Neutral Citation Number: [2021] EWHC 30 (Admin)

Case No: CO/2608/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/01/2021

Before :

BEFORE THE HONOURABLE MR JUSTICE HENSHAW

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Between :

THE QUEEN
on the Application of

(1) AVIVA INSURANCE LIMITED
(2) SWISS REINSURANCE COMPANY LIMITED — **Claimants**

- and –

THE SECRETARY OF STATE FOR WORK AND PENSIONS — **Defendant**

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- -

Michael Kent QC, Benjamin Tankel and Kate Boakes (instructed by **Keoghs LLP**) for the **Claimants**
Edward Brown and Brendan McGurk (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 15 December 2020
Draft circulated to the parties on 21 December 2020

Approved Judgment

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Mr Justice Henshaw:

(A) INTRODUCTION

1. This judgment deals with certain consequential matters arising from my judgment dated 20 November 2020 on the substance of the Claimants' claim ([2020] EWHC 3118 (Admin)) ("***Judgment***"). They are:

    i) the scope of the Judgment, and hence the appropriate order, in particular the policy date range and types of claim to which it applies;

    ii) from what starting dates the court should declare the legislation became non-compliant with Article 1 to the First Protocol to the European Convention on Human Rights ("***A1P1***");

    iii) whether the legislation can be 'read down' pursuant to section 3 of the Human Rights Act 1998 ("***HRA***");

    iv) whether the order should state that the Defendant acted unlawfully;

    v) whether the Bainbridge certificate should be quashed;

    vi) whether the order should be stayed pending further argument on a potential contention by the Defendant under section 31(2A) of the Senior Courts Act 1981 ("***SCA***"); and

    vii) permission to appeal.

2. The background and context are set out in the Judgment, in conjunction with which this present judgment should be read.

(B) SCOPE OF JUDGMENT

3. The first question is whether the Judgment is limited to insurance policies underwritten before the enactment of the Social Security (Recovery of Benefits) Act 1997 ("***the 1997 Act***" or "***the Act***") on 19 March 1997. The Defendant notes that Judgment § 85 states:

> "Section 22 does not give rise to a 'one-off insertion' of deemed wording into policies of insurance on 6 October 1997 (or, if later, when relevant insurance contracts were made). It creates a deemed contractual liability as and when the circumstances set out in section 22(1) arise, namely when a compensation payment is made following the incurring of a liability by a compensator that is covered (to any extent) by the insurance policy. The interference thus arises, on an ongoing basis, each time a compensator incurs a liability under section 6 and the insurer incurs a corresponding liability under section 22"

and expresses concern that the Judgment may extend to policies underwritten at any time.

4. Judgment § 3 notes that the Claimants' challenge relates to *"obligations imposed on a dwindling number of liability insurers holding long-tail disease legacy policies (including Aviva), arising from liabilities for long-tail asbestos-related diseases"*. Paragraph 6 of the Claimants' Detailed Statement of Facts and Grounds explains that in the normal case, a long-tail disease claim will fall to be dealt with by the employer's liability insurer whose policy was in force at the time of the act or omission giving rise to the disease, "*which is likely to have been many years before a claim is made and before the 1997 Act came into force*" (noting that in mesothelioma cases the tortious exposure to asbestos may be fifty years or more before the disease becomes manifest). Paragraph 3 of the Claimants' skeleton argument for the substantive hearing stated:

> "… The challenge in these proceedings relates to an unintended but increasingly onerous by-product at the margins of the scheme, which involves obligations imposed on a dwindling number of liability insurers holding long-tail disease legacy policies (including the First Claimant). The objectionable features of the scheme of benefit recovery as currently operated by the Defendant, though significant to EL insurers with legacy policies, therefore form a very small part of the whole."

5. Those are the "*legacy policies*" to which I refer in Judgment § 3, and which I take to mean insurance policies underwritten before the 1997 Act came into force, in September/October 1997. The Judgment accordingly proceeds on the basis that the claim relates to pre 1997 Act policies (and reinsurances of such policies): see, e.g., Judgment §§ 15(ii), 15(iii)(d), 146, 151 and 155. It does not consider one way or the other the position is relation to policies underwritten thereafter. Ultimately, of course, it is for others to interpret the meaning and effect of the Judgment, but in my view the order reflecting the Judgment should be confined within the scope of the claim as I understand it, and hence to insurance policies underwritten before the Act came into force (together with reinsurances of such policies). In their draft order, the Claimants seek further to narrow the relief granted slightly, by confining it to policies of insurance issued before 19 March 1997, when the Act was enacted as opposed to when it came into force.

6. The second question on scope concerns the relevant recipients of compensation payments. Judgment § 11 summarises the Claimants' complaint in this way:

> "The present Claimants' complaint is that the combination of the 1997 Act (as interpreted by the Defendant) and the developments outlined above has given rise to five situations where liability insurers are obliged to reimburse the State for benefits that do not correspond to any damage caused by their insured, or (or including) where the insured is only one of two or more employers liable for such damage and the insurer's contribution to the victim's exposure was limited (and in some cases very limited):
>
> i. the requirement to repay 100% of the recoverable benefit even where the employee's own negligence also contributed to the damage sustained;
>
> ii. the requirement to repay 100% of the recoverable benefit even where the employee's "divisible" disease is, as in *Carder*, in part unconnected with the insured's tort;
>
> iii. where others would also be liable in full for an "indivisible" disease (which by section 3 of the Compensation Act 2006 but not at common law applies to mesothelioma), but they or their insurers cannot be traced. A particular instance of this, relating to a Mr Bainbridge, is cited as an example for the purposes of the present claim. This situation has become a particular problem in asbestos cases where (a) the events causing the injury were usually decades earlier; (b) employees often did contract work for many different employers; and (c) the rules on causation have been relaxed in various ways so that a relatively minimal contribution to asbestos exposure can nevertheless result in an award in damages. The legal and public policy underpinning these developments was designed to ensure full recovery for the victims of torts but, the Claimants say, can provide no justification for the State being allowed, parasitically, to recover 100% of its outlay on benefits connected with that injury;
>
> iv. the requirement to repay certain benefits that do not correspond to a recognised head of loss. The choice as to which benefits to pay to a disabled person is a matter of government policy. Only some of these are prescribed benefits which the Claimants are required to repay. Nevertheless, the nature and amounts of those prescribed benefits do not always correspond to heads of compensation that would be payable by way of damages following a successful negligence claim. For example, Universal Credit is now a listed benefit referred to in

> Schedule 2 to the 1997 Act, but is deductible only against *"Compensation for earnings lost during the relevant period"*. Universal Credit now includes a number of benefits that were previously not recoverable, including housing benefit. However, the Claimants' evidence indicates that, as one would expect (and as exemplified by the case of *Bainbridge*), claims for loss of earnings are often not made by those suffering from mesothelioma given their average age; and
>
> v. the requirement to repay 100% of the recoverable benefit despite the element of compromise that is present in most settled claims. This requirement even extends to claims that are settled without admission of liability."

7. Judgment § 182 concludes that the three aspects of the scheme set in place by the 1997 Act summarised in subparagraphs (i) to (iii) above are incompatible with the Claimants' rights under A1P1.

8. The Claimants noted in their skeleton argument for the substantive hearing that *"For simplicity, the claimant seeking damages from an insured entity is referred to as "the employee" even though in fatal cases such claims will be pursued by his or her personal representative and there may be a limited number of cases not involving employers' liability"*. As an example of the latter category, the Claimants point out that one of the claims in *Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22; [2003] 1 AC 32* arose from occupier's liability satisfied by public liability insurance. The Claimants submit that the reasoning in the Judgment applies equally in such circumstances, and that the order should accordingly refer to *"the person suffering from the disease"* rather than being confined to employees (in the way that the wording of Judgment § 11 might appear to be confined). The Defendant does not dissent from this, and I agree.

9. Thirdly, the Claimants submit that the order resulting from the Judgment should be confined to claims resulting from diseases, as opposed to accidents or injuries, as it is only the former which can give rise to the kind of long-tail liability where the problems forming the subject-matter of this case arise. The *"relevant period"* of benefit payments, in respect of which the liability to make payments to the Defendant arises, is five years from the date of an accident or injury (section 3(2)), but in disease cases is five years from the date when the victim first claimed a listed benefit in consequence of the disease (section 3(3)). Again, the Defendant does not dissent, and I agree.

(C) STARTING DATES

10. Judgment § 181 states:

> "I have also given some consideration to the question of whether I should seek to determine from what date or dates the aspects of the scheme that I have found not to comply with A1P1 became non-compliant. However, I am conscious that this topic was not the subject of focussed argument before me.

> My inclination would be to consider that feature (i) referred to in § 11 above was non-compliant from the date the HRA came into force, but that features (ii) and (iii) became non-compliant only when the Act began to operate in the circumstances that existed following (respectively) the decision in Carder and the passage of the Compensation Act 2006. However, considerations of limitation may make certain distinctions academic, and in any event I consider that the parties should have the opportunity to address these issues by way of further argument, either before me in the context of remedies, or in any ensuing proceedings directed at the Claimants' financial loss claims."

11. I see no reason not to adhere to my provisional view about feature (i). The Claimants submit that features (ii) and (iii) became non-compliant at earlier dates, namely 2 October 2000 in respect of (ii) and the end of 2002 in respect of (iii).

12. As regards category (ii) (divisible diseases), the judgment of the Court of Appeal in *Carder v University of Exeter [2016] EWCA Civ 790* (handed down in July 2016, upholding a first instance judgment handed down in July 2015), established that even in cases where the claimant could not show that the small contribution made by the defendant sued had made any appreciable difference to his symptomatic condition or life expectancy, the *'compensator*' (the party sued or its insurer) was nevertheless liable for an appropriate proportion of the damages due in respect of the whole. The Claimants point out that this was merely an extreme example of what had been established by the Court of Appeal in *Holtby v Brigham & Cowan (Hull) Ltd.* [2000] I.C.R. 1086; [2000] 3 All ER 421, several months before the HRA came into force. Resolving an uncertainty arising from previous cases, the court there concluded that in a case of one of the 'divisible' asbestos-related diseases such as asbestosis (a form of cumulative fibrosis of the lungs), a given defendant will be liable only for a proportion of the damages attributable to the disease based upon the amount of exposure for which that defendant was tortiously responsible. It had previously been thought that the defendant might be liable for the damages flowing from the injury or disease as a whole.

13. In fact, a consideration of *Holtby* suggests that it had been established at least since the decision in *Bonnington Castings v Wardlaw* [1956] AC 613 (followed in a *McGhee v National Coal Board* [1973] 1 WLR 1) that the fact that dust to which a compensator exposed a claimant had caused or materially contributed to the pneumoconiosis which the claimant had contracted was sufficient to give rise to liability. In conjunction with the present Defendant's reading of the 1997 Act, that would render such a compensator liable to pay the Defendant an amount equal to 100% of the relevant listed benefits for the applicable 5-year period.

14. It may follow that the aspect of the scheme referred to in Judgment § 11(ii) (divisible diseases), like the contributory negligence aspect (§ 11(i)), and unlike the indivisible diseases aspect (§ 11(iii)), could be viewed as having existed from the outset upon the enactment of the 1997 Act. It will be for the Court of Appeal, following my grant of permission to appeal, to determine what, if any, significance that point may have. For my part, I would not see it as altering the essential core of the reasoning set out (in particular) in Judgment §§ 118, 128-129, 137(ii) and 140ff. The position may be that

the problem so far as concerns divisible diseases cannot be regarded as emanating from future legal developments (viewed as from 1997). Nonetheless, it remains the case that, on the materials put forward, the objectives Parliament sought to pursue via the 1997 Act were not directed to recovery from employers/insurers in respect of injuries caused by third parties; and all the points on legitimate aim, rational connection, no less intrusive means and fair balance remain the same.

15. I therefore accept the Claimants' submission that the appropriate starting date for 'divisible' diseases is 2 October 2000, when the HRA came into force.

16. Turning to category (iii), 'indivisible' diseases, the Claimants point out that it was in fact the decision of the House of Lords in *Fairchild*, handed down on 20 June 2002 (reversing the decisions in the courts below), that established the liability for damages attributable to the contraction of a malignant disease (there mesothelioma) of any person who tortiously exposed the claimant to conditions that materially elevated the risk that he would contract the disease. *Fairchild* was an important decision for defendants, and those who stood behind them such as liability insurers, in relation to cases of long-term exposure to toxic substances such as asbestos. Prior to *Fairchild*, the existence of exposure to the substance on other occasions created considerable difficulties of proof for the victims and therefore limited the number of successful claims that could be made; after *Fairchild*, the low threshold for establishing liability in a mesothelioma case against an employer who had breached common law or statutory duties by exposing the claimant to any substantial quantity of asbestos very considerably increased the number of such claims that had to be satisfied by liability insurers. This was understood at the time to amount to the imposition of a joint and several liability for the whole of the damages on any such defendant (as illustrated by the contents of the Mesothelioma Handling Agreement of 28 October 2003 entered into by a number of liability insurers under the aegis of the Association of British Insurers, which proceeded on the basis that any one defendant would be liable for the whole). The later decision in *Barker v Corus UK Ltd* [2006] UKHL 20; [2006] 2 AC 572 limited the defendant's liability to an aliquot part of the damages, but that decision was quickly reversed by Parliament by section 3 of the Compensation Act 2006.

17. Accordingly the Claimants submit, and I accept, that the proper starting point in category (iii) cases is the end of 2002, after allowing the Defendant a reasonable period in order to adapt its processes of compensation recovery to make due allowance for the change in the law.

(D) HRA SECTION 3

18. Judgment § 180 stated:

> "Given the complexity of the matter, I consider it appropriate to accede to the proposal of both sides that they be the subject of further submissions in the light of my conclusions on the substance of the matter".

19. The conclusions set out in Judgment § 182 related to the three aspects of the scheme summarised in Judgment § 11(i)-(iii). Judgment § 11 as a whole related to the effect of the 1997 Act *"as interpreted by the Defendant".* The question now arises as to

whether or not the legislation can, pursuant to HRA section 3(1), be *"read and given effect in a way which is compatible with the Convention rights"*.

20. In *Ghaidan v Godin-Mendoza* [2004] UKHL 30, Lord Rodger said:

> "The use of the two expressions, "read" and "given effect", is not to be glossed over as an example of the kind of cautious tautologous drafting that used to be typical of much of the statute book. That would be to ignore the lean elegance which characterises the style of the draftsman of the 1998 Act. Rather, section 3(1) contains not one, but two, obligations: legislation is to be read in a way which is compatible with Convention rights, but it is also to be given effect in a way which is compatible with those rights. Although the obligations are complementary, they are distinct. So there may be a breach of one but not of the other. For instance, suppose that legislation within the ambit of a particular Convention right requires a local authority to provide a service to residents in its area. The proper interpretation of the duty in the legislation may be straightforward. But, even if the local authority interprets the provision correctly and provides the appropriate service, if it provides the service only to those residents who support the governing political party, the local authority will be in breach of article 14 in relation to the other article concerned and, in terms of section 3(1), will have failed to give effect to the legislation in a way which is compatible with Convention rights. So, even though the heading of section 3 is "Interpretation of legislation", the content of the section actually goes beyond interpretation to cover the way that legislation is given effect." (§ 107)

21. The present case may provide an example of the distinction. In Judgment section (L) I concluded that the Claimants' claim could also be cast, and would succeed, as one based on failure to make regulations under section 22(4) of the 1997 Act, under which *"Regulations may in prescribed cases limit the amount of the liability imposed on the insurer by subsection (1)"*. Thus it was open to the Defendant to give effect to the legislation, by making appropriate regulations, in a manner that would have avoided the infringements of the Claimants' A1P1 rights that I have held occurred.

22. The court itself cannot "*give effect to*" the legislation in a Convention-compliant manner using the section 22(4) route: it cannot deem regulations to exist when none have been made. However, the court can "*read*" the legislation itself in a Convention-compliant manner, provided it is "*possible*" to do so in the sense in which that word has been interpreted in the case law.

23. The Defendant nonetheless submits that in the present case the court should confine the relief granted to a declaration in the ordinary sense, rather than exercising either the HRA section 3 'reading down' power or the section 4 power to grant a declaration of incompatibility. The Defendant submits that there is ample Supreme Court authority that, in contexts such as this, the court should simply make a declaration of the relevant Convention violation, following which it will be for the Defendant (or,

here, Parliament) to decide what action, if any, to take in response (it being recalled that the HRA operates subject to Parliamentary sovereignty and not the other way round).

24. As an example, the Defendant cites *R (Mathieson) v SSWP* [2015] UKSC 47, [2015] 1 WLR 3250. The Supreme Court concluded there that the claimant's Convention rights were infringed by a rule whereby Disability Living Allowance ceased to be payable after he had been an in-patient in a National Health Service hospital for more than 84 days; and made orders granting specific relief to the claimant (Judgment § 48). The court concluded that a formal declaration that the Defendant had violated the claimant's rights would add nothing to that relief. Further, the court declined to read the legislation down under HRA section 3. Lord Wilson said:

> "Second, more controversially, Mr Mathieson asks this court to discharge its interpretative obligation under section 3 of the 1998 Act by somehow reading the provisions for suspension of payment of DLA in regulations 8(1) and 12A(1) of the 1991 Regulations so as not to apply to children. In my view however it is impossible to read them in that way. Anyway, as the Secretary of State points out, it may not always follow that the suspension of payment of a child's DLA following his 84th day in hospital will violate his human rights. Decisions founded on human rights are essentially individual; and my judgment is an attempted analysis of Cameron's rights, undertaken in the light, among other things, of the extent of the care given to him by Mr and Mrs Mathieson at Alder Hey. Although the court's decision will no doubt enable many other disabled children to establish an equal entitlement, the Secretary of State must at any rate be afforded the opportunity to consider whether there are adjustments, otherwise than in the form of abrogation of the provisions for suspension, by which he can avoid violation of the rights of disabled children following their 84th day in hospital" (§ 49)

Similarly, Lord Mance said:

> "With regard to the appropriate remedy to give effect to these conclusions, I agree that this should be tailor-made and limited to Cameron's particular position, by simply deciding that the decision in his case cannot stand and that he was entitled to continued payment of DLA after 84 days. The Secretary of State may be able to refine the criteria for the receipt or cessation of DLA in other cases in a manner which avoids the inequity involved in its withdrawal in respect of those in Cameron's position. We cannot address in general declaratory terms the position of children receiving DLA and hospitalised for longer than 84 days, as Mr Mathieson invites us to do." (§ 61)

Both judgments had the agreement of the majority of the court.

25. The court in *Mathieson* thus concluded that it was not possible to read down the legislation in the manner proposed by the claimant there, since it was not possible to state in general terms the circumstances in which the application of the 84-day rule would infringe the Convention rights of other children, who might be differently placed.

26. Further, Lord Nicholls in *Ghaidan* said:

> "Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "*go with the grain of the legislation*". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation." (§ 33, my emphasis)

27. At the same time, HRA section 3 is expressed in mandatory terms: "*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*." Hence, as Baroness Hale said in *Secretary of State for the Home Department v MB* [2007] UKHL 46, "*If it is possible, then section 3(1) of the 1998 Act requires that it be done.*" Similarly, in *R v Waya* [2012] UKSC 51, the Supreme Court at §§ 14 accepted the submission that the effect of HRA section 3(1) was that the Proceeds of Crime Act 2002 *"must be read and given effect in a manner which avoids a violation of A1P1"*; and quoted Lord Bingham's summary of the extent of the court's obligation under section 3 in *Sheldrake v Director of Prosecutions* [2005] 1 AC 264 § 28, which included the point that *"… a Convention-compliant interpretation under section 3 is the primary remedial measure and a declaration of incompatibility under section 4 an exceptional course"*.

28. As to how to reconcile these two strands of authority, I do not consider the answer to be that the court has a discretion as to whether or not to apply section 3(1). Instead, when considering whether a Convention-compliant reading is "*possible*", the court must keep in mind that section 3(1) mandates and permits a reading down only to the extent that it is *necessary* in order to make the legislation Convention-compliant; and that a reading down will not pass that test if it pre-empts alternative ways in which the court might reasonably anticipate the legislature could choose to render the provisions compliant. In *Mathieson,* reading down was not possible because the claimant's proposed reading (disapplying the 84-day rule to all children) evidently went further than necessary. As Lord Wilson pointed out, his judgment in the claimant's favour took account among other things of the extent of care provided to this particular claimant by his parents at the hospital in question.

29. In the present case, the Defendant suggests that other insurers may be differently placed, for example by reason of differences between policies. However, it is unclear why any such differences would or could result in materially different conclusions being arrived at on the issues considered in the Judgment, and the Defendant did not put forward any examples of how they might do so. In my view, the conclusions I have reached would be of general application to insurers liable under pre-1997 Act policies who are affected by the features referred to in Judgment § 11(i)-(iii) (as modified by the points discussed in §§ 3-9 above).

30. The Defendant also submits that there are other ways in which it might choose to redesign the scheme so as to make it Convention-compliant. At the general level, I certainly see force in the submission that the court ought not to apply section 3 in such a way as to pre-empt other legislative solutions, and the statements in *Ghaidan* and *Mathieson* make that clear. On balance, however, I am not persuaded that the present case is of the type where such concerns arise. I am unable to see how alternative measures (whether by way of amendment of the Act or the making of regulations under section 22) could render the legislation compliant if it did not remove those particular features.

31. In principle therefore I consider that it is necessary, provided it is "*possible*", to read the relevant provisions of the 1997 Act down in the manner proposed by the Claimants. In substance, that would involve construing the Act (and in particular section 6 of it) so as to make a proportionate reduction in the liability to repay benefits under the Act of an insurer under a policy of insurance issued before 19 March 1997 indemnifying its insured for liability to pay damages for a disease (and the liability under the Act of any reinsurer in respect of such a policy), if and to the extent that the insured's liability to the person suffering from the disease:

    i) is (or was) for a proportion only of the damages otherwise due to the person suffering from the disease, by reason of the contributory negligence of that person; and/or

    ii) is (or was) for damages in respect of part only of a disease constituting a 'divisible' injury in respect of which the relevant State benefits were paid; and/or

    iii) would, but for section 3 of the Compensation Act 2006, have been for only a proportion of the damages attributable to a disease constituting an 'indivisible' injury.

32. As to whether such a reading is "*possible*", the applicable principles are familiar. The Divisional Court in *Connolly v Director of Public Prosecutions* [2007] EWHC 237 (Admin) § 17 found it sufficient to refer to the following passage from Lord Nicholls' judgment in *Ghaidan*:

> "30. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the

court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.

31. On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the "interpretation" of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.

32. From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.

33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of

> Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

33. Lord Bingham in *Sheldrake* said:

> "…there is a limit beyond which a Convention-compliant interpretation is not possible, such limit being illustrated by *R(Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 and *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] 2 AC 467. In explaining why a Convention-compliant interpretation may not be possible, members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation (paras 33, 49, 110-113, 116). All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: "*So far as it is possible to do so* ..." While the House declined to try to formulate precise rules (para 50), it was thought that cases in which section 3 could not be used would in practice be fairly easy to identify." (§ 28)

34. The Claimants point out that a Convention-compliant interpretation under HRA section 3 need not necessarily involve detailed (notional) redrafting of the provisions in question. They cite as examples:

i) *MB*, where Baroness Hale (with whom Lord Brown agreed) concluded that certain provisions of the Prevention of Terrorism Act 2005 should be read and given effect *"except where to do so would be incompatible with the right of the controlled person to a fair trial"* (§ 72);

ii) *Connolly*, where the Divisional Court concluded that section 1 of the Malicious Communications Act 1988 should be interpreted *either* by giving a heightened meaning to the words *"grossly offensive"* and *"indecent"*, or *" by reading into section 1 a provision to the effect that the section will not apply where to create an offence would be a breach of a person's Convention rights, i.e. a breach of article 10(1), not justified under article 10(2))"*; and

iii) *R v Waya*, where the Supreme Court held that section 6(5)(b) of the Proceeds of Crime Act 2002 should be read as subject to the qualification *"except in so far as such an order would be disproportionate and thus a breach of article 1, Protocol 1"*.

35. The Defendant in the present case submits that the proposed reading down would be contrary to a fundamental feature of the legislation, which contains no exceptions of the kind put forward by the Claimants and, moreover, states explicitly in section 22(5) that section 22 (liability of insurers) *"applies to policies of insurance issued before (as well as those issued after) its coming into force"*. The relief sought by the Claimants would, it is said, amount to writing a new scheme in a revenue-raising legislative context.

36. I do not find those submissions persuasive:

    i) The fundamental features of the scheme in this case, reflected in the legislative consideration summarised in Judgment section (D), are (so far as relevant) the imposition upon compensators and their insurers of positive liabilities to the State, even in respect of State benefits that cannot be deducted (vis-à-vis the victim) from a head of claim, limited to 5 years of benefits, and deemed insurance coverage for such liabilities. The proposed reading down would not be inconsistent with, or go against the grain of, any of those features. It would merely create a discrete carve-out relating to a particular set of historic insurance policies, in respect of diseases only, relating only to cases where the insured was only partly responsible for the disease, and in respect of only part of the liabilities that would otherwise arise. Moreover, the fact that the reading down would in substance create an exception where none currently exists, is comfortably within the permitted scope of interpretation pursuant to HRA section 3 as explained in *Ghaidan* and exemplified by the cases referred to in § 34 above.

    ii) It is questionable whether it is a fundamental feature of the legislation that it should apply to liabilities from events long-predating its enactment: the materials referred to in Judgment § 46 and 52 suggest that Parliament's intention was, rather, merely to catch cases "*in the pipeline*". In any event, however, the proposed reading down would not prevent the retrospective application of section 22(5). It would merely remove, in the discrete category of cases identified in subparagraph (i) above, a portion of the liability that would otherwise arise.

    iii) I accept that the court should not attempt to rewrite the legislative scheme, but consider that in the present case reading down would do no more than to give effect to the exceptions which, based on the conclusions reached in the Judgment, are essential in order to make it Convention-complaint (see further § 30 above). I am not convinced that it assists the argument to characterise the legislative scheme here as a revenue-raising scheme. It is dissimilar from a general taxation scheme for the reasons identified in Judgment § 145. I also do not consider the possibility that the legislature could, at least in theory, decide to replace the whole scheme with a different way of raising money from the insurance industry in general means that the court, in reading down these particular provisions, is engaged in making quasi-legislative choices.

37. If I were wrong on the above points, in particular point (iii) above, I would instead have concluded that the provisions could and should be read down in a more general manner, along the lines of the formulation used in *Waya*, and that the Defendant acted, vis-à-vis the Claimants, in breach of the provisions as so read down.

(E) UNLAWFUL ACTION

38. The Defendant does not accept that she has "*acted unlawfully*", submitting that if the authentic interpretation of the legislation, as determined by the court, yields a result that an individual's Convention rights have been violated, then the Defendant cannot "*lawfully*" act in any other way. The Defendant is required to apply the provisions mandated by primary legislation, not some other notionally compliant scheme that has not been introduced yet. The defects are in primary, not secondary, legislation. Until that primary legislation is amended, then the scheme continues in full force. The Convention does not have overarching legislative force that allows for primary legislation to be disapplied.

39. The principle underlying these submissions is enshrined in HRA section 6(2), which provides that subsection (1) (under which it is unlawful for a public authority to act in a way which is incompatible with a Convention right) does not apply to an act if:

> "(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provision."

40. There are, however, two answers to the Defendant's point in the present case.

41. First, the primary legislation in question made provision, in section 22(4) of the 1997 Act, for regulations under which insurers' liability could be limited. The Defendant could have made the scheme Convention-compliant by exercising that power, and acted unlawfully by not doing so: see Judgment section (L) and § 21 above.

42. Secondly, the legislation can and must be read down in the manner indicated in section (D) above. The Defendant has exacted sums from the Claimants over and above those lawfully due under the legislation as so read down, and has thus acted unlawfully.

(F) BAINBRIDGE CERTIFICATE

43. It follows logically from the conclusions reached in section (E) above that the certificate of recoverable benefits relating to sums claimed by the Defendant in the case of Mr Bainbridge (see Judgment § 11(iii)) was unlawful. The usual remedy would be for the certificate to be quashed, so that the Defendant can replace it with a lawful certificate.

44. There was some debate before me as to whether such an order could have unintended consequences. I am persuaded on the basis of the submissions made that quashing the certificate could not be detrimental to the interests of Mr Bainbridge. Any adverse consequences for the Defendant (over and above the reduction in the amount of the certificate flowing from the conclusions in the Judgment) could perhaps be rectified by the issue of a replacement certificate. Section 10 of the 1997 Act makes provision

for the review of certificates of recoverable benefits, but I have not heard argument about whether those powers could be exercised in the circumstances now under contemplation. Conversely, it was not clear from the submissions made to me that the Claimants actually need the Bainbridge certificate to be quashed in order to obtain the relief they seek. In all the circumstances I propose, at least for the time being, not to quash the Bainbridge certificate, but to give the Claimants liberty to apply at any stage for an order that it should be quashed. Fuller argument can then be heard at that stage.

(G) SCA SECTION 31(2A) AND OTHER REMEDY ISSUES

45. As indicated in Judgment § 92, the parties envisage that issues relating to the Claimants' financial losses should be transferred to the Chancery Division, though it is now clear that the parties wish that to happen only if and when the Claimants' claim is upheld on appeal. However, the Defendant's skeleton argument for the present hearing listed a number of issues which the Defendant proposes should be dealt with as remedy issues, but by the Administrative Court, before any transfer to the Chancery Division.

46. One of these was whether the court should decline to grant relief to the Claimants, pursuant to section 31(2A) of the Senior Courts Act 1981:

> "(2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> (2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
>
> (2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

47. The Defendant submits that, insofar as the Judgment is based on a lack of sufficient consideration by the Defendant, it is or may be open to the Defendant to contend that the outcome would not have been substantially different even if such consideration had been given. My provisional impression is that, although the consideration given to matters by Parliament can clearly be relevant when resolving an A1P1 issue, such a claim is in essence not fundamentally based on a failure to give proper consideration, in the way that a judicial review on conventional public law grounds may be based. However, the Defendant must be given a fair opportunity to advance the argument, including any relevant evidence if appropriate.

48. The Claimants submit that it is too late for any such argument to be advanced, particularly in circumstances where the Defendant has to date put forward no concrete basis for it. However, as noted earlier, I expressly held over issues as to remedies, and indeed did so at the parties' suggestion. An argument under section 31(2A) can fairly be described as going to remedy, even though it is also intertwined with the substantive issues, and I do not consider that it would be fair at this stage to shut the Defendant out from advancing such an argument. I therefore invited the parties to seek to agree directions for any such issue to be resolved. It would clearly be appropriate for the Administrative Court to resolve it.

49. The potential section 31(2A) issue gives rise to a difficult question, on which I shall hear further submissions following the handing down of this present judgment, as to whether the court can or should make any order from which the parties' proposed appeals can be brought, until the section 31(2A) issue has been resolved: or whether any such order would risk infringing section 31(2A) itself. Subject to such submissions, I am presently inclined to the view that the court could and should make an order at least recording that the Claimants' judicial review claim succeeds in principle, and that such an order should (a) provide a basis for appeals but (b) not amount to a grant of relief potentially infringing section 31(2A).

50. The Defendant proposes in addition that the Administrative Court deal with the following remedy-related questions:

    i) whether damages are in fact necessary to afford just satisfaction under section 8(3) of the HRA;

    ii) what sort of claim arises in principle: the Claimants have suggested that a *Kleinwort Benson* or *Woolwich* claim might arise in this context (see *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 and *Woolwich Equitable Building Society v IRC* [1993] A.C. 70), but the application of those cases to this situation is not accepted by the Defendant; and

    iii) limitation under the HRA (or, if applicable, under the Limitation Act 1980).

    The Defendant submits that the gravity of these specialist consequential issues remains centred on the Administrative Court and not the Chancery Division.

51. The difficulty, however, is that the three issues listed above are intricately linked to the details of the Claimants' forthcoming financial loss claims. I do not consider that they can sensibly be tackled except in the context of the consideration of those claims. Further, there is no reason why the Chancery Division would be an unsuitable forum for the resolution of those issues. It is true that issue (i), in particular, is usually addressed by the Administrative Court, in the context of the Strasbourg case law on just satisfaction. However, it seems to me impossible for the issue to be addressed in isolation before the details of the claimed losses, and their basis, have been laid out and considered by the court: and that is the very part of the case which the parties, sensibly, propose should be dealt with in the Chancery Division. As a result, I consider that whilst the Administrative Court should resolve any section 31(2A) issue, the other remedy issues should be transferred to the Chancery Division.

(H) PERMISSION TO APPEAL

52. The Defendant seeks permission to appeal from my decision on several grounds, as set out in her skeleton argument and proposed Grounds of Appeal. The Claimants seek permission to appeal from my decision to the extent that I did not accept their case on recoverable benefits in excess of sums for which the Claimants have or expect to receive a credit from the person suffering from the relevant injury or disease.

53. Both parties submit that their proposed appeals would have a real prospect of success, and in any event that the wider importance of the case (e.g. for others similarly placed in the industry, and for public funds) provides a compelling reason for an appeal to be heard.

54. I indicated at the hearing that I accept both parties' submissions, and propose to grant both permission to appeal. I do not think it necessary to elaborate on my reasons for granting permission. There are, though, two specific points arising from the Defendant's proposed grounds on which it may be appropriate to comment briefly.

55. First, the Defendant submitted that it was common ground that the relevant threshold when evaluating proportionality was whether, at each stage of the A1P1 analysis (see Judgment § 67), the challenged measure was "*manifestly without reasonable foundation*" ("***MWRF***"). The Defendant also referred to a recent authority that was not cited before me prior to the Judgment, *R (Joint Council for the Welfare of Immigrants v The National Residential Landlords Associations & Ors* [2020] EWCA Civ 542 ("***JCWI***"), for that proposition.

56. It was not in fact common ground in the present case that the MWRF test applied at each stage: the Claimants' submission was expressly that that was not the case, at any rate at the fourth (fair balance) stage of the analysis. I accepted that proposition in Judgment §§ 68-71. It will be for the Court of Appeal to determine, in the light of the authorities (including *JCWI*) to what extent, if at all, the MWRF does apply in the present case. I would make only the following short observations:

    i) I do not read the Court of Appeal's analysis in *JCWI* as standing for the simple proposition put forward by the Defendant. The analysis (see, in particular, §§ 125-141 in the judgment of Hickinbottom LJ, with which Henderson LJ agreed) is considerably more nuanced than that (and, indeed, indicates at § 135 that the applicability of the MWRF test was not decisive in the case before the court).

    ii) The real question, as indicated in *JCWI* as I interpret it, is not a binary one but, rather, the degree of deference to be accorded to the democratically elected or accountable decision maker in the light of the degree of social and economic policy involved (see *JCWI* § 140).

    iii) The present case has an economic and/or social policy component, but is at heart concerned with a measure imposing financial obligations on discrete groups of entities. It is significantly removed from cases about, for example, general allocation of State resources or social policy.

iv) It is open to debate how and to what extent deference should be afforded where the alleged A1P1 infringement has arisen by reason of particular events and circumstances that were not (on the findings set out in the Judgment) the subject of conscious assessment or focus by the decision-maker.

57. Secondly, the Defendant submits that *"[i]n having regard to certain Parliamentary materials and not to others and having considered the adequacy of those materials relied upon to justify the 1997 Act in assessing the alleged interference in Insurers' A1P1 rights, the Court has acted contrary to s.9 of the Bill of Rights in considering the sufficiency of Parliament's reasons for an enactment"*.

58. The impact of the Bill of Rights, including the Supreme Court's clear statements in *Wilson*, is considered at Judgment § 161 and (implicitly) § 143.

59. It was the Defendant's own case that the scheme put in place by the 1997 Act was "*adopted by Parliament for good socio-economic reason*s" (Defendant's substantive skeleton argument § 4); that the Act was "*passed by Parliament following a detailed and thorough Parliamentary debate and examination of the public benefit to be achieved and the private interests affected [as part of which] the interests of the insurance industry, well-represented by the "lobby" and Parliamentarians, were considered in detail*" (*ibid*. § 11); that the Act reflected a "*social policy consensus*" (*ibid*.); that "*it is clear that the legislature in fact took considerable care to consider and analyse the impact of the Scheme upon all relevant parties and the insurance industry in particular*" (*ibid*. § 37); that the Claimants' challenge seeks to impugn "*the balance struck by Parliament in the 1997 Act itself*"; and that "*[t]he measures, including the impugned provisions, were analysed in considerable detail and evidence taken from a wide range of stakeholders. The matters were debated extensively in Parliament and then passed by primary legislation. It had cross-party support and was effectively supported by every relevant section of society, including the TUC and the insurance industry*" (*ibid*. § 127).

60. When invited, on the basis of such a case, to afford a high degree of deference to the decision-maker, the court is in my view not only entitled but bound to consider – without criticising Parliament or its proceedings – whether the impugned measures do in fact reflect, in the relevant respect, a balance struck by Parliament, or whether the claimed violation of Convention rights derives from circumstances and matters outside the decision-maker's actual contemplation and aims. That is consistent with *Wilson*, and the faithful application of the HRA in my view requires nothing less.