

# A JUST RESULT

## Harminster Bains explains her firm's successful judicial review of government changes affecting mesothelioma victims

This article concerns the recent case of *R (on the Application of Whitston) v Secretary of State for Justice* [2014] EWHC 3044 (Admin).

### Background

On 24 July 2013, the government released a consultation headed 'Reforming Mesothelioma Claims'. The stated objective was to ensure that claims were settled as quickly and efficiently as possible. It proposed four major changes, as follows:

1. A mesothelioma pre-action protocol (MPAP)
2. A secure mesothelioma claims gateway (SMCG)
3. Fixed recoverable costs (FRC)
4. Removal of the section 48 exemption for mesothelioma claims under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

Surprisingly, the consultation did not refer to the existence of - nor to the success of - the specialist mesothelioma list in the RCJ, and to the 'show cause' procedure as set out in the Practice Direction 3D. Nor did it mention that the Association of British Insurers, which had attempted to introduce an almost identical pre-action protocol in 2007, had consented at a meeting with Master Whitaker and other interested parties to the practice direction being implemented.

The efficiency and success of the RCJ mesothelioma list is acclaimed by not only those practitioners involved in it, but by other courts in the UK and abroad. The speed at which it deals with urgent cases is unparalleled.

### The first judicial review

On 22 October 2013, Tony Whitston, on behalf of the Asbestos Victims Support Groups Forum UK (the Forum), represented by my firm, issued judicial review proceedings against the government, and



argued that the consultation was proceeding on an invalid basis. The proposals were based on inaccurate and unreliable data and a number of false assumptions. Despite several requests for disclosure of key information to allow informed responses, and intelligent debate, the government refused to do so. We had obtained reports from three independent statisticians who all agreed that the government data was incomplete, and one stated that 'the data that have been analysed appear to be missing key elements of information, an oversight that may be a mistake or more worryingly, intentionally to render misleading results'.

As the JR proceeded, the Treasury Solicitor requested extra time to provide its submissions. APIL and other victims' groups campaigned strongly against the proposals, and on 4 December 2013, government announced that, in light of the responses to the consultation, it had decided not to go ahead with the first three proposals as set out above. We then withdrew our judicial review.

But the government also announced that it would proceed to remove the section 48 exemption from LASPO, and therefore apply sections 44 and 46 to mesothelioma cases. This would mean that the dying victims or their dependents would no longer recover the success fee or the costs of the after-the-event insurance premium from the losing party, which in these cases are usually met by the employers' liability insurers.

### The second judicial review

The government sought to make victims of mesothelioma pay up to 25% from their compensation on the basis that it did not believe that the case had been made that claimants would generally be worse off.

This was astonishing, as the reason for the section 48 exemption in the first place was because the government accepted - at least in parliament if not in private - that there was a special case for exempting mesothelioma cases from LASPO. These factors included:

- (i) That mesothelioma claimants were not, and could not sensibly be seen as part of the 'compensation culture' against which the Jackson reforms were directed.
- (ii) That mesothelioma victims who have just months to live should not have to shop around to find the best deal.
- (iii) That 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'.
- (iv) That 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.
- (v) That 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.

So on 3 March 2014, we commenced further judicial review proceedings on behalf of the Forum. We argued that the government had a statutory obligation under s48 LASPO to carry out a review into the 'likely effect' of the abolition of recoverability of success fees and the ATE insurance premium from the losing party, and not to bring in such provisions until the Lord Chancellor had 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, when the consultation closed only six months after implementation. The government did not - could not - explain why mesothelioma was no longer a special case.

The ABI intervened in the JR proceedings, as it supported the government.

#### 'Secret deal'

Some suspected that the government's decision was based on a 'secret deal' having been made between it and the ABI. It

was believed that the ABI and the government agreed that there would be a lifting of the section 48 exemption, to fund the Diffuse Mesothelioma Payment Scheme introduced by the Mesothelioma Act 2014. These concerns were justified when, 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. It said the government's approach had been 'maladroit', and a promised

## Standing out from the crowd.... We are different and we make a difference.

Employment experts of choice, our success as leaders is built on a formidable reputation and a robust business model.

- Twice winners of the prestigious Eclipse Proclaim Personal Injury Awards. "Influential in calculating loss for claimants" - 2012. And of our Chairman; "a true expert in an area where he has made a significant impact on the world of personal injury" - 2013
- ISO 9001 accredited - the quality assurance system for service industries
- APIL TIER 1 approved experts
- Sweet & Maxwell checked
- Jackson compliant Form H total estimate of costs provided with each enquiry

Our reports are tightly focused on the claimant and really do make a difference.

Check out our testimonials on our web site, they are not only from lawyers but claimants.

### Can you afford to place your trust in anything less?

[www.employmentexperts.co.uk](http://www.employmentexperts.co.uk)

call 01473 288 018

email [info@employmentexperts.co.uk](mailto:info@employmentexperts.co.uk)

fax 01473 288 863



Trevor Gilbert  
&  
ASSOCIATES  
THE EMPLOYMENT EXPERTS

review to the effects of LASPO 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'.

#### Judicial review judgment

On 2 October 2014, William Davis J gave judgment in the second 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 reforms in mesothelioma cases, and therefore the Forum succeeded. He made a finding (the second one in a fortnight) that the Lord Chancellor had acted unlawfully.

#### Implications of the judgment

The judgment is welcomed by victims of mesothelioma and their dependants, as it means that the success fees and ATE insurance premiums can still be recovered from the losing party. The Justice Select Committee's report dated 15 July 2014 recommends that such review of section 48 should not be undertaken until sufficient time has elapsed for the effects of the LASPO changes on non-mesothelioma cases to be assessed.

James Dalton stated that the ABI was 'frustrated' by the judgment, and the government said it was 'disappointed'. And, in the wake of the decision, the ABI has attempted to portray this decision as a setback for victims.

But the notion that it is the ABI – rather than the Forum which brought the JR – which understands and speaks for the interests of sufferers, may be a little difficult for some to swallow.

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 losing party.

### *A specialist mesothelioma list of law firms should be set up by the government*

The ABI has staged a long campaign to implement these proposals. They were adopted wholesale by the government, presumably as a result of the secret agreement, and were advanced without any reference to victims' support groups or what they might want. Sadly, the incidence of mesothelioma is still rising and yet to peak. And, whatever the real motive behind the ABI's proposals, the actual effect would undoubtedly have made it substantially more difficult for these sufferers to gain access to the courts, and to justice.

Naturally, one would expect, the ABI represents the interest of its stakeholders and their shareholders. But, if the government really wants to know how to help mesothelioma sufferers, a better place to start would be with those who actively represent them.

#### My own recommendations

Should the ABI be genuine in its desire to assist victims of mesothelioma, then it should, as requested by the British Lung Foundation, agree to pay further funds for mesothelioma research and to a levy being imposed on insurance companies to enable the research to continue indefinitely without fear of lack of funds. The ABI has steadfastly refused to support such a proposal. I understand that the ABI has declined such payments for research, as its stakeholders have refused to agree. These are the very same stakeholders who accepted premiums and such payments for

research would be 'small change' to the insurance industry.

Should the government be genuine in its desire to assist victims of mesothelioma, it simply needs to recognise the success of the RCJ specialist mesothelioma list and, in doing so, provide additional Masters and administrative staff. An immediate improvement would be to replace the Senior Master so that there are, as there were previously, three Masters dealing with the mesothelioma list, and to provide the Masters with personal assistants who can deal solely with allocating the claims and listing hearings. The cost of a personal assistant cannot be much more than £30,000 per annum. Surely this would be cheaper than the government employing civil servants in concocting consultations and employing lawyers to oppose the Forum in its judicial reviews.

#### Recognition required

James Dalton, on behalf of the ABI, in an interview with *The Guardian* yet again criticised claimant lawyers, and blamed them for the legal costs in mesothelioma cases remaining disproportionately high.

My father died from mesothelioma and I specialise in these cases. I, and the specialist lawyers that I have the privilege to work with for many years, do a highly successful job in the most difficult of circumstances, in that we are having to take evidence and instructions from victims who often have months if not days to live. With this in mind, a specialist mesothelioma list of law firms should be set up by the government.

#### Questions still to be answered

The Justice Select Committee said that the government's approach had been maladroitness. 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.

*Harinder Bains is a partner at Leigh Day who acted for the Forum in the judicial review proceedings; tel 020 7650 1166; hbains@leighday.co.uk*