Neutral Citation Number: [2022] EWCA Civ 15

Case No: C1/2021/0310 &
C1/2021/0340

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Henshaw
[2020] EWHC 3118 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/01/2022

Before:

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE DINGEMANS
and
LADY JUSTICE CARR

- -

Between:

(1) AVIVA INSURANCE LIMITED **(2) SWISS REINSURANCE COMPANY LIMITED**	**Claimants/ Respondents**
- and -	
THE SECRETARY OF STATE FOR WORK AND PENSIONS	**Defendant/ Appellant**

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

Hearing dates: 12, 13 & 14 October 2021

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Approved Judgment

Lord Justice Dingemans :

Introduction

1. This appeal and cross-appeal raise issues about the compatibility of the Social Security (Recovery of Benefits) Act 1997 ("the 1997 Act") and regulations made under it, with article 1 of the first protocol (A1P1) of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"), to which domestic effect was given by the Human Rights Act 1998. The 1997 Act made alterations to the scheme for the repayment to the State of benefits made under certificates of benefits issued by the Compensation Recovery Unit ("CRU"). The certificates are issued where claims for compensation have been made by those suffering an accident, injury or disease ("the injured person"). The CRU was originally established by the Social Security Act 1989 ("the 1989 Act") which Act had made fundamental changes to the scheme established by the Law Reform (Personal Injuries) Act 1948 ("the 1948 Act").

2. The proceedings were brought by a claim dated 4 July 2019 by the Claimants Aviva Insurance Limited ("Aviva") and Swiss Reinsurance Company Limited ("Swiss Re") against the Defendant, the Secretary of State for Work and Pensions ("the Secretary of State"). Aviva sold employers' liability insurance policies. These policies covered employers who had acted in breach of common law or statutory duties and were liable for various industrial diseases. Swiss Re provided reinsurance cover for certain of Aviva's liability for long tail claims.

3. The complaint made by Aviva and Swiss Re ("the insurers") is that the 1997 Act and the Regulations made under it require employers' liability insurers to pay to the CRU amounts equal to certain social security benefits received by claimants in personal injury cases. The complaint is not of the scheme as a whole, which they accept could, with modifications in their favour, be lawful. The challenge is to what the insurers describe "as 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 arising from liabilities for long-tail asbestos-related diseases". The insurers contend in particular that the effect of the decision of the House of Lords in *Fairchild v Glenhaven Funeral Services Limited* [2003] 1 AC 32, and other developments in relation to employers' liability for long-tail diseases has meant that their obligations under the 1997 Act infringe A1P1 of the ECHR.

4. The claim was heard by Mr Justice Henshaw ("the judge") in a hearing on 8 and 9 July 2020. Judgment was handed down on 20 November 2020. There was a further hearing on the terms of the order to give effect to the judgment, and a judgment on those consequential matters was handed down on 12 January 2021. The judge declared that the Defendant, the Secretary of State had acted unlawfully by failing to read down the 1997 Act to permit a reduction in the quantum of benefits paid by Aviva or Swiss Re in two situations from 2 October 2000. The situations were first the requirement to pay 100 per cent of the recoverable benefit even where the employee's own negligence contributed to the damage sustained ("the contributory negligence CRU payments" and "the first situation"), and secondly the requirement to pay 100 per cent of the recoverable benefit even where the employee's "divisible" disease is in part

unconnected with the insured's wrongdoing ("the divisible disease CRU payments" and "the second situation").

5. The judge also held that the Secretary of State had acted unlawfully in the same way in a third situation from 1 January 2003. This situation was where other tortfeasors would, in addition to the employed insured by Aviva, be liable in full for an "indivisible" disease, but where the other tortfeasors could not be traced ("the indivisible disease CRU payments with missing contributors" and "the third situation"). The judge granted liberty to the insurers to apply to quash a CRU certificate issued on 7 February 2019 in the sum of £39,144.50 which related to the case of Lawrence Bainbridge.

6. The insurers are intending to claim damages in respect of payments they have made under CRU certificates dating back to 2 October 2000 in certain situations and 1 January 2003 for another situation. The judge ordered that the claims for damages should be transferred to the Chancery Division for further case management and determination. The parties had agreed that issues of limitation in relation to individual claims for repayments under CRU certificates should be dealt with during hearings in the Chancery Division of claims for damages brought by Aviva and Swiss Re. This agreement does not appear to have been recorded in any formal order made by the Court below, although it is referred to in the judgment on consequential matters.

7. The insurers cross-appeal against the refusal of the judge to make a declaration in a fourth situation, namely where the insurers are liable to repay benefits which do not correspond to a head of loss ("the CRU certificates not matching a head of loss" and "the fourth situation") which they say, on the basis of the judge's reasoning in his main judgment should have resulted in the same order as was made in the first three situations. It might be noted that the insurers relied on a fifth situation which they accepted could not give rise to any remedy, but which was relevant to the issue of fair balance between the insurers' rights and the rights of others made by the 1997 Act and the Regulations made under it. This fifth situation was the requirement to pay 100 per cent of the CRU despite the element of compromise present in most settled claims, including claims settled without admission of liability ("the compromised CRU certificates" and "the fifth situation").

8. The Secretary of State accepts that the difference drawn by the judge between the first three situations (the contributory negligence CRU payments, the divisible disease CRU payments, and the indivisible disease CRU payments with missing contributors), and the fourth situation loss ("the CRU certificates not matching a head of loss") was not apparent. It is submitted on behalf of the Secretary of State that this showed an internal inconsistency in the judgment and is said to support the contention that the judgment is wrong. The Secretary of State, however, resists the insurers' cross-appeal, and appeals on the basis, among other grounds, that the judge was wrong to find that the 1997 Act and the Regulations made under it infringed the insurers rights under A1P1 in any of the five situations.

9. In order to make sense of the issues raised by the appeal and cross-appeal it is necessary to set out some relevant developments relating to the treatment of state benefits in personal injury and industrial disease claims.

Relevant developments relating to the treatment of state benefits in personal injury and industrial disease claims

10. As is well known as a matter of history state benefits were not paid to injured workers by the state before the advent of the welfare state and so there was no question of deciding whether such payments should be made to claimants bringing actions for damages or whether they should be taken into account in the calculation of damages. The common law had decided to ignore sums accruing to the injured claimant paid under policies of insurance, as well as sums paid by the benevolence of third parties motivated by sympathy for the injured claimant's misfortune, see *Hodgson v Trapp* [1989] AC 807 at page 819-820.

11. Sir William Beveridge produced a report in 1942 on Social Insurance and Allied Services. He identified two clear principles, namely that the possible existence of an alternative remedy (and in particular an action for damages) should not prevent an injured person from obtaining immediately the welfare state benefits to which the claimant would otherwise be entitled. The second was that the injured person should not have the same need met twice over. Sir William Beveridge recorded that he could only identify the problem and recommend that possible solutions were considered by technical committees.

12. A departmental committee reported in 1946 which made a recommendation that a claimant should give credit for state benefits received and to be received. In fact, what the then Attorney General described as a compromise was made in the 1948 Act. This provided that the Claimant should give credit for half of certain listed benefits for a period of five years. The five year period has been retained all the way through to the 1997 Act. It is fair to record that the assessment of damages in personal injury actions in the late 1960's and early 1970's was, as the relevant law reports show, a rough and ready exercise without the sophistication of detailed schedules and counter-schedules of damages that are now properly employed on both sides in serious personal injury actions.

13. With the increasing particularisation of claims for past and future financial losses, greater attention came to be paid to the matching, or correspondence, of heads of loss to state benefits not listed in the 1948 Act which had been received by the claimant. The Courts originally did not take into account those state benefits received by the claimant but which were not listed in the 1948 Act, see *Bowker v Rose* Court of Appeal, Times 3 February 1978. This was said to be because the purpose of the legislation was to benefit the injured person. As appears below the House of Lords later took a different approach.

14. In 1973 a Royal Commission on Civil Liability and Compensation for Personal Injury was commissioned to consider, among other matters, the relationship between state benefits and tort damages. The Royal Commission reported in March 1978 ("the Pearson report"). The Pearson report recommended that the fault based system of compensation should be replaced. It did, however, recommend that the relationship between state benefits and tort damages should be altered, and there should be a full offset of all social security damages. The Pearson Committee considered creating a right of subrogation for benefits paid to injured parties, but rejected it because that would require proof of fault which the Committee had recommended should be excluded from the system of compensation for personal injuries. It was apparent from

the Pearson report that there were some who objected to the fact that the state was, through the payment of benefits, relieving the tortfeasor and their insurer of their liability to pay part of the compensation.

15. Following the Pearson report, and a change of Government, further consideration was given to the recovery of state benefits from the tortfeasor and their insurers. There was a consultation which ended in March 1982 which showed mixed views. There seemed to be acceptance of the principle that the victim should not be compensated twice, but there was also support for the Government to take further steps to ensure that benefits deducted were returned to social security funds.

16. The Comptroller and Auditor General produced a report dated 21 July 1986 about the "Recovery of Social Security Benefits When Damages in Tort are Awarded" ("the Auditor General's report"). This report recommended, as the full name of the report suggests, that social security benefits should be repaid to the state when damages were awarded. The Auditor General's report recorded that since the Pearson report Governments had subscribed to the view that those who were responsible for accidents should not expect the state to pay for their wrongdoing, whether in the form of treatment under the National Health Service or in cash benefits under the social security system, and that accident victims should not benefit twice (paragraph 22(c) of the Auditor General's report). It was recorded that the DHSS had considered various ways of changing the existing system but had not yet conducted a thorough investigation into the feasibility of "a cost effective method of recovering social security benefits from tort damages" (paragraph 22(d) of the Auditor General's report). The appendix to the report showed the inconsistent treatment of benefits received by the accident victim when claims were made.

17. On 10 November 1988 the approach taken in *Bowker v Rose* was reversed by the House of Lords in *Hodgson v Trapp* [1989] AC 807 which emphasised the fact that the assessment of common law damages for personal injury was intended to be purely compensatory.

18. The 1989 Act was then enacted. This Act established the CRU which had responsibility to collect prescribed sums, representing state social security benefits paid to injured persons, from those making compensation payments to injured persons. The sums identified in CRU certificates were then deducted from the payments to be made by the paying party from the compensation payment. The statutory purpose of the scheme of the 1989 Act was to recover from those making payments (either the tortfeasor or their insurer) certain of the state benefits paid to those injured persons which were then set off against payments made to the claimants. This was in circumstances where there had been no pre-existing liability of the tortfeasor or their insurer to make that payment. The state benefits which were to be repaid to the state were listed.

19. There were three features of the statutory scheme established by the 1989 Act which should be noted. First the period for which benefits would be deducted remained at five years. This appears to have been a continuation of the compromise represented in the 1948 Act. If there was an earlier settlement the deduction for benefits would cease as at the date of the payment of the sums due under the compromise to the injured person. Secondly the full amount of the benefits identified in the CRU certificate were deducted from the payment to be made to the injured person. Thirdly if the payments

to the injured person was £2,500 or below, it was excluded from the requirements to obtain and pay a CRU certificate.

20. As many personal injury practitioners will remember aspects of the scheme were the subject of much criticism. In particular the effect of the deduction of the sum set out in the CRU certificate from any compensation paid to the injured person meant that a sum paid to compensate for general damages for pain, suffering and loss of amenity to an injured person could be reduced, or extinguished entirely, by the deduction of the amount of the CRU certificate. This caused particular issues if there was no claim for financial losses, but deductible benefits had been paid to the injured person. In *Hassall v Secretary of State for Social Security* [1995] 1 WLR 812 at 819 it was suggested that a claim for special damages might be made against the tortfeasor for the effective loss of continuing benefits, where those benefits had been paid both before and after the accident.

21. The practical effect of the deductions could also mean that a payment for damages for various heads of loss totalling some £40,000 might, in certain circumstances, be exceeded by the amount set out in the CRU certificate. This created an incentive for the injured person and the tortfeasor or insurer to agree a £2,500 compromise, meaning both that the injured person would at least get something for his losses and that the tortfeasor or insurer would not be liable to make any payments under the CRU certificate. Another cause for complaint was the fact that personal injury claimants would have the whole of the CRU certificate set against their claim for damages, even in cases where those damages were reduced for contributory negligence. This could mean that a claim for loss of earnings, of which only 50 per cent was recoverable from the defendant, could result in no payment being made to the claimant, because the remaining losses were exceeded by the amount set out in the CRU certificate.

22. The scheme set out in the 1989 Act was re-enacted and amended by the Social Security Administration Act 1992 ("the 1992 Act") but complaints about the operation of the scheme continued. In *Stevens and Knight v United Kingdom* 9 September 1998 (1999) 27 EHRR 38 the Commission of the European Court of Human Rights held that complaints brought by two injured persons complaining about the compatibility of the 1989 Act and the deductions of the CRU certificate and their property rights protected by article 1 of the first protocol were inadmissible. It is also right to note, in the light of the changes made by the 1997 Act, that part of the reason that the complaint was inadmissible was because the claimants had received payments for their losses, even if it was by way of state benefits.

23. The continuing complaints about the effect of the 1989 Act led to various consultations and proposals for changes, and ultimately the 1997 Act. It is apparent from the witness statement of Robert Towers, senior policy manager in the Department for Work and Pensions, that there was "a detailed and thorough examination of the public benefit and private interests, as part of which the interests of the insurance industry were considered in detail." Mr Towers said that a search of the DWP archives was carried out and various documents and minutes were identified, together with extracts of debates from Parliament. These materials are relevant to one of the grounds of appeal advanced on behalf of the Secretary of State and were extensively summarised in the first judgment of the judge. They are referred to below when I turn to the judge's judgments.

The 1997 Act

24. The 1997 Act was enacted. Sections 1, 6 and 22 of the 1997 Act provide:

> "1.— Cases in which this Act applies.
>
> (1) This Act applies in cases where—
>
> (a) a person makes a payment (whether on his own behalf or not) to or in respect of any other person in consequence of any accident, injury or disease suffered by the other, and
>
> (b) any listed benefits have been, or are likely to be, paid to or for the other during the relevant period in respect of the accident, injury or disease.
>
> (2) The reference above to a payment in consequence of any accident, injury or disease is to a payment made—
>
> (a) by or on behalf of a person who is, or is alleged to be, liable to any extent in respect of the accident, injury or disease, ...
>
> (b) in pursuance of a compensation scheme for motor accidents, or
>
> (c) under the Diffuse Mesothelioma Payment Scheme (established under the Mesothelioma Act 2014);
>
> but does not include a payment mentioned in Part I of Schedule 1.
>
> (3) Subsection (1)(a) applies to a payment made—
>
> (a) voluntarily, or in pursuance of a court order or an agreement, or otherwise, and
>
> (b) in the United Kingdom or elsewhere.
>
> (4) In a case where this Act applies—
>
> (a) the "injured person" is the person who suffered the accident, injury or disease,
>
> (b) the "compensation payment" is the payment within subsection (1)(a), and
>
> (c) "recoverable benefit" is any listed benefit which has been or is likely to be paid as mentioned in subsection (1)(b).
>
> 6.— Liability to pay Secretary of State amount of benefits.

A person who makes a compensation payment in any case is liable to pay to the Secretary of State an amount equal to the total amount of the recoverable benefits.

(2) The liability referred to in subsection (1) arises immediately before the compensation payment or, if there is more than one, the first of them is made.

(3) No amount becomes payable under this section before the end of the period of 14 days following the day on which the liability arises.

(4) Subject to subsection (3), an amount becomes payable under this section at the end of the period of 14 days beginning with the day on which a certificate of recoverable benefits is first issued showing that the amount of recoverable benefit to which it relates has been or is likely to have been paid before a specified date.

22.— Liability of insurers.

(1) If a compensation payment is made in a case where—

(a) a person is liable to any extent in respect of the accident, injury or disease, and

(b) the liability is covered to any extent by a policy of insurance, the policy is also to be treated as covering any liability of that person under section 6.

(2) Liability imposed on the insurer by subsection (1) cannot be excluded or restricted.

(3) For that purpose excluding or restricting liability includes—

(a) making the liability or its enforcement subject to restrictive or onerous conditions,

(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy, or

(c) excluding or restricting rules of evidence or procedure.

(4) Regulations may in prescribed cases limit the amount of the liability imposed on the insurer by subsection (1).

(5) This section applies to policies of insurance issued before (as well as those

issued after) its coming into force.

> (6) References in this section to policies of insurance and their issue include references to contracts of insurance and their making."

25. As appears above section 1(a) and (b) provided that the 1997 Act applies in cases where "a person makes a payment (whether on his own behalf or not) to or in respect of any other person in consequence of any accident, injury or disease suffered by the other" and listed benefits have been or are likely to be paid to that person "in respect of the accident, injury or disease".

26. The relevant period for the assessment of the benefits paid was, pursuant to section 3(2) the period of five years "immediately following the day on which the accident or injury in question occurred", or, in the case of disease, from the date on which the claimant "first claims a listed benefit in consequence of the disease" unless there was an earlier compromise of the claim, see section 3(4). Section 4 required certificates of recoverable benefits to be obtained by the "compensator".

27. Section 6 imposed a statutory duty on "a person who makes a compensation payment in any case" to pay "the Secretary of State an amount equal to the total amount of the recoverable benefits". Provision was made in section 7 to recover benefits if they should have been paid by the compensator but had not been so paid.

28. Section 8 permitted those who had paid recoverable benefits to deduct them from payments to the injured person "where in relation to any head of compensation listed in column 1 of schedule 2 (a) any of the compensation is attributable to that head, and (b) any recoverable benefit is shown against that head in column 2 of the schedule". Schedule 2 was headed "Calculation of compensation benefit" and provided for three heads of damage being "compensation for earnings lost during the relevant period", "compensation for cost of care incurred during the relevant period", and "compensation for loss of mobility during the relevant period". Relevant state benefits were listed against each head of damage. For example, "Universal credit" is listed against "earnings lost", and "attendance allowance" is listed against "cost of care".

29. Provision was made for appeals to be made to the First-tier Tribunal against the amounts set out in CRU certificates, but the grounds were very limited. Section 11(1)(b) provided that a ground of appeal was "that listed benefits which have been, or are likely to be, paid otherwise than in respect of the accident, injury or disease in question have been brought into account". This meant that there was a continuing link between the accident, injury or disease and the quantum of the CRU certificate.

30. Section 19 made provision for payments by more than one compensator. This was necessary to ensure that there was not over recovery and to deal equally with compensators and others liable who could be identified.

31. Section 22 provided that if a compensation payment is made in respect of the accident, injury or disease, and the liability is covered to any extent by a policy of insurance "the policy is also to be treated as covering any liability of that person under section 6". Section 22(2) provided that "liability imposed on the insurer by subsection (1) cannot be excluded or restricted". Section 22(4) provides that "Regulations may in prescribed

cases limit the amount of liability imposed on the insurer by subsection (1)". No Regulations have been made to limit that liability, and this is the subject of complaint by the insurers in the action. The practical effect of this section was to impose an additional liability on insurers beyond the terms of their contractual liability to their insured.

32. It is apparent the policy of the 1997 Act was to continue the full recovery of benefits paid to injured persons for the state. However it shifted part of the burden of the recovery of those payments from the injured persons to compensators. This was because the effect of schedule 2 was that deductions from payments made to the injured persons could only be made if the benefits corresponded with a head of loss suffered and claimed by the injured person. For example this meant that if an injured person had received income support by reason of his injury, but did not have a claim for loss of earnings, the liability to make the payment under the CRU certificate remained on the insurer, but the injured person would not lose any element of the claim for general damages for pain, suffering and loss of amenity. It is therefore apparent that the objective of the 1997 Act was to continue the full recovery of state benefits paid to a person who had suffered accident, injury or disease which had been caused by a tortfeasor (which recovery had commenced under the 1989 Act), but to shift the burden of the payment of those state benefits which did not correspond to a loss claimed by the claimant to the compensator, who was either the tortfeasor or their insurer.

Relevant developments relating to state benefits in industrial disease claims after the 1997 Act

33. The case on behalf of the insurers is that since the passage of the 1997 Act there have been further changes in the common law and statutory regimes which have increased the burdens of the 1997 Act on insurers in industrial cases, particularly in cases where claimants have suffered from silicosis, asbestosis, pneumoconiosis and mesothelioma. The insurers point particularly to the changes effected by the decision of the House of Lords in *Fairchild*. The cases now distinguish between: "indivisible" diseases where the severity of the disease, once contracted, is not affected by an increase of exposure to the substance which caused the disease; and "cumulative" or "divisible" diseases, where the severity of the disease will increase with any increase in the ingestion of the substance which caused the disease, so that the severity of the disease is sometimes referred to as "dose-related".

34. In fact the starting point for the development of the law in *Fairchild* was probably the decision of the House of Lords in *Bonnington Castings Limited v Wardlaw* [1956] AC 613. In *Bonnington* the claimant had been exposed to silica dust which had caused pneumoconiosis. The dust was from a grinder operated in breach of duty and from a pneumatic hammer operated without breach of duty. Medical science could not identify which exposure had caused the injury, but it was held to be sufficient that the dust from the grinder had materially contributed to the injury. The pneumoconiosis in *Bonnington* was treated as if it were an indivisible disease but later cases have identified that pneumoconiosis is a cumulative disease so that the dust ingested by the claimant, whether in breach of duty or otherwise, contributed to and increased the severity of symptoms. In *McGhee v National Coal Board* [1973] 1 WLR 1 the claimant developed dermatitis after being exposed to brick dust. One exposure might have caused the dermatitis. It was found that the original exposure at work was not in breach of duty, but the failure to provide showers meant that the claimant cycled home still covered in

dust, and that might have caused the dermatitis. The House of Lords held that the defendant's wrongful failure to provide showers had materially contributed to the risk of injury and that was sufficient to establish causation. These cases pre-dated the enactment of the 1997 Act, but the Courts continued to develop the relevant principles. In *Holtby v Brigham & Cowan (Hull) Limited* [2000] ICR 1086 the Court concluded that in a divisible asbestos related disease such as asbestosis a defendant would be liable only for the proportion of damages attributable to the disease based upon the amount of exposure for which the defendant was responsible, rather than for 100 per cent of the whole.

35. These developments were considered by the House of Lords in *Fairchild*. In that case the claimants had developed mesothelioma following exposures to asbestos, in breach of duty, at various workplaces with different employers. Current medical knowledge shows that mesothelioma is an indivisible disease, meaning that one exposure might have caused the mesothelioma. The claimants had been negligently exposed in various workplaces but were unable, on the present state of medical knowledge, to identify the workplace in which they had been exposed to the asbestos that had caused the mesothelioma. The House of Lords developed a special rule so that the claimant could recover against all the employers because they had materially contributed to the risk of contracting the disease. The principle was refined in *Barker v Corus (UK) plc* [2006] UKHL 20; [2006] 2 AC 572 where the claimant's husband had died from mesothelioma after having been negligently exposed to asbestos by the defendant, but had also been exposed to asbestos when working for himself for which he could not claim. The House of Lords held that each employer was only severally responsible for their exposure meaning that the claimant in *Barker* could not recover the whole of the losses. The result in *Barker* was then reversed by section 3 of the Compensation Act 2006 for cases of mesothelioma, meaning that the insurers would have joint and several liability for the whole of the loss, subject to issues of contribution and contributory negligence. The insurers do not, in this litigation, challenge the Compensation Act 2006 but complain of the effect of this change on the payments made under CRU certificates. Some of these changes were summarised in *Equitas Insurance Limited v Municipal Mutual Insurance Limited* [2019] EWCA Civ 718; [2020] QB 488 at paragraph 90.

36. It should be recorded that there were cases where legal developments were more favourable to employers and their insurers. In *Rothwell v Chemical & Insulating Company Limited* [2007] UKHL 39; [2008] AC 281 the House of Lords confronted the issue where a negligent exposure to asbestos had caused pleural plaques. The plaques caused no physical symptoms to the claimant, but there was evidence that they caused concern to those suffering from them. Before this decision many cases for claims arising out of pleural plaques had been compromised on the basis that payment for pleural plaques had been made, as appears from the judgment in *Axa General Insurance Limited v Lord Advocate* [2011] UKSC 46; [2012] 1 AC 868. The House of Lords in *Rothwell* held that the development of pleural plaques which did not cause physical symptoms were not actionable even when taken together with the risk of future disease and consequential anxiety.

37. The Scottish Parliament, established by the Scotland Act 1998, was given powers to make laws in respect of Scotland. It enacted the Damages (Asbestos-related Conditions) (Scotland) Act 2009, "the 2009 Scotland Act". The effect of this was to reverse the decision of the House of Lords in *Rothwell* and provide that the development

of pleural plaques was actionable. Axa General Insurance Company contended that the effect of the 2009 Scotland Act was to infringe rights protected by A1P1 of the ECHR. If that contention was right, it would have meant that the 2009 Scotland Act was beyond the devolved powers of the Scottish Parliament because the Scottish Parliament does not have power to legislate in a way incompatible with the ECHR. In *Axa* the Supreme Court dismissed the claim that the 2009 Scotland Act infringed the insurers' rights under A1P1 of the ECHR. Lord Hope relied on the fact that there had been a tort committed by the employer, insured by *Axa*, and that the insurers had taken the risk of insuring the employers. Lord Hope also noted the past misunderstanding that plaques were actionable.

38. At about the same time issues had arisen about the meaning of insuring clauses between employers and insurers about whether policy cover extended to, or was "triggered", when the disease manifested itself many years later. These issues were resolved by the Supreme Court in *Durham v BAI (Run Off) Limited* [2012] UKSC 14; [2012] 1 WLR 867.

39. The National Assembly for Wales was established by the Government of Wales Act 2006. The Recovery of Medical Costs for Asbestos Diseases (Wales) Bill ("the Wales Bill") was passed. It provided that the costs incurred by the National Health Service in treating victims of industrial diseases should be recovered from tortfeasors and their insurers who had caused or contributed to the diseases. Before the Wales Bill had received assent the Counsel General for Wales referred to the Supreme Court the issue of whether the Bill infringed insurers' rights under A1P1 of the ECHR. In *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3; [2015] AC 1016 (the "*Welsh Bill case"*) the Supreme Court held that the provisions of the Wales Bill infringed the insurers' rights under A1P1 of the ECHR.

40. In *Heneghan v Manchester Dry Docks Limited* [2016] EWCA Civ 86; [2016] 1 WLR 2036, the Court of Appeal held that the *Fairchild* exception to causation applied to asbestos related lung cancer cases because such lung cancer cases were "indivisible", in the same way as mesothelioma was indivisible. *Barker v Corus* was applied so that each defendant's liability was proportionate to that defendant's contribution to the deceased's risk of contracting lung cancer. *Carder v University of Exeter* [2016] EWCA Civ 790; [2017] ICR 392 concerned asbestosis, which is a divisible disease and dose related disease in that current medical knowledge shows that any exposure will have contributed to the severity of the asbestosis. In that case a former employer who had only been responsible for some 2.3 per cent of the claimant's total exposure to asbestos dust was held liable for 2.3 per cent of what would have been the full liability for the claim, because the exposure for which the former employer was responsible had made a material contribution to the claimant's asbestosis. The insurers in that case were responsible for payment of the whole of the CRU certificate.

41. On 7 February 2019 the CRU certificate for Mr Bainbridge was issued in the sum of £39,144.50. This included industrial injuries disablement benefit under the Social Security Contributions and Benefits Act 1992 in the sum of £16,895.80. Mr Bainbridge was aged 77 years at the time of the settlement and did not advance a claim for loss of earnings against which that sum could be set off. He had been employed for 35.3 per cent of his time with the employer provided insurance and reinsurance by the insurers. He had been employed for 44.53 per cent of his time with another employer who had also exposed him to asbestos dust who was not in business and whose insurer could not

be located. The insurers were liable to make the payment to the CRU under the CRU certificate.

42. These proceedings for judicial review then commenced in July 2019.

The first judgment below

43. The insurers submit on this appeal that the answer to the points made on behalf of the Secretary of State are set out in the judgment below. I will therefore refer to relevant parts of that judgment. Having introduced the parties, the judge summarised the insurers' claims. The judge said that the insurers' complaint was that "statutory and common law developments since the 1997 Act, designed for the protection of victims of asbestos-related diseases, have led to a situation where those in the position of the claimants are required to pay to the state amounts equal to the state benefits that do not correspond in any real way to any injury caused by their respective insured". The judge summarised in paragraph 11 of the judgment the five situations about which particular complaint was made.

44. The judge set out the changes to the law which had made the insurers' position more onerous, and noted their reliance on the judgment of Lord Mance in the *Welsh Bill case*. The judge recorded that the insurers relied on the fact that the number of asbestos claims had increased significantly "well beyond what government expected when enacting the legislation". In paragraph 15 of the judgment the judge summarised the insurers' complaints and in paragraph 16 the judge set out some statutory schemes where an appropriate balance had been struck. The judge summarised the Secretary of State's position at paragraph 17 of the judgment.

45. The judge set out the legislative background leading up to the 1997 Act from paragraphs 21 to 33 of the judgment. The judge noted that the significant change introduced by the 1997 Act was that compensators could be required to pay the benefits in respect of the accident, injury or disease even though they might not be deducted from the payments to the claimants.

46. The judge recorded in paragraph 35 the Secretary of State's submission that the scheme reflected a social policy consensus underpinning a package of measures which sought to respond to a range of social problems arising from workplace injuries, and a consensus that it was fair for the insurance industry and not taxpayers to meet the full costs of tortious injuries for which insured employers were liable, even if they exceeded those agreed by the insurance contract. The judge said that the legislative history materials indicated that the 1997 Act reforms "flowed to a very large degree from two significant problems that had emerged under the 1989/92 scheme". These were the £2,500 limit which had created a perverse incentive for the parties to settle at just below the limit to the disadvantage of injured persons, and the CRU certificate was deducted against all damages, including general damages for pain, suffering and loss of amenity.

47. The judge set out Parliamentary materials in paragraphs 37 to 41 and referred to a memorandum from the Association of British Insurers ("ABI") on the difficulties of working out deductions for contributory negligence. The judge also set out compliance cost assessments which he said showed that the understanding was that additional burdens would be modest. The judge referred in paragraph 45 of the judgment to a speech by Lord MacKay as sponsoring minister in November 1996 in which Lord

MacKay referred to the objectives of the then Bill of ensuring that victims retain their compensation for pain and suffering while ensuring that "public funds do not subsidise the negligence of others", and the decision to apply the scheme to all claims not determined before October 1997 "and those arising subsequently". The judge referred to other passages of the debates in paragraphs 46 to 52 of the judgment.

48. The judge referred to part of the debate in which it was apparent from the speech of Viscount Chelmsford, who had been briefed on behalf of the ABI, that "the broad thrust of the proposals was fully agreed by the insurance industry, as was the need to protect awards for pain, suffering and loss of amenity".

49. The judge then set out key provisions of the 1997 Act from paragraphs 53 to 65 of the judgment. The judge recorded in paragraph 65 of the judgment that it was true that ever since the 1989 Act the scheme applied to compensation payments due from a compensator who is liable to any extent in respect of the accident, injury or disease. The judge however remarked that "the major statutory and common law developments referred to in paragraph 10 above, hugely extending compensators' liabilities vis-à-vis injured persons, still lay in the future".

50. The judge then set out the legal framework relating to A1P1 from paragraphs 66 to 73 of the judgment. The judge turned to the targets of the insurers' claim as identified in the Judicial Review claim form. He identified these as being: (1) a failure to read and give effect to provisions of the 1997 Act so as to ensure its compatibility with A1P1 rights of the insurers; (2) a failure to make Regulations under section 22(4) of the 1997 Act to ensure such compatibility; and (3) the certificate in the Bainbridge case.

51. The judge considered the characterisation of those claims and accepted that he was of the view that the Secretary of State was "correct to characterise the challenge to Decision 1 as being in substance a challenge to the balance struck by the 1997 Act itself, at least in the circumstances to which the Act applies today".

52. The judge then dealt with the issue of justiciability in paragraphs 79 to 87 of the judgment. The judge accepted that the Human Rights Act did not apply to conduct before it came into force but accepted that section 22 created "a deemed contractual liability as and 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".

53. The judge addressed the issue of limitation from paragraphs 88 to 94 of the judgment. The judge recorded in paragraph 88 of the judgment that the Secretary of State accepted that a claim for declaratory relief under section 3 or 4 of the Human Rights Act could be brought at any time and no issue of time bar arose in respect of it. The judge addressed the submission that the claim for damages must ordinarily have been brought within one year of the act complained of, and that time ran from 2 October 2000. The judge held in paragraph 91 that he did not accept the Secretary of State's contention that all potential claims under section 6 of the Human Rights Act became barred within a year of the entry into force of the Human Rights Act. First this was because the judge concluded that sections 6 and 22 of the 1997 Act interfered with possessions on a continuing basis. Secondly the insurers' complaint was "in essence that those provisions now fail to strike a fair balance following various legislative and common law developments since 1997, some of which post-date the introduction of the HRA". The judge recorded that damages claims under section 6 may be prima facie time barred

whether the CRU certificate was issued more than a year before the current proceedings commenced, but noted that the insurers' claims include an alternative claim for restitution on the basis of payment under mistake of law to which the HRA time limit would not apply, citing *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, and the insurers indicated that they wished to reserve the right to contend that the limitation period should be extended pursuant to section 32(1)(c) of the Limitation Act 1980. The judge said that the insurers pointed out that they had not formulated their financial loss claims and sought a transfer to the Chancery Division for an inquiry into the losses that they had suffered, and that the Secretary of State had not taken issue with that approach.

54. In paragraphs 93 and 94 of the judgment, the judge set out the submission on behalf of the Secretary of State that section 22(4) of the 1997 Act was enacted openly and that the insurers could have asked the Secretary of State to exercise the power to make regulations, and that the claim had not been brought promptly or at any rate within three months after the claim first arose. The judge held that although the 1997 Act had been enacted 23 years ago and that there had been a failure to make regulations under section 22 throughout that time "it is only that, on the claimants' case, the legislation has begun to infringe their A1P1 rights. It would be difficult to define precisely when that moment occurred." The judge also held that the failure to make regulations was a continuing act, so that the claim could be brought at any time. The judge recorded that the claim was within three months of the settlement in the Bainbridge case.

55. The judge addressed whether the insurers were victims for the purposes of the section 7 of the Human Rights Act from paragraphs 95 to 110 of the judgment. The judge held that the insurers needed to show that they are at least persons who could be adversely affected by the matters of which they complain. The judge then addressed the Secretary of State's argument that Aviva did not qualify as a victim because it had reinsured itself with Swiss Re. The judge recorded that Aviva remained primarily liable to their insured and exposed if Swiss Re could not meet its obligations. As to the argument that Swiss Re reinsured Aviva in the full knowledge of the liabilities imposed by the 1997 Act, the judge considered the arguments based on *Aston Cantlow v Wallbank* [2003] UKHL 37; [2004] 1 AC 546 and distinguished it.

56. The judge then turned to consider whether the 1997 Act infringed the insurers' A1P1 rights in paragraphs 111 to 165 of the judgment. The judge found that the rights and obligations of the insurers under a policy of liability insurance constituted possessions for A1P1 purposes, and that the present case was one of interference with those rights, rather than deprivation.

57. The judge addressed the legitimate aim of the 1997 Act from paragraphs 115 to 122 of the judgment. The judge considered the legitimate aim formulated in the Secretary of State's detailed grounds of resistance. The insurers accepted that the objectives of recovering costs attributable to tortious wrongdoing and increasing public resources generally were legitimate aims, but the judge recorded that the insurers argued that the scheme "as is now applies in the light of subsequent developments … goes well beyond those objectives". The judge did not accept the Secretary of State's submission that the aims of the scheme were wider. In paragraph 118 the judge held that the legislators' focus was to deal with problems arising from the small claims limit and the unfairness of deducting state benefits from general damages.

58. The judge dealt with the issue of rational connection to the aim in paragraphs 123 to 132 of the judgment. The judge accepted in paragraph 127 "with some hesitation" that the contributory negligence CRU payments could be regarded as rationally connected to an aim of recovering from tortfeasors costs attributable to their wrongdoing even though it omitted on practical grounds to carve out benefits attributable to the victim's own contributory negligence. However the judge held at paragraph 128 that the second feature ("the divisible disease CRU payments") and the third feature ("the indivisible disease CRU payments with missing contributors") were not rationally connected to the aim of recovering from tortfeasors costs attributable to their wrongdoing. The judge held "recovery from wrongdoers of the costs occasioned by their wrongdoing would be rationally connected with recovering state benefits in proportion to the extent of the wrongdoing in question, but not with recovering all state benefits without regard to the extent of the wrongdoing". The judge held that the second and third features could only be justified, if at all, on the basis of being rationally connected to the objective of increasing state resources.

59. The judge held, in paragraph 131 of the judgment, that the fourth feature ("the CRU certificates not matching a head of loss") was rationally connected to the aim "because the costs that can fairly be attributable to the insured's tortious wrongdoing include welfare benefit costs that arise by reason of the wrongdoing, even if they are not themselves recoverable as heads of loss". The judge rejected the insurers' submissions that percentage increases in amounts paid broke this link.

60. The issue of whether the law was no more than is necessary was addressed from paragraphs 133 to 137 and the judge concluded that the first of the five features ("the contributory negligence CRU certificates") could have been dealt with as contemplated in the Bills introduced in Scotland and Wales. The law therefore failed this test. The second feature (the divisible disease CRU certificate) and the third feature (the indivisible disease CRU certificate with missing contributors) had already been held not to be rationally connected with an aim of recovery of costs fairly attributable to the insured's wrongdoing, but the judge held if he was wrong about that it would be possible to limit recovery in proportion to the insured's contribution to the overall exposure. The fourth feature ("CRU certificates not matching a head of loss") could not be achieved with less intrusive means, and so far as the fifth feature ("the compromised CRU certificates") was concerned it was accepted that the scheme could not distinguish between compromises which represented an agreed assessment of the claim and other compromises made for commercial reasons.

61. The judge addressed fair balance from paragraphs 138 to 165 of the judgment. The judge found that the first to third features did not strike a fair balance, and that special justification could not be shown bearing in mind their retrospective effect. The judge said it might be that Parliament could introduce a tax on the insurance industry as a whole to cover the state benefits to which the present claim relates, but that the 1997 Act was not such a scheme and the legality of such a scheme shed no light on the legality of the present scheme. I will address the material parts of the judge's conclusions when dealing with this in the judgment.

62. At the end of the judgment the judge dealt with the failure to make regulations under section 22(4) of the 1997 Act from paragraphs 166 to 179 of the judgment. The judge concluded that the insurers' claim could be cast as one based on failure to make regulations under section 22(4) of the 1997 Act.

63. The judge agreed that, given the complexity of the matter, he should accede to the proposal from both sides that there should be further submissions. He set out a provisional view that "the contributory negligence CRU payments" were non-compliant from the date that the Human Rights Act came into force but that the "the divisible disease CRU payments" and the "indivisible disease CRU payments with missing contributors" were non-compliant only when the Act began to operate in the circumstances following the decision in *Carder* and the enactment of the Compensation Act 2006. He noted that considerations of limitation might make those distinctions academic, and he would address them in the light of the submissions.

The second judgment below

64. The judge heard further argument on remedies on 15 December 2020. He circulated a draft judgment to the parties on 21 December 2020 and handed down judgment on 12 January 2021. The judge referred to his provisional view set out in paragraph 181 of his judgment about the date from which the declaration of incompatibility should run. The judge noted the decision in *Holtby v Brigham & Cowan* (referred to in paragraph 34 above) and stated that this may have an effect on the date of the declaration because he said that it might be that the second feature of the 1997 Act could be viewed as having started from the outset. The judge accepted the submissions that the appropriate date for that part of the scheme was when the Human Rights Act came into force. The third feature became unlawful at the end of 2002 as a result of the judgment in *Fairchild* which was handed down on 20 June 2002. The judge also set out his reasons for granting the other relief.

The issues on appeal

65. The Secretary of State pursues eight grounds of appeal. These are: (1) the Judge erred in finding that Parliament's decision not to formulate a scheme based upon the insurers' "matching" principle constituted an unjustifiable interference with their A1P1 rights; (2) the Judge erred in identifying what was the target for the judicial review; (3) the Judge erred in failing to treat the claim as non-justiciable as the relevant interference pre-dated the introduction of the Human Rights Act; (4) the Judge erred in treating the individual insurers each as "victims" for the purpose of the Human Rights Act in light of the relevant commercial arrangements made by them; (5) the Judge erred in concluding that the Court could compel the Secretary of State to introduce new regulations, based upon "matching" principles under section 22(4) of the Act (and also erred in concluding that section 6(6) of the Human Rights Act precluded such a finding in any event); (6) the Judgment contravened article 9 of the Bill of Rights 1689; (7) the Judge erred in his evaluation as to when and how the A1P1 violation arose; and (8) the Judge erred in concluding that section 3 of the Human Rights Act enabled the Scheme to be "read down" so as to replace the actual statutory principles with the insurers' "matching" principles.

66. The Secretary of State submits that the judge erred in his approach to the compatibility of the 1997 Act with A1P1. The insurers say that the answer to all the points made on behalf of the Secretary of State is set out in the judgment of the judge, on which they rely to submit that the appeal should be dismissed.

67. The insurers cross-appeal on the ground that: the Judge erred in failing to hold that, in relation to policies of liability insurance issued before 17 March 1997, the making of

demands for repayment of recoverable benefit in amounts in excess of sums for which the Claimant has or expects to receive a credit under a head of loss from the person suffering from the relevant disease amounted to an infringement of the Appellant's rights guaranteed by A1P1 and the Secretary of State thereby acted unlawfully from 2 October 2000 or a later date. The insurers say that the only error made by the judge in his first judgment was not finding that the fourth situation raised by the cross-appeal was incompatible with their A1P1 rights. The Secretary of State relies on the judge's own finding in relation to the fourth situation to show that the judgment was internally inconsistent and wrong.

68. I am grateful to Mr Kent QC and Mr Brown, and their respective legal teams, for their helpful written and oral submissions. It is apparent that many of the Secretary of State's grounds of appeal overlap. It was also clear that the main issue which divides the parties is whether the 1997 Act infringes the insurers' rights under A1P1. Before I address that issue it will be necessary to consider the Secretary of State's submission that the judge has used Parliamentary materials in breach of article 9 of the Bill of Rights. As to this point the insurers point out that it was the Secretary of State who exhibited the materials in witness statements.

Relevant statutory provisions

CPR Part 54

69. Part 54.5 provides, so far as is relevant that "(1) the claim form must be filed- (a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose".

The Bill of Rights 1688

70. Article 9 of the Bill of Rights 1688 provides that "the freedome of speech and debates in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament".

The Human Rights Act 1998

71. Sections 3 and 7 of The Human Rights Act 1998 ("the HRA") provide:

> "3.— Interpretation of legislation.
>
> (1) 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.
>
> (2) This section—
>
> (a) applies to primary legislation and subordinate legislation whenever enacted;
>
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

4.— Declaration of incompatibility.

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility …

7.— Proceedings.

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

> (4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.
>
> (5) Proceedings under subsection (1)(a) must be brought before the end of—
>
> (a) the period of one year beginning with the date on which the act complained of took place; or
>
> (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,
>
> but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.
>
> (6) In subsection (1)(b) "legal proceedings" includes—
>
> (a) proceedings brought by or at the instigation of a public authority; and
>
> (b) an appeal against the decision of a court or tribunal.
>
> (7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act."

72. The relevant convention right in this case is A1P1.

A1P1

73. A1P1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Whether there was an infringement of article 9 of the Bill of Rights

74. Article 9 of the Bill Rights is "a provision of the highest constitutional importance", see Lord Browne-Wilkinson at page 638D of *Pepper v Hart* [1993] AC 593. This is because it is a foundation of the separation of the legislative, executive and judicial

branches of Government in the United Kingdom. It helps to ensure comity between two of those branches of Government, namely the judiciary and the legislature.

75. In *Wilson v First County Trust Ltd (No.2)* [2003] UKHL 40; [2004] 1 AC 816 at paragraph 111 Lord Hope emphasised the need for the court to look at the legislation itself to determine the legislative aim of Parliament. The court however was entitled to look at Parliamentary and other materials to identify the policy objective of the legislation and when assessing whether the legislation was proportionate. As Lord Nicholls explained at paragraph 64 by using materials in this way the Court would not be "questioning" proceedings in Parliament. In *R(SC) v Works and Pensions Secretary* [2021] UKSC 26; [2021] 3 WLR 428 at paragraph 163 Lord Reed returned to the use which can be made of Parliamentary debates and other Parliamentary material when considering whether primary legislation is compatible with rights under the ECHR. At paragraph 176 of *R(SC)* Lord Reed analysed the speech of Lord Nicholls in *Wilson v First County Trust (No.2)* as establishing that beyond the uses identified above, Parliamentary debates had no direct relevance to the issues the court had to decide. This was because the will of Parliament was expressed in the language of the statute, and proportionality was not to be judged by the quality of reasons advanced in support of a measure in the parliamentary debate.

76. Mr Brown criticises the use made by the judge of Parliamentary materials because he submits that the judge wrongly identified the objective of the legislation from those materials and not from the wording of the 1997 Act. Even if Mr Brown is right to say that the judge wrongly identified the objective of the legislation (a point to which I return below) it is not right to say that the judge contravened article 9 of the Bill of Rights. This is because the judge was attempting to use the materials to identify social policy and proportionality of the 1997 Act, and that is a permissible use of Parliamentary materials. Saying that the judge has come to the wrong conclusion from those materials does not take this point any further. I would therefore dismiss this ground of appeal before turning to the main issues on the appeal, namely whether the judge's finding that the 1997 Act infringed the insurer's rights in the three situation was right, and whether the judge was right to find that there was no infringement in the fourth situation.

The test for assessing an infringement of A1P1 rights

77. It was common ground that possessions within A1P1 had an autonomous meaning, and that a requirement to pay a CRU certificate was capable of amounting to a deprivation of possessions. A1P1 has been analysed as containing three rules. First that there should be a peaceful enjoyment of property, set out in the first sentence. Secondly the rule against deprivation of possessions except in certain circumstances contained in the second sentence of the first paragraph. The third rule, contained in the second paragraph, recognises the right of a state to control the use of property in accordance with the general interest to secure the payment of, among other matters, contributions. These three rules are connected.

78. Any interference with property rights must comply with the principle of legality, pursue a legitimate aim, and be proportionate. In *Bank Mellat v Her Majesty's Treasury (No.2)* [2013] UKSC 38 and 39; [2014] AC 700 the Supreme Court considered a substantive issue about whether a 2009 Order should be quashed for infringement of A1P1, together with a procedural issue about the use of closed materials. The ground on which the

2009 Order was challenged was that it involved an impermissible interference with the A1P1 rights of the relevant bank. In paragraph 20 Lord Sumption, giving the majority judgment, referred to relevant previous decisions about the tests for assessing the compatibility and proportionality of measures interfering with human rights. Lord Sumption said: "the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community". Although Lords Hope and Reed dissented in the result there was no relevant dispute about the applicable test.

79. It was common ground on this appeal and before the judge that the *Bank Mellat* approach was the appropriate test to be applied. The parties and the judge used the terms "legitimate aim" to cover the first part of the analysis, namely whether the objective was sufficiently important to justify the limitation of a fundamental right; "rational connection" to cover whether the limitation was rationally connected to the objective; "no more than necessary" to cover whether a less intrusive measure could have been used; and "fair balance" to cover whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

80. There was a dispute between the parties about how the court was to assess whether there had been a breach of any part of the four stage analysis. Mr Brown submitted that the court should only find that the legislative provision had failed any part of the four stages if the legislature's judgment could be assessed as being "manifestly without reasonable foundation" and that the judge had wrongly applied the "manifestly without reasonable foundation" assessment only to the fourth stage of the test. Mr Kent on behalf of the insurers submitted that the judge took the right legal approach to the test.

81. It seems that the first use of the phrase "manifestly without reasonable foundation" for A1P1 purposes was by the European Court of Human Rights ("ECtHR") in *James v. United Kingdom* (1986) EHHR 123. The ECtHR held at paragraphs 46 that: "the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one" and that the Court "will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation." There were then a number of Supreme Court cases, including the *Welsh Bill case*, which applied the manifestly without reasonable foundation test only to the first to third stages, and not the fourth stage of the *Bank Mellat* test.

82. In *R(DA) v Work and Pensions Secretary* [2019] UKSC 21; [2019] 1 WLR 3289, the Supreme Court confirmed that the manifestly without reasonable foundation test applied to all parts of the four stage analysis. Lord Wilson considered article 14 discrimination and A1P1 deprivation of property cases, including the *Welsh Bill case* and held, at paragraph 65 that in relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits "the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it".

83. This conclusion was revisited in *R(SC)*. *R(SC)* was decided in the Supreme Court after the judgment of the judge below. At paragraph 115(2) of *R(SC)* Lord Reed identified that "a wide margin is usually allowed to the state when it comes to general measures of economic or social strategy". There may be a wide variety of other factors which bear on the width of the margin of appreciation. The Court must make a balanced overall assessment. At paragraph 142 Lord Reed emphasised that the ECtHR has generally adopted a nuanced approach, which enables account to be taken of a range of factors which may be relevant in particular circumstances so that a balanced overall assessment can be reached. As Lord Reed said "there is not a mechanical rule that the judgment of the domestic authorities will be respected `unless it is manifestly without reasonable foundation'. The general principle that the national authorities enjoy a wide margin of appreciation in the field of welfare benefits and pensions forms an important element of the court's approach, but its application to particular facts can be greatly affected by other principles which may also be relevant, and of course by the facts of the particular case." Lord Reed went on to show that this approach applied to many different types of cases.

84. When turning to the approach of the domestic courts Lord Reed said at paragraph 143 that a similar approach had been taken by domestic courts and that "where the European court would allow a wide margin of appreciation to the legislature's policy choice, the domestic courts allow a wide margin or `discretionary area of judgment' …". This was relevant to the intensity of review. Lord Reed set out his conclusions from paragraph 157 of the judgment. He recorded that "a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the legislature will generally be respected unless it is manifestly without foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors …". This would depend on the circumstances of the case, and very weighty reasons would usually be required to be shown, and the intensity of view would be high, if a difference in treatment on a suspect ground was to be justified. Lord Reed cautioned against taking a mechanical approach stating "a more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant".

85. In these circumstances I do not accept Mr Brown's submission that the appeal should be allowed on the basis that the judge failed to apply, in a mechanistic fashion, the formula of "manifestly without reasonable foundation" to each stage of the four stage analysis. It is therefore necessary to return to the judge's assessment of the four stages of the *Bank Mellat* test applying the appropriate intensity of review.

Errors in the judge's approach

86. The judge's characterisation of the legitimate aim or objective of the 1997 Act was, in my judgment, impermissibly narrow. The judge held that the 1997 Act was not "designed with a view to increasing public resources as end in itself, without regard to the fault of the compensator/insurer from whom contributions were to be demanded" in paragraph 118 of the judgment. This followed on from the judge's approach as set out in paragraph 62 of his judgment where he found what was the legitimate aim from the Parliamentary materials, as opposed from finding it from the legislation itself. In my judgment the judge did not take proper account of what was provided for by the 1989 Act, which made it clear that all state benefits paid to a claimant who had suffered

accident, injury or disease were to be recovered, which scheme was continued by the 1997 Act. If the judge had had the benefit of the guidance in paragraphs 163 to 167 of *R(SC)* about ascertaining the aim of the legislation from the legislation itself, the judge might not have been misled into using the legislative materials to determine the aim of the legislation.

87. This impermissibly narrow approach to the legislative aim of the 1997 Act affected the judge's whole approach to the four stage analysis. This explains how the judge came to find that there was no rational connection to the legitimate aim in two of the four situations about which complaint is made by the insurers. In paragraph 127 he considered the rational connection to the aim of the legislation to be "tenuous" in the first situation so far as it concerned contributory negligence, without taking account of the fact that the compensator (albeit together with the claimant) caused the accident, injury or disease. The narrowness of the judge's approach became even clearer when the judge in paragraph 128 of his judgment held that the second and third features were not rationally connected to the legislative aim. The judge found that "recovery from wrongdoers of the costs occasioned by their wrongdoing would be rationally connected with recovering state benefits in proportion to the extent of the wrongdoing in question". Such a conclusion ignores the fact that the policy of the 1989 Act, continued in the 1997 Act, was for a full recovery of state benefits, and that the 1997 Act allocated responsibility for non-matching deductions to the insurers.

88. However, even if the judge's analysis was wrong because it took an impermissibly narrow approach to legitimate aim which affected the whole of his approach to the issue of infringement of the insurers' A1P1 rights, that does not mean that the appeal will be allowed. This is because this court will need to undertake the analysis for itself.

This court's assessment of the compatibility of the 1997 Act and A1P1 rights of the insurers

89. It is relevant to record that the claim by the insurers in this case, namely that their A1P1 rights have been infringed in four particular situations, does not concern a suspect ground, such as discrimination on a ground such as sex or race, where even closer scrutiny by the courts might be expected.

90. It is also important to state that the 1997 Act is a measure of economic policy and social policy. This is because the 1997 Act continued the state practice, in accordance with the recommendation made in the Beveridge Report in 1942, of paying state benefits to persons who suffered an accident, injury or disease even where that person is bringing a claim for compensation. The 1997 Act continued the practice, adopted in the 1989 Act, of ensuring that all state benefits paid to a claimant who was bringing a claim for compensation in respect of accident, injury or disease should be recouped. The 1989 Act had provided an exception for claims where £2,500 or less was paid to claimants, but this had created incentives for the parties to compromise an action for £2,500. It is not apparent that the judge's analysis below paid sufficient attention to the fact that the scheme of recovery of all state benefits paid in respect of the accident, injury or disease established in the 1989 Act was continued in the 1997 Act, and his analysis of the objectives of the legislation concentrated on the changes made to the 1989 Act by the 1997 Act.

91. Even though the 1997 Act is an instrument of economic and social policy, the court is still required to carry out an exacting, careful, analysis, giving appropriate respect to the assessment of Parliament on this issue of economic and social policy, but taking account of all factors which are relevant. Otherwise appropriate recognition by the Court of the fact that certain matters are by their nature more suitable for determination by Government or Parliament than by the courts, might lead to an impermissible abdication of the judicial function. The judicial function remains for the court to determine whether the relevant provision infringes rights provided to the insurers under the Human Rights Act.

92. Another relevant feature of the 1997 Act is that it was retrospective in effect in the sense that although it only applied to compromises or judgments made after the 1997 Act had been enacted, it affected policies of insurance which had been priced and issued many years before, but where the claimant had only recently suffered from the disease. The insurers rely in particular on this feature, noting that such a feature required "special justification", see the *Welsh Bill case*. Although the changes in the 1997 Act did only apply after enactment of the 1997 Act, I accept that, for the reasons given in the *Welsh Bill case* the effect of the 1997 Act was retrospective in effect and special justification is required. This was because it affected insurance policies sold many years earlier. In this respect it is relevant to record that the legal effect of those policies was to provide cover to employers in respect of liabilities for disease manifesting itself many years later. This meant that the insurers would be at risk of legal developments relating to personal injury and long tail disease claims. The developments in personal injury litigation in the time since the policies were issued included, for example, alterations to the discount rate which affects the multipliers used to calculate future losses. Some of the developments were not unheralded. The decision in *Fairchild* had its roots in earlier decisions such as *McGhee*. It might also be noted that the law has developed in different ways in other jurisdictions including the United States, see for example the note of counsel's argument reported in *Barker v Corus*, but most jurisdictions have fashioned remedies to ensure full recovery for claimants where there has been any wrongful exposure to asbestos. Although it is right that the liabilities fall on the insurers because employers' liability insurance has been compulsory since 1972, it is also fair to record that Aviva has continued to operate in the employers' liability insurance market and Swiss Re reinsured Aviva after the 1997 Act had been in force for over 15 years.

Legitimate aim

93. As recorded above, the 1997 Act changed the position from the 1989 Act by providing that if state benefits could not be matched to a head of loss claimed by the claimant, the paying party would not be the claimant who might lose payments for general damages (as under the 1989 Act), but would be the tortfeasor or the insurer. This meant that it was inevitable in the scheme of the 1997 Act that there would be payments made by the insurers even though the losses could not be directly matched to losses claimed by the claimant as a result of the insured employer's wrongdoing. The objective of the 1997 Act was to continue the full recovery of state benefits paid to a person who had suffered accident, injury or disease which had been caused by a tortfeasor (which recovery had commenced under the 1989 Act), but to shift the burden of the payment of those state benefits which did not correspond to a loss claimed by the claimant to the compensator, who was either the tortfeasor or their insurer. This broadly accords with the description of the legislative objective identified on behalf of the Secretary of State

and set out by the judge in paragraph 115 of the judgment. This legislative object of the 1997 Act is determined from the legislation itself in accordance with the approach set out in *R(SC)*. This was a legislative object which was sufficiently important to justify the limitation of fundamental rights protected by A1P1.

Rational connection

94. In my judgment there was a rational connection between the objective of the legislation and the interference with insurers' interests in each of the five situations about which complaint is made by the insurers. This is because for the contributory negligence CRU payments, the divisible disease CRU payments, the indivisible disease CRU payments with missing contributors, the CRU certificates not matching a head of loss, and the compromised CRU certificates, each interference continued the legitimate aim of recovering the full state benefits paid to the person who had successfully claimed compensation from the tortfeasor or their insurers. It did this by placing the burden of such payments on the tortfeasors or their insurers where it did not correspond with a head of claim advanced by the claimant. It meant that the situation which occurred with the Bainbridge CRU certificate, where a wrongdoer who, on current medical knowledge was responsible for a very small part of the wrongful actions which caused the development of the disease, is left with the burden of the whole payment. The decision and judgment that it should be the insurer, and not the claimant, who carried the burden of missing payments, because of non-matching heads of loss, or missing contributors, was one that Parliament was entitled to consider rational.

95. Further the existence of section 1(1)(b), which required the listed benefits to have been paid in respect of the accident, injury or disease, and section 11(1)(b) of the 1997 Act, which meant that insurers could appeal against the quantum of a CRU certificate if the listed benefits had not been paid "in respect of the accident, injury or disease in question", ensured that there remained a rational connection between the objective of the 1997 Act and its practical operation, by limiting the recovery of state benefits to those which were paid in respect of the accident, injury or disease.

No more than is necessary

96. Once the legitimate aim and rational connection are established, it is difficult to see what less intrusive measure would have achieved the same outcome in each of the four situations. The judge considered statutory schemes whereby a finding of contributory negligence operated to reduce the payments which would be made under the scheme, see for example *The Welsh Bill case*. That however was very different legislation, requiring payment for free at the point of delivery medical treatment provided by the NHS, which did not include the objective of recovering all the state benefits paid in respect of the accident, injury or disease. Such a scheme would not have achieved the legislative objective, because it would have meant that not all the state benefits paid in respect of the accident, injury or disease would be recovered.

A fair balance

97. The issue of fair balance therefore becomes the critical issue dividing the Secretary of State and insurers in respect of all four situations complained of by the insurers. The Secretary of State relies on the decision in the *Axa case*, and the insurers rely on the decision in the *Welsh Bill case*. There was some discussion in the submissions about

whether the decisions of the Supreme Court in those cases bound the Court of Appeal as they were, it was suggested, first instance decisions by the Supreme Court in proceedings under the Scotland Act and Wales Act respectively. It is not necessary to answer this issue to determine the appeal, because it is common ground that both decisions involved consideration of separate legislation and did not compel this court to any particular result, and because it is apparent that the decision of the Supreme Court in the *Welsh Bill case* on the compatibility of the proposed legislation with the A1P1 rights of the insurers in that case was obiter. In my judgment, as a matter of formal precedent, these are decisions of the Supreme Court in particular statutory proceedings under the Scotland Act and Wales Act respectively and therefore do not formally bind the Court of Appeal in England and Wales as a matter of precedent. In some respect the role performed by the Supreme Court in considering the validity of the legislation before it is enacted comes closest to the advisory role on legislation performed by the Conseil d'état in France. The decisions in *Axa* and the *Welsh Bill case* are, however, decisions of the Supreme Court and I propose to follow and apply them.

98. In my judgment, however, neither the *Axa case* nor the *Welsh Bill case* provide an answer to the question of fair balance in this case. This is because these cases were both dealing with very different statutory schemes. The *Axa case* concerned whether there should be a statutory return to the widespread understanding that pleural plaques were actionable on their own, which had been shown to be a misunderstanding by the decision in *Rothwell*. The *Welsh Bill case* involved a proposal to make insurers pay for medical costs incurred by the NHS in treating claimants who had suffered certain industrial diseases. There were statements in the *Axa case* which the Secretary of State proposed to rely on, and statements in the *Welsh Bill case* which the insurers relied on, but neither case provided the answer to the balancing exercise which needed to be undertaken in this case.

99. As to the fair balance the insurers rely in particular on what they say was the increasingly onerous effects of the developments in the common and statutory law relating to industrial disease claims. They complain, for example, that insurers are being required to pay 100 per cent of state benefits under CRU certificates for claimants where the claimant may have been mainly responsible for the disease in the first situation, and where the insured may have been only 1 per cent responsible for the disease in the second and third situations. They are required to pay all benefits where there is no corresponding head of loss. They are required to pay CRU certificates even if there has been a compromise for commercial reasons without an admission of liability. All of this is relevant to the issue of special justification.

100. I accept that that there have been relevant developments in the common law and in statute, in particular the Compensation Act 2006, which have increased the liabilities of compensators under the 1997 Act. It is accurate to state that insurers will, in certain cases, pay the whole of the CRU certificate when their insured was responsible only for some of the wrongful exposure, see for example the position in *Carder v University of Exeter* where the former employer was responsible only for 2.3 per cent of the claimant's total exposure. However this is against a background where the tortfeasor is responsible in law, at least in part, for the accident, injury or disease which has led to the payment of the state benefits.

101. It is apparent that there was a deliberate decision made in the 1989 Act to recover all state benefits paid to a claimant who had suffered from an accident, injury or disease,

and there was then a decision in the 1997 Act to limit the burden on the claimant only to the deduction for benefits which correspondence with a head of claim made by the claimant. These were economic and social policy choices made by Parliament. Parliament is the body particularly well suited to make such policy choices. So far as contributory negligence is concerned, which was the first situation about which complaint is made by the insurers, it was only with the advent of the Law Reform (Contributory Negligence) Act 1945 that Parliament introduced an apportionment of responsibility between the claimant and tortfeasor. Before that the courts had been confronted with the choice of either dismissing the claim or allowing it in full using the doctrine of "last opportunity", see Clerk & Lindsell on Torts, Twenty Third Edition, at 3-61. In cases where there is a joint and several liability with bankrupt fellow tortfeasors, tortfeasors and their insurers can end up paying for 100 per cent of the damages even though their liability is only assessed at 1 per cent. The social and economic policy choices in the 1997 Act made by Parliament were not objected to by the ABI. This failure to object by the ABI does not of course bind the insurers in this case, but it is a relevant factor to be considered and it may explain why the insurers spent so long in identifying common law and legal developments in industrial disease claims after the 1997 Act had been enacted which they said meant that the effect of the 1997 Act had now infringed their A1P1 rights.

102. The insurers point out that they are not the tortfeasors, and that the effect of the 1997 Act is to create a new statutory liability for payment of CRU certificates. The answer to this is that the whole scheme is based on the fact that the insured employer has acted in breach of common law or statutory duties which has caused or materially contributed to the accident, injury or disease. The link with the accident, injury or disease is maintained by the provisions of sections 1(1)(b) and 11(1)(b) of the 1997 Act.

103. The insurers state that none of this could be priced in the historic insurance policies. As to the issue of retrospectivity it is right that the insurance policies were issued and sold many years ago, but they covered continuing liabilities and any reasonable insurer in the employer liability market must have known that medical understanding about causes of industrial diseases would develop, and the law would react to those developments with, for example, developments in the way that divisible and indivisible diseases were treated. There was special justification for the interference with the insurers' "possessions" because the 1997 Act transferred the liability for the recovery of the state benefits which did not correspond with a head of loss from the claimant to the compensators. This was to ensure that the claimants retained the benefits of all their claims for personal injuries, save where there was a claim for financial losses which corresponded with a state benefit which had been paid.

104. Other factors relevant to the fairness of the balance struck by the 1997 Act include the fact that state benefits are only payable up to the date of compromise or a long stop of five years, even if the state benefits continue to be paid after that date. The insurers have the benefit of the fact that the state has made available free medical care to claimants, and if the claimants have taken advantage of that free medical care, it avoids the need for payment of medical expenses by the claimants which would then be recovered from insurers. The insurers have the benefit of the practice in personal injury claims whereby damages for loss of earnings are generally claimed and paid net of income tax, so that the state loses out on the income tax in a claim for loss of earnings. All these matters are to be taken into account as part of a fair balance. In my judgment

the scheme of the 1997 Act, built as it was on proposals dating back to the report by Beveridge to the effect that state benefits should be paid to injured claimants who could bring a claim against their employers, and which continued the premise of the 1989 Act that all state benefits paid in respect of an accident, injury or disease should be recovered by the state, was justifiable and there was special justification for it from all of the factors set out in paragraphs 99 to 103. This is not a surprising conclusion in circumstances where: the 1997 Act had been in operation for about 21 years by the time that the insurers commenced their action; the 1997 Act continued social and economic policies identified in the 1948 Act and the 1989 Act; and the ABI had not opposed the 1997 Act.

105. The judge was therefore wrong to find that the 1997 Act and the Regulations made under it infringed the A1P1 rights of the insurers in the first three situations, but he was right to find that it did not infringe the A1P1 rights of the insurers in the fourth situation. I would therefore allow the Secretary of State's appeal and dismiss the insurer's cross-appeal, and dismiss the claim for judicial review.

Victims, non-justiciability, target of the claim, limitation and delay

106. In the light of my conclusion on the main ground of appeal, I can deal with the Secretary of State's other grounds of appeal both shortly and together, because they raise overlapping points.

107. First in my judgment both Aviva and Swiss Re would, in the event of an infringement of A1P1, be victims for the purposes of the Human Rights Act 1998. This is because Aviva has issued employers' liability insurance policies under which they are liable to make payments to the CRU under the 1997 Act. They remain primarily liable, even if they have reinsured those employers' liability policies with Swiss Re, for example, in the event that Swiss Re could not meet claims. So far as Swiss Re is concerned, it is the party now responsible to pay the CRU under the 1997 Act under its reinsurance arrangements with Aviva. It is correct to record that it became responsible under reinsurance arrangements made long after the 1997 Act had come into force. However there is nothing to suggest that Swiss Re did not then contemplate this challenge, and there was nothing in the arrangement to suggest that it should not do so. Although there is a loose analogy with *Aston Cantlow* this is a different situation where many tortfeasors and insurers were affected and an individual reinsurer is in no different place to complain. It is in fact closer to the situation in *Pye v United Kingdom* where the ECtHR held at paragraph 77 that the fact that legislation had been in existence for a period of time was relevant to fair balance, but the fact that the claimants had become landowners after the enactment of the 1925 and Limitation Acts did not prevent them from being victims.

108. Secondly, as far as the target of this claim is concerned, it is right to say that the insurers are complaining about the effect of the 1997 Act and the Regulations made under the 1997 Act, but the complaint arises in relation to liabilities to pay CRU that have arisen after the enactment of the 1997 Act.

109. Thirdly the fact that the claims relate to matters which were identifiable before the enactment of the 1997 Act does not mean that the claims became justiciable only at that time. This is because CRU certificates continued to be issued under the 1997 Act and a continuing failure to make regulations.

110. Fourthly it was common ground that the judge was correct to say that a claim for declaratory relief under the Human Rights Act could be brought at any time but, in my judgment, that was not a complete answer to the issue of limitation or delay. The insurers have made claims for damages, under the Human Rights Act, for the amounts paid under CRU certificates issued pursuant to the provisions of the 1997 Act. As the judge recorded the insurers claim that they can avoid limitation issues by relying on *Kleinwort Benson*. As to the proposed reliance on *Kleinwort Benson* and the reservation of the right to rely on section 32(1)(c) of the Limitation Act 1980, this was not a satisfactory way of addressing the issues of limitation. Further, it did not explain why the claims for judicial review arising in respect of the wrongful issue of past CRU certificates had not been brought within three months after the issue of the certificate, or at the least within three months of payment of the certificate. A claim for damages under the Human Rights Act may be brought within "one year beginning with the date on which the act complained of took place; or such longer period as the court or tribunal considers equitable having regard to all the circumstances" but this was a claim for judicial review. A claim for damages may be added to a claim for judicial review, but as section 7(5) of the Human Rights Act makes clear, the limitation period "is subject to any rule imposing a stricter time limit in relation to the procedure in question".

111. In this case the rule imposing a stricter time limit in relation to the procedure for judicial review was CPR Part 54, and the stricter time limit was the three months set out in CPR 54.5. The three month time limit in judicial review proceedings exists for good reason. It permits the courts to carry out a rapid audit of the legality of decision making by public authorities. It ensures that any necessary interference with good administration is kept within reasonable and proportionate limits. To grant a declaration in proceedings issued in July 2019 to permit insurers to seek to bring claims for damages for every single CRU certificate issued since 2 October 2000 in the first and second situations, and since 1 January 2003 in the third situation is the antithesis of a rapid audit of the legality of decision making. The exhumation of so many historic CRU certificates will create administrative difficulties for both the insurers and the Secretary of State. If the insurers had wished to bring free-standing claims for damages for infringement of A1P1 rights they were at liberty to do so and they could have dealt with the issues of limitation in that claim. As, however, they brought a claim for judicial review they can have a determination of the current issues, and any issues arising within the period of three months before the issue of the claim form. The insurers have not adduced any evidence to justify the court, in this action for judicial review, making declarations to cover situations dating back to 2000 or 2003. The fact that the insurers contended that it was difficult to identify when they said that the 1997 Act began to infringe their A1P1 rights, as recorded by the judge in paragraph 94 of his judgment, does not justify ignoring the provisions of CPR 54.5 and making declarations relating to historic matters.

112. Finally, as already noted, the claim for judicial review included a claim for damages. It was asserted that there was a right to claim restitution but no detail was given. The judge expressly recorded that the insurers had not formulated their financial loss claims in detailed grounds, on the basis that it would be impracticable pending the court's decision on the substance of the challenge, and that the Secretary of State had not taken issue with this approach. In my judgment this was a wrong approach by the parties to the case management of the claims for damages. It is for the party claiming damages to set out the way in which the claims for damages are made, rather than attempt to

leave everything to be sorted out in the future in the individual claims transferred to the Chancery Division. As it was the Court below was told that the parties had agreed that limitation could be dealt with during the proceedings in the Chancery Division, but this did not form part of the order made by the judge. Further, as the judge had addressed limitation in paragraphs 88 to 94 of his first judgment it was not entirely clear what would be decided in the individual "inquiry into damages" transferred to the Chancery Division. If anything substantive remained to be challenged, this should have been dealt with in the Administrative Court.

Conclusion

113. For the detailed reasons set out above: (1) I find that the Court below did not contravene the provisions of article 9 of the Bill of Rights; (2) I would not allow the appeal on the basis that the judge failed to apply the formula "manifestly without reasonable foundation" to each stage of the four stage *Bank Mellat* analysis; (3) I would allow the Secretary of State's appeal against the judge's finding that the 1997 Act and the Regulations made under it infringed the insurers' A1P1 rights in the first, second and third situations; (4) I would dismiss the insurers' cross-appeal against the judge's finding that the 1997 Act and the Regulations made under it infringed the insurers' A1P1 rights in the fourth situation; and (5) I would dismiss the claim for judicial review.

Lady Justice Carr

114. I agree with both judgments.

Sir Julian Flaux, C.

115. The present appeal must be put in context. This challenge by way of judicial review was made 22 years after the 1997 Act was passed by Parliament. That Act is the latest expression by Parliament of a socio-economic policy which dates back at least to the 1948 Act, if not the Beveridge Report itself, of the state paying social security benefits to victims of a tort whilst ensuring that there was no double recovery. Since the 1989 Act, this policy has involved recouping the costs of those benefits paid by the state from the tortfeasors and their insurers. The lateness of the challenge is sought to be justified by contending that it is only recent developments in the law which have led to the statutory regime treating the insurers unfairly. However, as the historical analysis by Dingemans LJ in his judgment demonstrates, experienced employers' liability insurers and their reinsurers, such as Aviva and Swiss Re, must have known for some years, and certainly well before 2019, when these proceedings were commenced, that there had been or were likely to be developments in the law which would impose more onerous liabilities on employers and thus on their insurers in respect of industrial diseases.

116. The question of where the balance lies between tortfeasors and their insurers on the one hand and society as a whole on the other as regards recoupment of social security benefits paid to the victims of the tort is a matter of socio-economic policy which is quintessentially a matter for Parliament not for the Courts. That is all the more so in circumstances where, in the 24 years since the Act was passed, Parliament has had the opportunity to amend or reset the policy (not least when the Compensation Act 2006 was passed) yet, for whatever reason, has chosen not to do so. In the circumstances, this Court would need to tread very cautiously before it interfered with the statutory regime. Whether the applicable test under the four stage analysis derived from *Bank Mellat* as

to when the court will interfere is that the judgement of the legislature is "manifestly without reasonable foundation" or the more flexible approach in *R (SC)*, which still affords to the legislature in areas of socio-economic policy a wide margin of appreciation, in my judgment the insurers in the present case come nowhere near satisfying the test.

117. It is not necessary to repeat the comprehensive analysis by Dingemans LJ in his judgment as to why the four stages of *Bank Mellat* are satisfied save to emphasise a few points. The legitimate aim of the legislation is to recoup the costs of social security benefits paid to employees who contract industrial diseases from the insurance industry which insures against employers' liability, it being the fair and reasonable assessment of the legislature that the insurance industry is well able to shoulder the burden of the cost of those benefits. Before the 1997 Act was passed, the matter was extensively debated in Parliament with representations being made on behalf of the Association of British Insurers.

118. In terms of fair balance, although the insurers complain that the statutory scheme makes them 100% liable to recoup benefits even where those benefits are not matched by a head of loss for which the tortfeasor is liable, this seems to me to ignore two matters. First the insurers' matching approach would be contrary to the will of Parliament which clearly intended the insurers to be liable to recoup all the benefits even where they did not "match" a head of loss; hence the words of section 22 of the 1997 Act: "the liability is covered <u>to any extent</u> by a policy of insurance" (my emphasis).

119. Second, the insurers are not in fact obliged by the statutory scheme to recoup the state for the totality of the responsibilities which the state assumes towards those who have suffered industrial diseases. Thus, the five year limit introduced by the 1948 Act remains in place. The state remains responsible for paying benefits after five years as well as for the costs of social care and NHS treatment throughout, all of which demonstrates that the statutory scheme does strike a fair balance. It is no answer that many sufferers from industrial diseases such as mesothelioma have reduced life expectancy, since it is clear that the financial burdens for which the state assumes responsibility without any entitlement to be recouped under the statutory scheme remain considerable.

120. For these reasons and those set out in more detail by Dingemans LJ I would allow the Secretary of State's appeal and dismiss the insurers' cross-appeal.