Court of Appeal Rejects Insurers' Challenge to CRU Scheme

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On 14 January 2022, the Court of Appeal handed down judgment in *Aviva Insurance Ltd & Anor v Secretary of State for Work and Pensions* [2022] EWCA Civ 15 which concerns the compatibility of certain aspects of the Compensation Recovery Unit ("CRU") scheme and the rights of the claimant insurance companies under Article 1 of the First Protocol ("A1P1") of the European Convention on Human Rights ("the ECHR").

In short, the Court of Appeal found that the CRU scheme did not infringe the Claimant insurers' A1P1 rights.

Background

The CRU scheme was originally established by the Social Security Act 1989 ("the 1989 Act") and was altered by the Social Security (Recovery of Benefits) Act 1997 ("the 1997 Act").

The First Claimant, Aviva, sold employers' liability insurance policies. The Second Claimant, Swiss Reinsurance, provided reinsurance cover. The Claimants sought to claim damages in respect of payments made under CRU certificates dating as far back as October 2000.

The Claimants argued that, predominantly as a result of statutory and common law developments post-dating the 1997 Act, there were five situations under the 1997 scheme where liability insurers had to reimburse the State for 100% of the social security benefits even where their insured had not caused all the damage or where the benefits did not correspond to any damage caused by their insured (the "Five Situations"):

1. when the employee was contributorily negligent but the insurer has to pay 100% of the recoverable benefits;
2. when the employee has a divisible disease such as asbestosis i.e. a dose-related disease – the insured employer may only be responsible for, say, 2% of the claimant's total exposure to asbestos dust but is made to pay 100% of the recoverable benefits;
3. a situation where other employers would normally be liable in full for an indivisible disease (such as mesothelioma) but the employers or their insurers cannot be traced – this is particularly problematic in asbestos cases;
4. when the insurer is required to repay to the CRU benefits which do not correspond to a recognised head of loss in a negligence claim – for example, Universal Credit, which includes housing benefit, is a listed benefit in the 1997 Act; and
5. when the insurer has to pay 100% of the recoverable benefits despite the element of compromise present in most settled claims – even claims settled without admission of liability.

Background to the 1997 Act

The background to the 1997 Act, which proved pivotal to the Court of Appeal's decision in this case, is set out at [10] to [23] of the judgment.

Under the 1989 CRU scheme, the full amount of benefits identified in the CRU certificate were deducted from the payment made by a tortfeasor or their insurer to the injured person (see [19]). This meant that a sum paid to compensate a person for general damages for pain, suffering and loss of amenity could be extinguished entirely by the deduction of the amount of the CRU certificate. Criticism of the 1989 Act led to changes being made to the CRU scheme under the 1997 Act.

Per Dingemans LJ at [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."*

The shift in burden was effected by schedule 2 of the 1997 Act: deductions from compensation payments made to injured persons could only be made if the state benefits corresponded with or matched a head of loss suffered and claimed by the injured person. Accordingly, if an injured person had received state benefits in the form of income support as a result of his accident at work, but did not have a claim for loss of earnings, the insurer remained liable to make payment under the CRU certificate; the injured person would not lose any element of the claim for general damages for pain, suffering and loss of amenity.

Accordingly, it could be seen that the 1997 scheme required a tortfeasor or their insurer to pay state benefits even where those benefits did not correspond to a loss claimed by the claimant as a result of the tortfeasor's wrongdoing. It was this finding that underpinned much of Dingemans LJ's reasoning in this case.

The earlier High Court judgment

In the High Court, Henshaw J found that 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 the Claimants in the first, second and third situations above.

Henshaw J considered that the fourth situation did not fall foul of A1P1.

The Claimants accepted that the fifth situation could not give rise to any remedy but, they argued, it was relevant to the issue of fair balance between the insurers' rights and the rights of others – a key issue in determining whether the 1997 Act's interference with the Claimants' A1P1 rights was proportionate.

The appeal

The Secretary of State appealed on the basis that Henshaw J was wrong to find that the 1997 Act and the regulations made under it infringed the Claimants' A1P1 rights in any of the five situations. The Claimants cross-appealed against Henshaw J's finding that the fourth situation did not infringe A1P1.

The Court of Appeal deals with the main issues on the appeal and cross-appeal from [77] onwards.

It was common ground that the Court had to apply the four-stage test from *Bank Mellat v Her Majesty's Treasury* (No.2) [2014] AC 700 in deciding whether A1P1 had been infringed:

1. Is the objective sufficiently important to justify the limitation of a fundamental right? (i.e. is there a legitimate aim?)
2. Is the measure rationally connected to the objective?
3. Could a less intrusive measure have been used? (i.e. was the 1997 Scheme no more than necessary?)
4. Has a fair balance been struck between the rights of the Claimants and the interests of the community?

Legitimate aim

Dingemans LJ found that Henshaw J's characterisation of the legitimate aim or objective of the 1997 Act was "*impermissibly narrow*" at [86]. Henshaw J had held that the 1997 Act was not "*designed with a view to increasing public resources as an end in itself, without regard to the fault of the compensator/insurer from whom contributions were to be demanded*" in paragraph 118 of the High Court judgment. Dingemans LJ considered that this finding did not take proper account of 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*". Henshaw J considered that there needed to be a rational connection between the extent of an employer's wrongdoing and the recovery from wrongdoers of the costs associated with their wrongdoing.

Dingemans LJ found at [87] that this was to ignore the policy of the 1989 Act which was for a full recovery of state benefits and to ignore the fact that the 1997 Act allocated responsibility for non-matching deductions to insurers.

Having determined that the objective of the 1997 Act was to continue the full recovery of state benefits from a tortfeasor but to shift the burden of payment from the injured person to the tortfeasor or their insurer, Dingemans LJ held, at [93], that this objective was sufficiently important to justify the limitation of fundamental rights protected by A1P1; it was a legitimate aim.

Rational connection

Dingemans LJ found at [94] that there was a rational connection between the objective of the 1997 Act and the interference with the Claimants' interests in each of the five above situations. Each interference continued the legitimate aim of recovering the full state benefits paid to a person who had successfully claimed compensation from a tortfeasor or their insurer.

No more than necessary

Once the first and second stage of the *Bank Mellat* test were satisfied, Dingemans LJ found at [96] that it was difficult to see what less intrusive measure would have achieved the same outcome in each of the first four situations.

Fair balance

Dingemans LJ considered that the issue of fair balance was the critical issue in this appeal and cross-appeal. Even where an insurer was required to pay the whole of a CRU certificate in circumstances where the insured's negligence did not correspond to the whole of the damage caused, the "*background*" was the tortfeasor's responsibility in law, "*at least in part*", for the accident, injury or disease which had led to the payment of state benefits.

Dingemans LJ noted the deliberate economic and social policy decisions made in the 1989 Act and 1997 Act: "*Parliament is the body particularly well suited to make such policy choices*".

As to the Claimants' argument that the now-onerous 1997 scheme liabilities were not priced under pre-1997 scheme insurance policies, Dingemans LJ held that "*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*."

Dingemans LJ also considered, as relevant to the fairness of the balance struck by the 1997 Act, the fact that state benefits are only payable up to the date of compromise or five years from the day after the accident or (in the case of disease) the date on which a claimant first claimed a listed benefit.

The Secretary of State's other grounds of appeal

These were dealt with succinctly at [106] to [112]. Whilst the findings are beyond the scope of this blog post, it is noteworthy that, in the Court of Appeal's judgment, the Claimants had not adequately dealt with the issue of limitation. There was no explanation for 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 within three months of payment of the CRU certificate:

> "*The exhumation of so many historic CRU certificates will create administrative difficulties for both the insurers and the Secretary of State… 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.*"

Commentary

There was perhaps some fairness in the insurers' submission that it is only, or mainly, recent developments which has led to the 1997 Act having a potentially unfair impact on insurers, although Sir Julian Flaux did not accept that this justified

the lateness of the challenge. However, no matter which view of that is considered the better view, it is fair to say that part of the difficulty with divining legislative intention is that the legislation was written at a time when the substantive law determining liability for tortfeasors did not encompass *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 and full liability for mesothelioma on the basis of more than *de minimis* increase in the risk of developing the disease. The position in terms of CRU liability is arguably made even worse for insurers by *Barker v Corus (UK) plc* [2006] 2 AC 572 which, at common law, rendered the tortfeasor only liable for the extent to which they had materially increased the risk on a divisible basis (bringing the damage which could be recovered in line with the causal requirement which was put in place by *Fairchild),* recognising that there was an argument in fairness that the tortfeasor in a multiple exposure case should only be liable for the part of the exposure which they had caused. Statutory intervention by section 3 of the Compensation Act 2006 immediately reversed the position, rendering the tortfeasor liable for the whole of the loss and putting the risk of co-tortfeasors being insolvent or untraced upon the tortfeasor. However, either way, in terms of recoverable social security benefit a tortfeasor, in a situation not envisaged at the time of the 1997 Act's enactment, suddenly found itself liable for the whole of the CRU certificate, despite having potentially made a very small overall contribution to the legally identified damage suffered by the Claimant.

It might also be said that the Court of Appeal placed significant reliance upon the legislative purpose of the 1989 Act in interpreting the legislative purpose behind the 1997 Act. There is some danger in that because statutory schemes change over time and the purpose of an old scheme is not necessarily fully reflected in the purpose of a new or replacement scheme.

Once, however, the legislative purpose was determined to be full recovery of state benefits paid by to a person who had suffered accident, injury or disease which had been caused by a tortfeasor, and 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, that left little room for argument on the other elements of the test for the infringement of A1P1 rights, and the rest fell into place against the insurers. With that purpose in mind, the wide recovery of the 1997 Act was justified. There was a rational connection between the objective of the legislation and the interference with insurers' interests in the situations about which complaint was made and less intrusive measures would not have secured the same outcome. It was a fair balance if the legislative purpose was drawn in that way.

The judgment is of wide implication. It is not realistically limited to only the particular challenges which were made or to particular insurance policies. If there are other similar challenges to the 1997 Act scheme in other situations they will be determined with the legislative purposes of full recovery by the state, even where the benefits did not correspond with the loss claimed by the Claimant, firmly in mind. It is difficult to see what insurers can do to limit or restrict the impact of that decision.

Whether the Court of Appeal's reasoning or the High Court's reasoning was more persuasive is a matter of personal taste. Both positions were clearly arguable. It might be felt that whatever the correctness of the view taken of Parliamentary intent, Parliament never had in mind the circumstances which have since arisen. That, however, in the end may be a case for the primary legislation to be changed, if Parliament considers it to be unfair, rather than to undermine the interpretation which has been given to the legislation. Legislation is in part written in the knowledge that unforeseen circumstances will arise, and, in that case, we have to do with the laws that we have, supplemented by the common law, unless and until there is further statutory intervention.

Further, whatever one's view of the fairness, the situation is at least practically ameliorated by the five year cut-off point under the relevant period, which limits the responsibility of the tortfeasor to step into the shoes of the Secretary of State.