foreword meant that the consultation was not confined to those aspects where explicit questions were posed. He relies on R (Bard) v Secretary of State for Communities and Local Government [2009] EWHC Admin 308 in which Mr Justice Walker emphasised that consultation documents have to be read as a whole including the Foreword. In Bard (which concerned a wide ranging Housing Green Paper) there was a general invitation for readers to send in their views on housing supply policy issues. This was held to encompass any views on so-called Eco-Towns even though the Green Paper did not include particular questions on such developments. The context and scope of this consultation document is wholly different. The review required by Section 48 had no immediate connection with the aims of the proposals set out in the consultation paper. Contrary to the argument put forward by the Defendant, the reference to "any further ideas" in this Ministerial Foreword could not and cannot be used to inform the section within the consultation paper dealing with the Section 48 review.

26. The Section 48 review was considered at paragraphs 65 to 76 of the consultation paper. Paragraph 65 read as follows:

> "This part of the consultation paper explains the review to be carried out in accordance with section 48 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012. The review is looking at the likely effects of sections 44 (conditional fee agreements: success fees) and 46 (recovery of insurance premiums by way of costs) of the LASPO Act in relation to mesothelioma proceedings. The Government will consider the likely effects, and determine the outcome of the review – that is, whether sections 44 and 46 should be brought into force in relation to mesothelioma claims – in the light of this consultation and the information provided as a result."

The reference to the "review is looking at the likely effects..." might suggest that the review was an exercise of which the consultation was only a part. However, the concluding sentence of the paragraph suggests that the review was to be the consultation and that the consultation and the responses thereto constituted the review. The evidence of Robert Wright, the civil servant in the Ministry of Justice responsible for advising ministers on civil litigation funding and costs, demonstrates that the consultation exercise was the principal basis on which the review was conducted. He refers in his evidence to the fact that the Ministry of Justice "has kept an eye on developments" since the general implementation of Sections 44 and 46 in April 2013 and that he had "not been made aware of the particular difficulty of bringing higher value...personal injury claims". I agree with the proposition put forward by the Defendant that he could rely on matters put before him by civil servants with knowledge and expertise. Equally, any such matters must constitute a process of review in order to form part of the Section 48 process. Neither matter referred to by Mr Wright could satisfy the requirement for the review under Section 48. The evidence of having "kept an eye on developments" is wholly non-specific. In any event keeping an eye on developments could hardly inform the Lord Chancellor on the likely effect of LASPO reforms on a type of litigation to which they did not yet

apply. As for the fact that he had "not been made aware" of difficulties, that cannot constitute a review. If nothing else, a review must involve some positive action. Moreover, the review required consideration of the likely effect of the LASPO reforms on mesothelioma claims. Plainly such claims would be likely to fall within the category of "higher value...claims" but Section 48 required a particular not a generic review.

27. I agree with the contentions of the Defendant that Section 48 did not stipulate any particular form of review, that Section 48 did not necessarily require the review to be postponed until empirical evidence became available (i.e. from the effect of the LASPO reforms in other types of personal injury litigation) and that the Lord Chancellor had a discretion as to how to conduct the review. It may be that another Lord Chancellor would have conducted the review by some means other than a consultation exercise. However, the method adopted was permissible. What was required was a consultation exercise that met the requirement of Section 48. It had to enable a review of the likely effects of Sections 44 and 46 on mesothelioma claims.

28. Much time was spent in discussing the authorities – of which there are many – which deal with the circumstances in which a consultation process will be considered to be unlawful. The Defendant cited what was said by Mr Justice Ouseley in what is known as the HS2 case:

> "the Court judges on an objective basis whether the process has been so unfair as to be unlawful in all the circumstances ... A consultation process is not unlawful because it could be improved on, let alone with the benefit of hindsight. The person undertaking the consultation process has a wide discretion as to its scope, when in the decision-making process it is carried out, so long as it is still at the formative stage, and how it should be carried out- the more so where the process is nationwide and includes issues of a general policy nature." R (Buckinghamshire CC) v Secretary of State for Transport [2013] EWHC 481 (Admin).

There can be no argument but that this is a correct statement of the law. I adopt it insofar as it applies to this case. I do observe that the authorities generally deal with consultations about a proposed course of action (or a series of options) with the consultation being a part of the decision making process. In this instance the consultation was used to carry out a specific review. It is rather easier for a court to determine whether the consultation has achieved the required purpose in those circumstances.

29. The Defendant argued that the consultation paper and the responses thereto have to be considered as a whole and that the reasonable meaning of the consultation has to be considered on an objective basis. It was argued that the subjective views of particular respondents are irrelevant to the court's assessment of the consultation. Therefore, if the consultation objectively could be considered to be a proper review, it could not be said that it was not a proper review just because consultees said that it was not. Again I agree with this analysis. It is akin to the concept of the reasonable man and how the standard of such a person is to be judged by the court. The judgment of Lord Reed in Healthcare at Home v The Common Services Agency [2014] UKSC 49 demonstrates the point.

> "It follows from the nature of the reasonable man, as a means of describing a standard applied by the court, that it would misconceived for a party to seek to lead evidence from actual passengers on the Clapham omnibus as to how they would have acted in a given situation or what they would have foreseen, in order to establish how the reasonable man would have acted or what he would have foreseen. Even if the party offered to prove that his witnesses were reasonable men, the evidence would be beside the point. The behaviour of the reasonable man is not established by the evidence of witnesses, but by the application of a legal standard by the court. The court may require to be informed by evidence of circumstances which bear on its application of the standard of the reasonable man in any particular case; but it is then for the court to determine the outcome, in those circumstances, of applying that impersonal standard."

Evidence of the responses to the consultation will be relevant to the assessment of whether the review satisfied the requirement of Section 48 but such evidence cannot be determinative of the issue. That (as the Defendant argues) must be for the court to determine objectively taking into account all of the circumstances.

30. Paragraphs 66 to 71 of the consultation document set out the essence of Lord Justice Jackson's reports and the subsequent legislative history in very summary form. I do not need to set out the content of those paragraphs here because it would be mere repetition of the much fuller discussion contained in this judgment. Paragraphs 74 to 76 of the consultation document rehearsed the position under Sections 44 and 46 as it applied to all other personal injury claims i.e. the increase in the level of general damages by 10%, the capping of success fees at 25% of damages for non-pecuniary and past financial losses and the system of qualified one way costs shifting. These paragraphs simply set out the funding position that would obtain were Sections 44 and 46 to apply to mesothelioma claims. Paragraphs 72 and 73 were the critical part of the review process. They were as follows:

> "72 The Government believes that other changes set out in this consultation, and the changes to the statutory framework for funding of litigation described above, together with the changes being introduced in the Mesothelioma Bill should make it possible, and appropriate, for sections 44 and 46 of the LASPO Act to be brought into force for mesothelioma claims at the same time as those other changes. The Mesothelioma Bill was introduced in Parliament on 9 May 2013, and it is hoped that it will receive Royal Assent this year, with the relevant provisions coming into effect in 2014.
>
> 73 The Government is committed to ensuring that all the changes – set out in this consultation paper and in the Mesothelioma Bill - are considered in a synchronised manner, and that mesothelioma sufferers benefit from the changes and receive compensation in a speedy and efficient way. Views on the likely effects of sections 44 and 46 of the LASPO Act in relation to mesothelioma claims in the light of the other changes would therefore be welcomed."

31. Two things follow from those two paragraphs. First, the objective reader/consultee would conclude that the proposal to apply Sections 44 and 46 to mesothelioma claims was linked to and affected by the other proposals in the consultation document. Second, such a person would conclude that his or her views on the likely effect of Sections 44 and 46 were to be given on the assumption that all of those proposals were to take effect. The objective reader/consultee would then be fortified in his or her conclusions by the terms of the question posed pursuant to the review. It was as follows:

> "15 Do you agree that sections 44 and 46 of the LASPO Act 2012 should be brought into force in relation to mesothelioma claims, in the light of the proposed reforms described in this consultation, the increase in general damages and costs protection described above, and the Mesothelioma Bill?"

Indeed the question of itself did not invite the objective reader/consultee to assess the likely effects of Sections 44 and 46 on mesothelioma claims. As the Defendant argues, an exercise such as this must be considered in its entirety and he is entitled to point to the final sentence of paragraph 73 of the consultation document. But that sentence itself refers to the likely effects "in the light of the other changes". Viewed as a whole the consultation document objectively was not in such terms as would provide the Defendant with what he needed for his review.

32. The Defendant argues that, whatever the objective meaning of the consultation document and the question posed, at least some of those who responded understood that he was conducting his review of the likely effect of Sections 44 and 46 on mesothelioma cases. The Defendant notes that the Claimant himself responded to Question 15 by reference to the review. In fact his response was simply an observation that the suggestion that LASPO reforms and/or the other proposals in the consultation document mitigated the effects of Sections 44 and 46 was "simply recycling discredited arguments and adds nothing to the review of the effects of Sections 44 and 46". The Claimant responded to the question in the context of the material set out in paragraphs 65 to 76 of the document. Many other responses made it clear that it was not considered that the consultation exercise fulfilled the requirements of Section 48. For instance, The Law Society of England and Wales concluded its response to Question 15 as follows:

> "We do not consider that a single consultation question feeding into an otherwise closed review on removing these key protections for mesothelioma sufferers is likely to produce the detailed data and analysis required to make a satisfactory assessment of the impact on such sufferers of introducing the stated sections, as required by section 48 of the LASPO Act."

There is some irony in the position impliedly taken by the Defendant i.e. the court must consider the review objectively but, if an objective view leads to the conclusion that the hypothetical consultee would not understand that the consultation was the Section 48 review, the court can look at how real consultees in fact responded. This might avail the Defendant if the overwhelming majority of the responses provided a view as to the "likely effect of Sections 44 and 46" so as to demonstrate that a proper Section 48 review could be and was undertaken. That is not the case.

33. There was considerable debate in the course of the hearing as whether the consultation document constituted an indivisible package or whether the Section 48 review as set out at paragraphs 65 to 76 was a discrete review. With respect to the competing arguments I consider that this debate was sterile. The issue is whether the consultation document could provide the Defendant with what he needed to conduct the review required by Section 48. For the reasons I have set out above I do not consider that it could. The consultation process as adopted did not enable a proper review of the likely effect of Sections 44 and 46 on mesothelioma claims.

The Decision

34. The outcome of the review was announced by way of a written ministerial statement on the 4th December 2013. On this occasion the Government Minister was Shailesh Vara. The statement identified the consultation and stated that it incorporated the review required by Section 48. It said that over 100 responses had been elicited. The Minister went on to say this: "The Government does not believe that the case has been made for mesothelioma cases to be treated differently, in particular by comparison to other personal injuries, which can also have profound consequences for the sufferer." It is of note that the Minister did not give any indication of what the Lord Chancellor had concluded as to the likely effect of Sections 44 and 46 on mesothelioma cases – which was the statutory purpose of the review. The statement also announced that the other proposals in the consultation document – the "proposed reforms" referred to in Question 15 – were not to be pursued. Therefore, the basis upon which any consultee had answered Question 15 no longer applied. This is not fatal to the Defendant's argument that the consultation was a proper review under Section 48. Equally it is hardly helpful to his case. In objective terms a consultee could reasonably have been expected to express a view in relation to Sections 44 and 46 based on the premise that the other proposed reforms would be implemented. Objectively the outcome of that consultation has to be flawed if the premise no longer applies.

35. The report required by Section 48(1)(b) of the Act was published on the 6th March 2014. In the course of the hearing I was told by counsel for the Claimant that no point was taken on the adequacy of the reasons given in the report and that I did not need to examine the reasons for that purpose. There are some aspects of the report which require mention. The report identified that the review had consisted inter alia of "pre-consultation consideration by the Lord Chancellor". I have no evidence of what this may have been save for the evidence of Robert Wright. For the reasons I already have given I consider that his evidence demonstrates no proper review prior to the consultation. The report also cited data which had been published by NIESR in relation to mesothelioma cases. This data was not published until January 2014 so it cannot have been part of the review given that the decision was announced a month earlier. Whether it would have provided appropriate material for the purposes of carrying out the review required by Section 48 has not been addressed in detail by any party. The Defendant's skeleton argument makes the bare assertion that the NIESR data provided additional support for the decision reached by the Lord Chancellor but this assertion was not developed. I conclude that the NIESR data does not assist in determining whether the Lord Chancellor conducted a proper review. It has not been argued by the Defendant that, even if the review did not satisfy Section 48, a proper review would have reached the same conclusion.

Conclusions

36. I have not reflected in this judgment some of the arguments made on behalf of the Claimant. He invited consideration of Secretary of State for Education and Science v Tameside M.B.C. [1977] A.C. 1014. It was argued that the decision of the Lord Chancellor in this case was Tameside irrational because he failed to acquaint himself with the relevant material and to ask himself the right question. The Defendant submitted that this argument was misconceived because Tameside arose in a specific statutory context which did not apply in this instance. With respect to these competing arguments I do not consider that I need to resolve them in determining the issue before me. The question I have to answer is simple: did the Lord Chancellor carry out a proper review of the likely effects of the LASPO reforms on mesothelioma claims as Section 48 required him to do? The Claimant also argued that R v Brent London Borough Council ex p Gunning (1985) 84 LGR 168 was relevant to his case in that Gunning identified criteria required of a lawful consultation, one of which was a requirement that the consultation must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response. The Defendant submitted that, in the circumstances of this case, this criterion only could arise if the proper interpretation of Section 48 was that mesothelioma claims were established as a principled exception to the LASPO reforms. I do not follow why this necessarily should be so. But I also do not consider that the Gunning criteria are of relevance in this instance. In respect of his review of the likely effect of Sections 44 and 46 on mesothelioma claims the Lord Chancellor was not engaged in a consultation of interested parties about a set of proposals. The fact that he decided to carry out his review by way of a consultation exercise – or to be more accurate as an adjunct to a consultation exercise – does not mean that inapposite general principles in relation to consultation exercises have any relevance.

37. I repeat the core point in these proceedings. The issue is whether the Lord Chancellor conducted a proper review of the likely effect of the LASPO reforms on mesothelioma claims. For the reasons given above I conclude that he did not. No reasonable Lord Chancellor faced with the duty imposed on him by Section 48 of the Act would have considered that the exercise in fact carried out fulfilled that duty. I do not find that a consultation exercise per se was an inappropriate means of fulfilling the duty. Rather, the nature of this consultation meant that it did not permit the Lord Chancellor to do so.

38. The Interested Party argued that no relief should be given despite the procedural failings which led to the lack of a proper review under Section 48 since the failings could not have made any conceivable difference to the outcome. It was submitted that the Lord Chancellor would be bound to make the same decision after a review as required by Section 48. Given the fact that the Lord Chancellor, by reason of the course he adopted, did not review the likely effects of the LASPO on mesothelioma cases in any meaningful sense, I do not consider that I possibly can reach that view. This is not a case in which the procedural failing was minor or technical in nature. Whilst it is clear that the Government has a clear view about the merits of applying the LASPO reforms to mesothelioma cases, there has not been a proper review as required by Section 48. As indicated in paragraph 19 above Section 48 is an odd provision. In part because of what might be termed its free-standing nature, I consider

that it would not be appropriate to dismiss the claim for the reason argued by the Interested Party.

39. I shall hear argument from the parties as to the appropriate relief. In strict terms I am concerned only with whether there was a proper review under Section 48. In view of my conclusion on that issue, my preliminary view is that I simply should make a declaration that the Lord Chancellor has failed to carry out a review as required by Section 48. The statutory consequence of such a declaration must be that that Sections 44 and 46 cannot be brought into force in relation to proceedings relating to a claim for damages in respect of diffuse mesothelioma. The decision of the 4th December 2013 will fall as a result of the operation of Section 48.

40. Whilst these proceedings were under way, the House of Commons Justice Committee conducted an inquiry into the appropriateness of the decision made on the 4th December 2013. The inquiry considered how the review pursuant to Section 48 had been carried out. At the conclusion of the hearing of these proceedings on the 30th July 2014 it was known that the Justice Committee's report was due to be published two days later. I indicated that I would consider the report when it had been published and that I would invite any submissions in relation to the content of the report if I considered this to be necessary or appropriate. Having considered the report after its publication, I concluded that no further submissions were required. I e-mailed the parties in these terms:

> "As was anticipated on the 1st August 2014 the House of Commons Justice Committee issued its Third Report of the Session 2014-15 entitled Mesothelioma Claims. I have read the report. Many of the issues discussed in the report were raised in the evidence placed before me in the course of the judicial review proceedings and in the submissions made during the hearing on the 29th and 30th July 2014. I do not consider that it is necessary for any party to make further written submissions about the content of the report. As the Committee notes on page 14 of the report it is not its function to adjudicate on the Secretary of State's compliance with the relevant statutory requirement; rather its judgment is a political one. That political judgment may or may not lead to the same result as my judgment on the alleged breach by the Secretary of State of his statutory and public law duty. The report cannot inform my conclusion."

I do not need to expand on that e-mail. My reading of the report of the Justice Committee has not influenced my decision.

41. I have concluded that no particular form of review was required by the terms of Section 48. It follows that it is not for me to set out the form of the review that will be required if the Lord Chancellor is to fulfil his duty under that section. My task has been to identify whether what happened did satisfy the requirement under Section 48. Having done so, it is now for the Lord Chancellor to carry out a proper review of the likely effects of the LASPO reforms in whatever manner he concludes will permit him reasonably to achieve the required purpose. In addition it is not for me in the current proceedings to resolve the oddity of Section 48 as set out in paragraph 19 above. That raises quite different issues to those argued before me.