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Case No: CO/2093/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2020

Before :

LORD JUSTICE BEAN
and
MR JUSTICE MARTIN SPENCER

- -

Between :

THE QUEEN (on the application of THE ASBESTOS VICTIMS SUPPORT GROUPS' FORUM UK)	**Claimant**
- and -	
THE LORD CHANCELLOR	**Defendant**

- -
- -

Jeremy Hyam QC and Alasdair Henderson (instructed by **Leigh Day**) for the **Claimant**
Jonathan Auburn and Rupert Paines (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 8-9 July 2020

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Approved Judgment

Lord Justice Bean and Mr Justice Martin Spencer :

Introduction

1. This is the judgment of the court to which we have both contributed.

2. On 1 April 2013, the provisions of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") came into force. They made fundamental changes to the way in which claims made in the civil courts are funded. On 7 February 2019, the Lord Chancellor published a Post Implementation Review ("PIR") of Part 2 of LASPO purporting to assess the impact of the LASPO Part 2 reforms and the effectiveness of the legislation against its objectives. Pursuant to permission granted by Steyn J on 6 December 2019, this claim challenges the PIR on the basis that the Claimant and its members had a "legitimate expectation" that the PIR would carry out a "thorough and detailed impact assessment of the LASPO reforms with regard to asbestos related disease sufferers" but failed to do so.

3. The Claimant, also referred to as "the Forum", is a charitable body whose objects are:

    a) To preserve and protect the physical and mental health of sufferers of asbestos-related illness, through the provision of financial assistance, support, education and practical advice; and

    b) To advance the education of the general public in all areas relating to asbestos-related illnesses including but not exclusively by providing information about the hazards of asbestos in the environment.

    The Forum represents a number of different asbestos support groups throughout the United Kingdom and acts as a representative body for those afflicted with asbestos-related diseases in respect of legal and political issues arising from such diseases.

Background

4. For the background to this legislation, we are indebted to William Davis J for his comprehensive recitation of the factual background set out in *R (on the application of Tony Whitston) v Secretary of State for Justice [2014] EWHC 3044 (Admin)* which was a successful challenge by Mr Whitston, then Chairman of the Forum, to the decision of the Lord Chancellor to bring into force sections 44 and 46 of LASPO in relation to mesothelioma claims.

5. The Legal Advice and Assistance Act 1949 introduced a system of legal aid provision in civil proceedings whereby any civil litigant had a means tested entitlement to legal aid, subject to the proposed claim having sufficient prospects of success.

6. In 1995, conditional fee agreements were permitted for the first time in relation to civil litigation in England and Wales. Until then, it was said that civil litigation was the domain of either the very rich, who could afford the legal fees, or the very poor, who qualified for legal aid, but was effectively closed to a large majority of the population falling between these extremes, for whom legal costs were ruinously prohibitive. Conditional fee agreements were intended to make it more practicable for those who did not qualify for legal aid to have access to legal assistance in

bringing a civil claim. These "no win, no fee" agreements meant that the Claimant's lawyers would not charge the litigant a fee unless the claim was successful but then, if successful, the lawyers could charge a "success fee" being a percentage surcharge on the base legal costs.

7. Of course, if the claim was unsuccessful, the Claimant would be liable to pay the costs of the successful defendant which were equally liable to be ruinously expensive. He would also be liable to pay his own disbursements, and in particular experts' fees, which are not subject to the "no win, no fee" regime but are payable in any event. It therefore became a virtually necessary adjunct to CFA funded litigation that the claimant would take out a policy of insurance to cover the risk of paying not only the costs of the defendant if the claim was unsuccessful but also their own disbursements. This was known as After the Event ("ATE") insurance. Between 1995 and 2000, the success fee charged and the ATE premium were in fact borne by the Claimant even if the proceedings were successful and those sums were deducted from the damages recovered.

8. The Access to Justice Act 1999 effectively removed legal aid provision in all civil claims, but particularly personal injury claims, and, in an attempt to balance this, changed the position in relation to success fees and ATE insurance. From 2000, when the Act came into force, success fees and the ATE premium became recoverable from the unsuccessful defendant. Thus, for example in a typical road traffic accident claim, the unsuccessful defendant's insurer would have to pay not only the damages awarded to the claimant but also the recoverable costs, the success fee payable and the ATE insurance premium.

9. There appears to be no doubt that the effect of the Access to Justice Act 1999 was to improve exactly that implied by the title of the Act, namely access to justice. However, this was at the expense of a significant rise in the costs payable by defendants. Two aspects were perceived by some to be prime movers in the escalation of costs: first the success fee which was often set at the maximum of 100% and therefore caused the base costs to be doubled in many cases. Secondly, the ATE insurance premiums which, as cases got closer to trial, rose exponentially and could sometimes be measured not in tens of thousands of pounds but hundreds of thousands of pounds: see, for example, *Percy v Anderson-Young* [2017] EWHC 2712 (QB) where, in a pre-LASPO case, the ATE premium quoted was £319,315.07 up to 45 days before trial and £533,017.13 within 45 days of trial.

10. The consequence was that in November 2008 Sir Anthony Clarke MR appointed Lord Justice Jackson to conduct a review of the costs of civil litigation. Lord Justice Jackson's final report was published in December 2009. In the explanatory foreword he said:

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

11. Lord Justice Jackson concluded that the recoverability of success fees and ATE insurance premiums had resulted in "unfortunate unintended consequences" and that this regime introduced by the Access to Justice Act 1999 had been one of the main

drivers of excessive costs. He recommended that success fees and ATE premiums should cease to be recoverable from unsuccessful defendants in civil litigation. Although the recommendation was of general application, its principal effect was in relation to personal injury actions, including clinical negligence. He also recommended a form of costs protection for Claimants, the unfortunately named "Qualified One-way Costs Shifting" ("QOCS"), whereby Claimants would generally be protected against having to pay the costs of successful Defendants in personal injury claims.

12. In November 2010, the Ministry of Justice issued a consultation paper entitled "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales" which addressed the potential implementation of the Jackson recommendations and in particular the abolition of the recoverability of the success fees and ATE insurance premiums, along with certain associated reforms in relation to damages. The paper endorsed Sir Rupert Jackson's belief that, if the recoverability of success fees and ATE insurance premiums was abolished, market forces would operate to bring both of those costs down because, as before 2000, they would be payable by claimants who would "shop around" for lower success fees and ATE insurance premiums. However, the consultation paper identified certain types of case where simple abolition might be problematic. One of those was claims for industrial disease including asbestosis. The paper put forward options to mitigate the impact of the abolition of the recoverability of success fees and ATE insurance premiums for such cases including the retention of some element of a recoverable success fee in certain categories of case.

13. The consultation period arising out of the Ministry of Justice's proposals ran from November 2010 to February 2011. The Government decided to implement the Jackson reforms in what became LASPO. The Bill was introduced in the House of Commons in June 2011 and reached the House of Lords in November 2011. The pertinent clauses were those which subsequently became sections 44 and 46 of LASPO. These provided:

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

14. In the debates in the House of Lords, concerns were raised by, among others, Lord Alton of Liverpool as to the effect of the proposed reforms on access to justice in certain types of case, with the emphasis on claims for mesothelioma. Diffuse mesothelioma is a rare form of lung cancer, memorably described by Lord Phillips PSC as "a hideous disease that is inevitably fatal. In most cases, indeed possibly in all cases, it is caused by the inhalation of asbestos fibres" (*Sienkiewicz v Grief* [2011] 2 AC 229). A feature of this disease is that it generally does not become apparent until many years after exposure to asbestos which, in the past, led to problems for those making a claim against, for example, former employers who were responsible for

exposing the victims to asbestos. Thus the exposure may have been as long as 40 years previously and, over the intervening period, the victim may have had several employments in all of which there was exposure, or potential exposure, to asbestos. There were challenges in identifying the employers, identifying the periods of exposure to asbestos, identifying the breach of duty at the relevant time and, importantly, identifying an insurer liable to pay the damages and costs liability of an unsuccessful defendant. Mesothelioma claims are particularly tragic (because the victim usually has only a short time to live once symptoms manifest themselves) and are usually meritorious (the dangers of asbestos having been known and recognised for very many years but, in the case of too many employers, ignored with, for example, inadequate precautions such as personal protective equipment).

15. In the debates on the LASPO Bill in the House of Lords on 30 January 2012, Lord Alton sought to exclude the operation of what were to become sections 44 and 46 from cases of diffuse mesothelioma. At the conclusion of that debate, the proposed amendments were withdrawn on the basis that there would be further discussion between Lord Alton and the Ministry of Justice, but with the threat of the amendments being re-proposed in the event that discussions did not make satisfactory progress. This in fact eventuated and Lord Alton again proposed amendments at the report stage of the Bill in the House of Lords on 14 March 2012. The relevant amendments related to claims for respiratory disease generally, not just mesothelioma, although, again, the debate concentrated on the effect of what became sections 44 and 46 on claims for diffuse mesothelioma. At the conclusion of the debate the amendments, which were opposed by the Government, were carried.

16. When the Bill returned to the House of Commons Lord Alton's amendments were overturned. They were reinstated when the Bill returned again to the House of Lords. Finally on 24 April 2012 the Bill returned to the House of Commons when the Parliamentary Under-Secretary of State for Justice, Mr Jonathan Djanogly MP, told the House that, having met with various interested parties (including Lord Alton) the Government had decided not to commence sections 44 and 46 in relation to mesothelioma claims. However, those sections were brought into full force in relation to all other claims including other claims arising out of exposure to asbestos, such as asbestosis and lung cancer other than mesothelioma resulting from exposure to asbestos, collectively referred to as Asbestos-Related Diseases ("ARDs"). So far as claims for diffuse mesothelioma are concerned, section 48 (1) of LASPO provides:

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

17. Finally, by way of background, it is relevant to mention that, on 27 March 2012, Lord Pannick QC tabled an amendment to LASPO whereby the Lord Chancellor would be given a discretion to respond to any problems seen to occur after enactment of LASPO, by excluding defined categories of case from the statutory provisions if he thought it appropriate to do so. In proposing the amendment Lord Pannick said:

> "Given the importance of the changes we are making in part 2, given the concerns that have been expressed about their impact on access to justice, and given that these matters may look very different indeed in some legal contexts in the light of experience after these changes are made, it is surely wise to add to the Bill a power for the Lord Chancellor whereby it would be entirely within his discretion to modify the effect by excluding categories of cases."

18. The government opposed this amendment, Lord McNally stating:

> "I understand the noble Lord's intentions. I understand that he thinks it sensible to allow for exceptions to be made at a later date. However, we are legislating now and [on] what we consider to be a fair and overdue basis. Funding arrangements need a degree of certainty. Claimants and defendants need to be able to plan and adapt to the new regime. The amendment would only create uncertainty. … Rather than settling the issue of CFAs, as this bill seeks to do, the amendment would open the door to constant campaigning and calls for individual exceptions. The amendment may be well-intentioned but it is fraught with difficulty. It would provide uncertainty and confusion where we are seeking to introduce clarity. It would provide increased costs where we are seeking to reduce costs. It is wrong in principle and unnecessary. I urge the noble Lord to withdraw it."

19. The amendment was not withdrawn but put to the vote and defeated. Mr Robert Wright, a civil servant in the Ministry of Justice who has been involved with legal aid and litigation funding issues throughout the past decade, has made two witness statements on behalf of the Defendant in these proceedings. At paragraph 28 of his first statement he says:

> "Parliament was emphatic on this point: it firmly rejected the possibility of allowing for the discretionary extension of categories of claim to be excluded from the LASPO Part 2 reforms at a later date."

LASPO and the Post Implementation Review

20. LASPO came into effect on 1 April 2013 and, on 24 July 2013, the Government launched a consultation on the reform of mesothelioma claims. In March 2014 the Ministry of Justice published its response to the mesothelioma consultation and stated, at paragraph 85 as follows:

> "The Government has been given little indication at the present that the LASPO part 2 reforms are resulting in difficulties in other cases to which they already apply. The position will be monitored as part of the intended post-implementation review of the LASPO Act within three to five years of implementation."

21. Thus, the Government reiterated what had been said during the passage of the LASPO Bill, namely that a PIR would be undertaken of the LASPO reforms, including Part 2.

22. On 17 January 2017 Sir Oliver Heald QC MP, then Minister of State for Justice, stated to the All-Party Parliamentary Group on Legal Aid Pro Bono and Public Legal Education that the PIR process would start with a Post Legislative Memorandum ("PLM") to the Justice Select Committee before May 2017. That would lead to an initial assessment of the extent to which the changes in LASPO had met their objectives and would be followed by a wider full PIR

23. On 30 October 2017 David Lidington CBE MP, then Lord Chancellor, presented the PLM (Cm 9486) to the Justice Select Committee. This stated, at paragraph 7:

> "The content and purpose of a post-implementation review is different to a post legislative memorandum: post-implementation reviews are primarily concerned with assessing the reforms from an analytical perspective, *in the manner of an impact assessment*, rather than reporting certain elements of the act's implementation and operation. As such, the analysis provided in the preliminary assessment sections of this memorandum is at a high level. The Ministry of Justice intends to undertake *a more thorough and substantive analysis* in the post-implementation review." [Emphasis added]

24. It may perhaps be noted that this was a statement of intention rather than a promise, although it has certainly been interpreted as a promise by the Claimant (see below). The PLM was accompanied by a written Ministerial Statement in which the Government reiterated its commitment to produce a PIR of the Part 1 and 2 LASPO reforms stating they hoped to conclude it to the same timetable as had previously been indicated, that is within three to five years of implementation.

25. On 28 June 2018, the Defendant published a policy paper entitled: "Post-Implementation Review of LASPO: initial assessment" which was, probably coincidentally, the same date that a Civil Justice Council conference was held, chaired by Mr Justice Robin Knowles, being a seminar on the PIR for part 2 of LASPO. Thus, the CJC seminar and the MoJ initial assessment marked the start of the PIR process. At the same time, Cris Coxon of the Ministry of Justice set out in a PowerPoint presentation the MoJ's approach, identifying the key evidence sources and some of the main data issues. In this regard, the presentation stated:

> • "Post-implementation reviews are policy led with analytical support. Data and research evidence will be used, so far as possible, to understand impacts of the reforms.
>
> • We do need to acknowledge the limitations of the hard data and what it can tell us.
>
> - The reforms are a delicate set of balances and counter-balances.
>
> - Our management information is comparatively blunt to measure the separate components in detail.

- We need to avoid making spurious inferences about causality.

• We will be using:

1. Courts' data on claims volumes and processes.
2. Publish data on pre-court claims and settlements.
3. Professor Fenn's assessment of litigation cost impacts.
4. Other published research data sources.
5. Expert opinion and responses to our request for evidence."

26. The presentation highlighted that one key area where published data were lacking was:

> "litigation costs and outcomes (damages). These are not captured by MoJ directly and not widely shared for commercial reasons. However, an independent analysis of claimant and defendant cost impacts has been carried out by Professor Paul Fenn and this will be an important resource for the review."

27. In the PIR initial assessment, the MoJ stated:

> "The Ministry of Justice is committed to undertaking a post implementation review (PIR) of part 2 of [LASPO]. It is clearly good practice to examine whether the legislation has met its objectives, *and whether there are unintended consequences that need addressing*. That is what this PIR is intended to deliver. We are publishing a survey to seek stakeholder views: we hope as many people as possible will complete it. Where possible, respondents should read this initial assessment, which provides steers on issues on which we would particularly welcome comment. The Civil Justice Council is holding a stakeholder conference which will take place while the survey is live and be a focal point of the PIR. … a report will be prepared by MoJ officials later in 2018 drawing on views of stakeholders and the available data. It would then be for MoJ ministers to decide what further actions to take. It should be noted that the MoJ has already prepared a post legislative memorandum on the part 2 reforms, which stated that 'Whilst there has inevitably been comment on points of detail, we are not aware of significant overarching concerns arising from the implementation of part 2.'" [Emphasis added]

28. The Claimant in these proceedings places particular reliance on the statements contained in the PLM and the PIR initial assessment. The PLM statement (see paragraph 16 above) is interpreted as a promise by the Defendant to undertake a "thorough and substantive analysis" of the effect of the LASPO reforms in the PIR. The PIR initial assessment is interpreted to include, as part of that thorough and

substantive analysis, a promise to carry out an examination of whether the LASPO reforms had resulted in "unintended consequences" that needed addressing.

29. On 3 July 2018, the Defendant issued a stakeholder alert encouraging stakeholders to complete an online survey to provide substantiated views and to supply further data and evidence which would help to indicate impacts of LASPO for the purposes of the final review. It was stated:

> "In particular, we have very limited access to data on the costs of litigation as this is typically held by private firms. If you wish to provide analytical evidence or have any queries, please email me to discuss this further."

The online survey asked what types of claims the responder dealt with and what was their experience of the impacts of the abolition of the recoverability of success fees (section 44) and the abolition of the recoverability of ATE insurance premiums (section 46), together with the introduction of qualified one-way costs shifting in personal injury claims. The final question asked:

> "Overall, what has been your experience of the combined impacts of the LASPO part 2 reforms?"

30. The MoJ received 155 non-duplicate responses in the consultation period including from the Bar Council (24 August 2018), the Association of Personal Injury Lawyers and the Law Society. They covered different categories of civil cases including personal injury, public liability, professional negligence, actions against the police, commercial/business disputes, insolvency, housing claims, human rights and claims for judicial review. Three of the responses primarily concerned asbestosis claims: those were from the Forum and from Leigh Day (including a personal response from Ms Harminder Bains which largely duplicated the response from the firm).

31. The response on behalf of the Forum was from its then chairman, Graham Dring. He indicated that the Forum sees approximately 350 newly diagnosed cases of asbestos related diseases each year of which, in 2017, 42% were mesothelioma cases, 33% were asbestosis, 17% were diffuse pleural thickening cases and 7% were asbestos related lung cancer cases. He pointed that out that diseases other than mesothelioma are divisible and a claimant will often have to sue multiple defendants in order to secure full compensation but it is often not possible to do this. Firms will have ceased trading in the intervening years and it may not be possible to trace insurance companies who provide appropriate cover with the result that these claimants only receive a proportion of the compensation they should be due. Payments received under the Pneumoconiosis (Workers' Compensation Act) 1979 are deducted in full from any civil compensation awards, even where only partial compensation has been secured. He stated:

> "The prospect of having success fees deducted from damages awards will further discourage seriously ill claimants from pursuing legal action where the benefits of doing so may seem marginal. … [but] while we have no firm documentary evidence on how law firms have responded to the changes to the rules on recovering success fees, we believe it is likely that

> there have been changes that have impacted adversely on asbestos victims."

In answer to the question "Overall, what has been your experience of the combined impacts of the LASPO part 2 reforms?" He stated:

> "We have seen no evidence that the reforms under the LASPO Act have resulted in wider choice or cheaper litigation for asbestos victims pursuing claims for civil compensation. If anything there are probably less firms pursuing this line of work as cases become less profitable and more risky. … the only direct effect of the reforms relating to success fees and ATE insurance premiums that we have seen is that asbestos victims are now experiencing deductions from their compensation that did not happen before the LASPO reforms. In addition we are no longer able to reassure asbestos victims that there are no financial risks involved in pursuing a claim for civil compensation. These reforms are more likely to deter victims with meritorious cases from seeking justice."

Mr Dring was not, however, able to provide the MoJ with any data as to the effect of the LASPO reforms particularly as they related to the victims of asbestos related diseases. The response was more in the nature of comments on the effect of the LASPO reforms generally as they would impact on all personal injury victims rather than indicating any peculiar, measurable effect on asbestos victims in particular (excluding, of course, mesothelioma cases).

32. The response of Leigh Day to the consultation was substantive and covered many different aspects of the LASPO reforms including costs budgeting, fixed costs, allegations of fundamental dishonesty, international and group claims, consumer law and product safety. At paragraphs 11 and 12, the response concentrated on ARD claims, contrasted with mesothelioma claims. They stated:

> "11.4 By contrast and with great reluctance, as a result of the commercial sustainability, there is an increased reluctance amongst claimant lawyers to run potentially meritorious but difficult claims for asbestosis, pleural thickening and lung cancer because of the combined effects of sections 44 and 46 of LASPO.
>
> 11.5 A big difficulty is created by QOCS as the claimant can still be liable to pay the costs of the successful defendant.
>
> 11.6 Asbestosis, pleural thickening and lung cancer cases are all treated as divisible conditions. This means that frequently claimants have to bring proceedings against multiple employers. Often as a result of employers' liability insurance not being in place, it is not possible to bring every possible tortfeasor into the proceedings."

The effect of LASPO was stated at 11.8 to be:

> "Since LASPO the claimants suffering from asbestosis, pleural thickening and lung cancer no longer have [the protection of ATE insurance] which means they lose damages even when successful, even possibly to the point of very small amounts of compensation being recovered or no compensation being recovered at all."

As part of their submission, Leigh Day set out, in appendix A 16 case examples of which five, cases 2, 3, 6, 7 and 8 related to asbestos victims. They also exhibited to their submission various other documents including a statement from Mr Frank Burton QC, a leading personal injury lawyer, and a statement which Ms Bains had made on 10 December 2014 in the case of *Coventry v Lawrence*.

33. In his statement, Mr Burton referred to the experience of the effect of LASPO on personal injury claims generally rather than on asbestos victims in particular. He stated that the abolition of recoverability of success fees meant that the vast majority of barristers under CFA work on a nil success rate fee. Also, the effect of the change has been to create a much more cautious approach to litigation to the personal injury Bar so that marginal cases on liability are rarely accepted and difficult ones practically never. He stated:

> "I have turned down several high value class actions and high value individual cases because there is simply no reserve available any more for me to subsidise unsuccessful cases on liability by the success fees obtained from successful cases."

He considered that the LASPO reforms were contributing to a "stultifying effect on the development of the common law because cases which are complex and difficult in the field of personal injury are much less likely to be litigated." He stated that the effect of the reforms appeared to have resulted in a decline of approximately 13% per annum in the first four years after LASPO namely 21,000 each year in personal injury claims under £25,000 and from January to March 2018 personal injury cases were further down by 7%.

34. Although a leading firm of solicitors in the field of asbestos-related claims, Leigh Day did not submit to the MoJ any statistical data on the effect of the LASPO reforms on asbestos victims in particular, as opposed to the effect on personal injury litigants generally. For example, there were no data submitted showing that asbestos victims' access to justice had suffered disproportionately compared to other personal injury litigants because of the particular difficulties arising from the nature of asbestos related claims. This omission is referred to in the first witness statement of Mr Wright on behalf of the Defendant. Having quoted from the PIR initial assessment which stated:

> "We are interested in receiving further data and evidence that will help to indicate impacts for the final review. In particular we have very limited access to data on the costs of litigation as this is typically held by private firms."

Mr Wright indicates that the submission of data was a key means by which the MoJ were gathering information for the final PIR. He says:

> "It is disappointing that neither the Claimant nor Leigh Day contacted Mr Smeeton [the contact for the provision of submissions] to discuss providing quantitative data despite it being made clear that we were inviting data for the PIR, as outlined above. It would have been very helpful to have received anonymised data with a significant sample size to compare the level of damages, case length, outcomes, costs and deductions for asbestos disease claims versus mesothelioma, for example, to analytically demonstrate the full impact of the part 2 reforms on mesothelioma versus other asbestos claims. It is disappointing that Leigh Day did not provide us with any detailed data and neither did they address specific questions set out in the initial assessment. For example, one of the issues on which we sought information was the level of success fees being charged, and we set out the reason for this."

35. In addition to receiving submissions in writing, the MoJ also held a series of meetings with stakeholders, including a meeting with representatives from the Claimant and Leigh Day on 28 November 2018. A note of that meeting records that Harminder Bains of Leigh Day stated:

> "In summary, we, Leigh Day, will say the effect of LASPO is a restriction to access to justice, because there is no success fee recoverable from the defendant, it means that there is no incentive on the defendant to reach early settlement. It's unjust to deduct 25% from the claimant's modest damages to pay for legal fees. The effect of this is to make cases uneconomic for solicitors and barristers and therefore makes it much more difficult for clients to actually get legal representation. It is not just Leigh Day lawyers who are saying this, it is QCs such as Frank Burton QC, he's an eminent QC. Mr Burton's confirmed in his statement that he has actually turned down several cases, and we confirm, as Leigh Day, that as a result of the depleted reserve funding we are more cautious on taking on cases."

Daniel Easton of Leigh Day also attended the meeting and emphasised the view of the firm on the impact of LASPO on asbestos cases which are not mesothelioma. He referred to two points made by Mr Dring about the deduction of success fees from damages:

> "Now clearly that's a consequence of LASPO, if we take ourselves back to pre-LASPO that did not happen. Asbestos victims, lung cancer victims, they are all entitled to seek a recovery of the success fee and their ATE premiums from the defendant and that enabled, in most cases, the clients to receive 100% of their compensation. We think this is a serious step backwards and the changes in LASPO to that category of people."

Mr Easton also referred to changes in the civil court procedure rules concerning costs budgeting as affecting claimants with under five years life expectancy. Another attendee, Mr Patrick Walsh of Leigh Day, made a point about the effect of the decision of the Court of Appeal in *Heneghan* where it was decided that cases of asbestos related lung cancer are indistinguishable from cases of mesothelioma and that such cases ought therefore to be dealt with in LASPO in the same way that mesothelioma cases are dealt with.

36. In February 2019, before the publication of the final PIR, Paul Fenn and Neil Rickman published their study entitled "*The impact of legislation on the outcomes of civil litigation: an empirical analysis of the Legal Aid Sentencing and Punishment of Offenders Act 2012*". Their study focused on two categories of claim where there had been no potentially confounding effect from the extension of fixed recoverable costs that also took place in 2013: clinical negligence claims up to £250,000 in value and all personal injury claims over £25,000 in value. (These would exclude many, if not most, of the low value asbestos-related claims.) They found a reassuring consistency in the results showing the impact of LASPO on claims outcomes for those two categories, both the litigation rate and the recovered base costs being reduced by 8-10% for post-LASPO claims. Damages awards were also lower by between 17% and 22%. They stated:

> "In conclusion, LASPO appears to have an effect on settlement behaviour and on the overall costs of litigation. There are fewer claims, and their base costs, damages and legal proceedings have all diminished. To some extent these effects are consistent with the stated objectives of the LASPO part 2 legislation to 'reduce the costs of civil litigation' and 'discourage unmeritorious claims' and to 'encourage early settlement'. On the other hand there may be some concern as to whether 'parties with a valid case can still bring or defend a claim' and whether those parties are being fairly compensated for their losses."

Their researches appeared to show that the 10% uplift in general damages introduced for post-LASPO CFA cases did not appear to have prevented an overall drop in real damage levels. They then state:

> "These interpretations are not necessarily the only ones that our results could support, though, as noted above, they can be linked into some economic models and empirical results. Also they do not have any normative implications (i.e. about whether the reforms had been 'good' or 'bad'); e.g. trading off lower damages for faster, cheaper resolution of claims may be welcomed by some and not by others. Similarly it is natural for lawyers (as other workers) to respond to the incentives they face. It is clear that further work, on more detailed data, would be required to help interpret our results, their desirability and the precise contribution of different elements of LASPO."

In short, the researches of Messrs Fenn and Rickman were generally supportive of the desired effect of LASPO in reducing the costs of civil litigation. They found that

although this was at some expense of access to justice, that result was to be expected if the effect of LASPO was to drive out unmeritorious claims.

37. The full PIR was published on 7 February 2019. The PIR identified the five objectives of the Part 2 LASPO reforms as being:

1. Reducing the costs of civil litigation
2. Rebalancing costs liabilities between claimants and defendants
3. Promoting access to justice at proportionate cost
4. Encouraging early settlement
5. Reducing unmeritorious claims

The review then considered the feedback received on the five statutory reforms contained within LASPO including the non-recoverability of success fees and the non-recoverability of ATE insurance premiums. At section 10, the PIR set out the data analysis contained within the review including the analysis by Messrs Fenn and Rickman. In the executive summary the PIR stated:

> "17. The high-level available data on the volumes of court claims suggests that the number of claims has reduced slightly and in a manner consistent with the Government's objective of reducing unmeritorious claims (objective 5) and not to an extent that would indicate a negative effect on access to justice (objective 3).
>
> Conclusion
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> 18. Based on the evidence received as part of the PIR the government considers the part 2 reforms to have been successful in achieving the principle aim of reducing the costs of civil litigation (objective 1). The evidence shows that in a range of personal injury claims (including clinical negligence claims), costs have reduced significantly (circa 8%-10%) and early settlement has also improved (objective 4). A definitive judgment on the impact of unmeritorious claims cannot be made at this time but the claims volumes data, the changes in financial incentives to CFA, the test of fundamental dishonesty for QOCS and anecdotal stakeholder feedback suggest there has been an overall decline in unmeritorious claims (objective 5). The government considers that, on balance, the evidence suggests the part 2 reforms have successfully met their objectives. The Government doesn't therefore propose any amendments to the primary legislation."

38. Within the PIR there are three references to asbestos related claims:

a) First, within the section which considers the non-recoverability of CFA success fees, it is stated at paragraph 76:

> "However there were a handful of calls by claimant lawyers to overturn section 44, particularly for diseases

> such as asbestosis, and to reintroduce recoverability for success fees to protect the claimants damages (paragraph 76)."

b) In the same section, at paragraph 81, the PIR stated:

> "One claimant lawyer firm [clearly a reference to Leigh Day] noted that in CPR (Practice Direction 3e2(b)) claimants with 'a limited or several impaired life expectation of five years or less' were treated differently for costs budgeting purposes and suggested that an exemption for the same category of the claimants with regard to the recoverability of success fees and ATE premiums would benefit claimants with serious disease claims such as asbestosis" (paragraph 81)."

c) In the section considering the non-recoverability of ATE insurance and the introduction of QOCS for personal injury cases, it was stated:

> "94. Several claimant lawyer respondents referred to the case of *Cartwright v Venduct Engineering* which relates to the entitlement of a successful defendant to enforce and adverse costs order against damages recovered by a claimant from another unsuccessful co-defendant. Concern was expressed that QOCS protection could potentially be lost in multi-defendant cases which could have a particular impact in divisible disease cases such as asbestosis."

39. Although there was reference to at least some of the evidence submitted on behalf of asbestos victims by the Forum and Leigh Day, their concerns were merely noted but not specifically analysed nor dealt with substantially. The focus of the review was at a higher level, considering the impact of the LASPO reforms on cases across the broad spectrum of civil litigation, but looking at and considering the data where such data was available. The review contrasted the findings of Fenn and Rickman noting a 17%-22% reduction in damages in the two categories considered (clinical negligence claims up to £250,000 and personal injury claims above £25,000 in value) and compared that with the data from the claims portal covering a much higher volume of lower value claims which appear to show that damages had <u>increased</u> for most types of claim, a potential explanation being the 10% uplift in general damages together with increases recommended by the Judicial College guidelines on general damages for personal injury and extension of the claims portal to cover cases up to £25,000 in value which occurred in 2013. The review stated:

> "205. That said, the data are inconclusive and the differing results potentially indicate that part 2 of LASPO may have had differing impacts in different categories of law."

Graph 7 (average general damages often in road traffic accident claims), graph 8 (average general damages in public liability claims) and graph 9 (average general damages in employer liability accident claims) all appear to show an increase since the LASPO reforms came into effect. However, graph 10 (average general damages in employer liability disease only claims), showed a fall in damages since April 2013, but there appears to have been no consideration within the PIR of the somewhat stark difference between graph 10 on the one hand and graph 7, 8 and 9 on the other.

The claim for judicial review

40. In a pre-action protocol letter of claim dated 5 April 2019, Leigh Day, on behalf of the Claimant, set out the Claimant's position which has formed the basis of this claim for judicial review. Having referred to the PLM and the PIR initial assessment, they alleged that the Claimant had a legitimate expectation that the Defendant would

    a) Assess the reforms from an analytical perspective in the manner of an impact assessment;

    b) Examine whether there were unintended consequences from the legislation that needed addressing; and

    c) Undertake a more thorough and substantive analysis than was contained in the PLM.

    They alleged that the PIR had failed to contain any thorough or substantive analysis of the effect of LASPO or any assessment remotely akin to an impact assessment. They criticised the failure of the PIR's conclusions to refer at all to the deductions from compensation experienced by asbestos victims or to the fact that victims with meritorious cases are being deterred from seeking justice. Nor, it was said, do the conclusions make reference to the alleged lack of evidence that the LASPO reforms had resulted in wider choice or cheaper litigation for asbestos victims. It was contended that the Fenn and Rickman analysis was an insufficient basis for the general conclusion in the PIR that the part 2 reforms had been successful when measured against their objectives: in fact, it was alleged, the data analysis fell well short of meeting the Defendant's stated objective of assessing the reforms from an analytical perspective in the manner of an impact assessment or of constituting a more thorough and substantive analysis.

41. In addition, it was alleged that the Defendant had failed conscientiously to take into account the review responses actually received. Leigh Day asserted that the Defendant had been told, through the review, that the LASPO reforms were working to the disadvantage of asbestos victims, had made things worse for many victims and there was no evidence that the LASPO reforms had resulted in wider choice or cheaper litigation for asbestos victims but there was a failure conscientiously to take these matters into account as the Defendant was obliged to do. The Defendant was required in the pre-action protocol letter to carry out an adequate consultation of the effect of the part 2 LASPO reforms on asbestos victims in a way that met the "Sedley

requirements" as endorsed by the Supreme Court in *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947.

42. The pre-action protocol led to an exchange of correspondence with the Government Legal Department and further elaboration by Leigh Day of the Claimant's complaints about the PIR. For example, in a further letter dated 16 May 2019, Leigh Day referred to the failure of the PIR to deal with evidence submitted by the Claimant and others about the unintended consequences of LASPO and in particular its effect on asbestos victims suffering serious and often terminal illnesses such as lung cancer. The letter stated:

> "The claimant's evidence explained that asbestos victims are now experiencing deductions from their compensation that did not happen before the LASPO reforms and that victims with meritorious cases are being deterred from seeking justice. We do not expect it to be disputed that these are unintended consequences of LASPO. It is also plain, we contend, that they need to be addressed, given the significant disadvantage now faced by a substantial cohort of asbestos victims and the chilling effect on access to justice."

The various letters did not cause the Defendant to change his position and the allegations and assertions in the pre-action correspondence were reproduced in the detailed grounds.

43. In the claim form issued on 28 May 2019 the details of the decision to be judicially reviewed were given as:-

> "1. D's failure to discharge its obligation to carry out an adequate "review" of the impact of the LASPO Part 2 reforms; and
>
> 2. D's decision not to make any changes to the LASPO reforms."

44. In the detailed Grounds of Claim which accompanied the claim form these two decisions were set out in these terms:-

a) the Defendant's failure to discharge its obligation to carry out an adequate "review" of the impact of the LASPO Part 2 reforms under the title "the Post-Implementation Review of Part 2 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO); Civil Litigation Funding and Costs (February 2019 CP38); specifically in relation to the adverse impacts of the reforms on a specific but substantial cohort of the Claimants, viz. asbestosis disease sufferers (i.e. asbestos-related lung cancer, asbestosis and asbestos-related non-malignant pleural thickening). Such cohort may amount, on the statistical evidence of the HSE (published October 2018) c. 3500 cases per year;

b) The Defendant's decision following such review not to make any changes to the LASPO reforms and in particular not to extend the exclusion in Section 48 LASPO for diffuse mesothelioma proceedings to cases of the very similar (in terms of consequence) asbestos related lung cancer or pleural thickening and/or asbestosis having regard to the severe adverse impact of the LASPO Part 2 reforms on Claimants seeking to bring such claims leading to;

i) the denial of full compensation for such Claimants;

ii) the denial of proper access to justice for such Claimants."

45. In argument before us Mr Hyam QC and Mr Henderson confined their challenge to the allegation that the Lord Chancellor had failed to discharge his obligation to carry out an adequate review of the impact of LASPO Part 2. They did not seek judicial review of the Lord Chancellor's decision not to make any changes to the LASPO reforms. Indeed, Mr Hyam accepted in the course of his submissions that if the review had properly engaged with the concerns raised by the Claimant and its solicitors Leigh Day and had explained why the Lord Chancellor had decided not to amend LASPO in the manner suggested, "we might not like the answers, but we could not complain." This concession was in our view rightly made. The present case is not, and could not be, a rationality challenge. It is not the proper function of a court to say that it is unlawful for a minister not to introduce legislation to amend an existing primary statute.

46. No one could reasonably argue that ARD claims are "unmeritorious" in the sense of being spurious or unwarranted: indeed the skeleton argument on behalf of the Lord Chancellor in this case records his opinion that ARD claims are *not* an instance of "compensation culture" (while adding that he considers that more proportionate costs in such cases would be desirable). The Claimant is entitled to take the view that the special provision made in section 48 of LASPO for mesothelioma claims should be extended to cases brought by sufferers from other asbestos related diseases. However, that is not a view to which this court can give effect. We have noted that during the passage of the Bill through Parliament, amendments were proposed which would have provided for exceptions to the LASPO Part 2 costs regime or at least conferred a power on the Lord Chancellor to make exceptions by statutory instrument; and that some amendments were carried against the Government in the House of Lords. But in the end only the limited exception in Section 48 was enacted. It was not the first time Parliament had made special provision for mesothelioma claims alone: the controversial decision of the House of Lords in *Barker v Corus UK Ltd* [2006] was reversed retrospectively by s 3 of the Compensation Act 2006, but only in relation to mesothelioma claims and not for other ARDs. The Mesothelioma Act 2014 was another example.

The parties' submissions

47. Jeremy Hyam QC and Alasdair Henderson, on behalf of the Claimant, submitted that the Claimant had a legitimate expectation that the PIR would examine adequately the impact of the LASPO reforms on asbestos-related claims. They submitted that this expectation arose from a number of representations made by the Defendant and in particular: statements to the Justice Select Committee on 30 October 2017 that the

PIR would assess the reforms from an "analytical perspective" and would be more thorough than the *Post-Legislative Memorandum*; and statements in the *Post-implementation review of Part 2 of LASPO Act: initial assessment* that the PIR would examine whether there were "unintended consequences" of the reforms which needed addressing. Mr Hyam submitted that the Defendant frustrated these promises in several ways: (a) the PIR did not identify asbestos-related claims as a major issue of examination; (b) the PIR did not refer to deductions from compensation experienced by asbestos-related disease victims; and (c) the PIR did not engage with evidence that asbestos-related disease victims are being deterred from seeking justice.

48. Mr Hyam submitted that these failures should be evaluated in light of several "elements of context". First, the PIR analysis contained no relevant data about asbestos-related claims, even though these claims have been disproportionately affected by LASPO. In Mr Hyam's submission, this precluded the Defendant from undertaking a proper impact assessment of the reforms in the manner in which the Defendant had promised. Secondly, there was significant concern during the passage of the LASPO Bill about the impact of the reforms on asbestos-related claims which, Mr Hyam submitted, further obliged the Defendant to carry out a thorough and substantive analysis of their effects. Thirdly, the obligation was heightened because much of that concern has continued after the implementation of the reforms.

49. Jonathan Auburn and Rupert Paines, on behalf of the Defendant, defended the legitimate expectation challenge on three bases. First, they submitted that the Defendant did not create the legitimate expectation identified by the Claimant. In *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, Laws LJ made clear that a legitimate expectation only arises if there is a "promise or practice" which amounts to a "specific undertaking, directed at a particular individual or group". Mr Auburn relied on *Re Finucane* [2019] HRLR 7 for the proposition that when a public authority has made a clear and unambiguous undertaking, it will "not be allowed to depart from it unless it is shown that it is fair to do so" and, in determining the fairness of such a departure, a court should consider "whether the alteration in policy frustrates any reliance which the person or group has placed on it" (paragraph 62). Applying those propositions to the facts of this case, Mr Auburn submitted that no legitimate expectation arose from the Defendant's representations because they were general in nature, not directed to the Claimant specifically and said nothing about asbestos-related claims in particular. He therefore characterised the Claimant's case as an irrationality challenge in all but name.

50. Mr Auburn submitted secondly, and in any event, that the Defendant met the Claimant's legitimate expectation, if such an expectation had in fact arisen. The Defendant promised to carry out an evidenced-based review of the LASPO reforms in a more thorough manner than he did in the *Post-Legislative Memorandum.* He fulfilled this promise through the PIR. The Defendant did not promise to take specific steps for any class of people, such as claimants suffering from ARDs, so was under no obligation to carry out the PIR in the manner in which the Claimant contends. Mr Auburn submitted thirdly that, in any event, it would not be conspicuously unfair for the Defendant to resile from any such promise, if such a promise had in fact been made.

51. On Ground 2 (failure to engage conscientiously with the issues raised in consultation) Mr Hyam submitted that the Defendant failed to engage with or consult relevant

stakeholders on ARDs, but that, even if he did, he failed to take into account the product of such engagement or consultation. This contravened the requirements of procedural fairness set out by Hodgson J, accepting the submissions of Stephen Sedley QC (as he then was), in *R v Brent LBC, ex p Gunning* (1985) 84 LGR 168, which, in Mr Hyam's submission, apply equally to the PIR as to a formal consultation: see also paragraph 41 above. The Claimant Forum provided evidence to the PIR that the reforms adversely affected the ability of asbestos-related disease claimants to secure "full compensation" and bring legitimate claims. In particular, the Claimant submitted evidence about their exposure to adverse costs and the requirements to purchase ATE insurance to guard against such risks. Although these were unintended and unforeseeable consequences of the LASPO reforms, the Defendant failed to consider them in a substantive manner in the PIR.

52. A further concern on the part of the Forum arose from the decision of the Court of Appeal in *Heneghan v. Manchester Dry Docks Limited* [2016] EWCA Civ 86, a concern which was specifically raised with the MoJ by a representative from Leigh Day, Patrick Walsh, during the meeting on 28 November 2018. The background was that, in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 A.C. 32, the House of Lords, in a claim for mesothelioma, had extended the concept of "material contribution". In general, in order for a Claimant to succeed, it is necessary for him to establish that, but for the breach of duty in question, he would not have sustained the injury complained of. However, special rules apply to cases where there is, or may be, more than one contributory cause of the Claimant's injury. In general, it will be sufficient for the Claimant to show that the wrongdoing in question made a material contribution to the injury. In *Fairchild*, the House of Lords stated that, where certain conditions are satisfied, then, as a matter of law, it will be taken that a Defendant who has materially increased the risk of damage occurring has materially contributed to such damage and causation will be proved. In *Heneghan*, the Court of Appeal extended the *Fairchild* exception, which previously applied only to mesothelioma claims, to an asbestos-related lung cancer claim on the ground that in a situation which was "truly analogous" the exception should be applied or the law in this area would be inconsistent and incoherent. Mr Hyam argued that this was powerful evidence that claims relating to other asbestos-related illnesses should be considered analogous to mesothelioma claims, which were exempted from the LASPO reforms by way of s.48 of LASPO. Indeed, the claim for exemption from LASPO for ARDs other than mesothelioma is arguably stronger because such claims do not enjoy the benefit of s 3 of the Compensation Act 2006, so that ARD victims may not receive all their compensation, but only a proportion of it, the damages being apportioned between Defendants, some of whom cannot be traced.

53. In reply, Mr Auburn submitted that the Defendant did not fail to take into account the product of stakeholder engagement. Mr Auburn argued that the duty conscientiously to take responses into account, as set out in *Gunning*, applies to consultation exercises rather than reviews. He relied on *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] 1 WLR 3923, in which the Court of Appeal observed that determining a breach of procedural fairness in relation to a non-statutory consultation process is a "context sensitive" task (paragraph 60), that fairness does not impose an obligation on a public body to accept submissions by specific consultees (paragraph 62), and that there are limits on the level of

particularity to which a public body can be expected to descend when responding to representations made in the course of a consultation exercise (paragraph 63).

54. Applying those observations to the facts of this case, Mr Auburn submitted that the PIR was a review, rather than a consultation exercise, and so the *Gunning* standards of procedural fairness do not apply. He submitted that even if they do apply, the Defendant did take into account stakeholders' views in a proportionate manner; the PIR, for example, made reference to claimants suffering from asbestos-related diseases, whilst also dealing with many other types of claim. In his submission, this plainly satisfied the test from *R (Liverpool CC) v Secretary of State for Health* [2003] EWHC 1975 (Admin), in which Stanley Burnton J held that only "purely cosmetic" consultation exercises, carried out with a "Machiavellian disingenuousness", would fail to discharge the requirements of procedural fairness. Mr Auburn also argued that there was no significant evidence that the LASPO reforms had deterred ARD claims in the manner alleged by the Claimant. In so far as the reforms reduced the ability of claimants to receive "full compensation", that was a *foreseen* consequence of the reforms. But in any case, he submitted that these issues were common to all personal injury claims and considered fully in the PIR.

Discussion

Substantive legitimate expectation: the law

55. The law applicable to substantive legitimate expectation based on a promise or representation was set out by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] AC 453, at para 60 in terms which were accepted by both Mr Hyam and Mr Auburn to be authoritative:

> "It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131."

56. As regards whether a representation can be said to be "clear, unambiguous and devoid of relevant qualification" the question is how, on a fair reading of the promise, it would have been reasonably understood by those to whom it was made; see per Lord Dyson JSC in *Paponette v Attorney General of Trinidad and Tobago* [2012] 1 AC 1 at paragraph 30.

57. The next issue is whether a substantive legitimate expectation can be created by a promise or representation made to a large or diverse group of readers or listeners. A classic (though unreported) judgment on legitimate expectation is that of Laws LJ in *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755. At paragraph 40 he asked: "What are the conditions under which a prior representation, promise or practice by a public decision-maker will give rise to an enforceable expectation of a substantive benefit?" He continued [emphasis added];

> 41. There is first an overall point to be made. It is that both these types of legitimate expectation are concerned with exceptional situations (see Lord Templeman in *Preston* at 864; compare *ABCIFER* [2003] QB 1397 per Dyson LJ at paragraph 72). It is because their vindication is a long way distant from the archetype of public decision-making. Thus a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel. All this is involved in what Sedley LJ described (*BAPIO* [2007] EWCA Civ 1139 paragraph 43) as the entitlement of central government to formulate and re-formulate policy. This entitlement – in truth, a duty – is ordinarily repugnant to any requirement to bow to another's will, albeit in the name of a substantive legitimate expectation. It is repugnant also to an enforced obligation, in the name of a procedural legitimate expectation, to take into account and respond to the views of particular persons whom the decision-maker has not chosen to consult.
>
> 42. But the court will (subject to the overriding public interest) insist on such a requirement, and enforce such an obligation, where the decision-maker's proposed action would otherwise be *so unfair as to amount to an abuse of power*, by reason of the way in which it has earlier conducted itself. In the paradigm case of procedural expectations it will generally be unfair and abusive for the decision-maker to break its express promise or established practice of notice or consultation. In such a case the decision-maker's right and duty to formulate and re-formulate policy for itself and by its chosen procedures is not affronted, for it must itself have concluded that that interest is consistent with its proffered promise or practice. In other situations – the

two kinds of legitimate expectation we are now considering – something no less concrete must be found. The cases demonstrate as much. What is fair or unfair is of course notoriously sensitive to factual nuance. In applying the discipline of authority, therefore, it is as well to bear in mind the observation of Sir Thomas Bingham MR as he then was in Ex p Unilever at 690f, that "[t]he categories of unfairness are not closed, and precedent should act as a guide not a cage".

43. Authority shows that where a substantive expectation is to run the promise or practice which is its genesis [it] is not merely a reflection of the ordinary fact (as I have put it) that a policy with no terminal date or terminating event will continue in effect until rational grounds for its cessation arise. Rather it must constitute *a specific undertaking, directed at a particular individual or group*, by which the relevant policy's continuance is assured. Lord Templeman in *Preston* referred (866 – 867) to "conduct [in that case, of the Commissioners of Inland Revenue] *equivalent to a breach of contract or breach of representations*".

44. I will give two concrete instances from the cases. In *Ex p Khan* [1985] 1 All ER 40 the Home Office promulgated specific criteria for the admission of children into this country for the purposes of adoption here. The appellant sought entry for his prospective adoptive child. He relied in terms on the published criteria which he fulfilled. But he found his application blocked by a further, unannounced criterion which he did not satisfy. This court allowed his appeal.

45. *Ex p Coughlan* is a particularly strong case. Miss Coughlan was a very severely disabled lady. She and seven comparably disabled patients had been given a clear promise by the health authority that a particular facility, Mardon House, would be their home for life. But the health authority decided to close Mardon House which had ceased to be financially viable. The court said this at paragraph 86:

> "[The health authority's promise of a home for life] was an express promise or representation made on a number of occasions in precise terms. It was made to a small group of severely disabled individuals who had been housed and cared for over a substantial period in the Health Authority's predecessor's premises at Newcourt. It specifically related to identified premises which it was represented would be their home for as long as they chose. It was in unqualified terms. It was repeated and confirmed to reassure the residents. It was made by the Health Authority's predecessor for its own purposes, namely to encourage Miss Coughlan and her fellow residents to move out of Newcourt and into Mardon

> House, a specially built substitute home in which they would continue to receive nursing care. The promise was relied on by Miss Coughlan. Strong reasons are required to justify resiling from a promise given in those circumstances. This is not a case where the Health Authority would, in keeping the promise, be acting inconsistently with its statutory or other public law duties. A decision not to honour it would be equivalent to a breach of contract in private law."
>
> 46. These cases illustrate the pressing and focussed nature of the kind of assurance required if a substantive legitimate expectation is to be upheld and enforced. I should add this. Though in theory there may be no limit to the number of beneficiaries of a promise for the purpose of such an expectation, in reality it is likely to be small, if the court is to make the expectation good. There are two reasons for this, and they march together. *First, it is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class.* As Lord Woolf MR said in *Ex p Coughlan* (paragraph 71):
>
> > "May it be... that, when a promise is made to a category of individuals who have the same interest it is more likely to be considered to have binding effect than a promise which is made generally or to a diverse class, when the interests of those to whom the promise is made may differ or, indeed, may be in conflict?"
>
> The second reason is that the broader the class claiming the expectation's benefit, the more likely it is that a supervening public interest will be held to justify the change of position complained of …"

58. It is right to say that the second reason given by Laws LJ in paragraph 46 of his judgment – the possibility that a change of policy may be justified by a supervening public interest – is inapplicable in this case. But the first reason he gives is highly material. The PLM said that the Government intended to undertake a "more thorough and substantive analysis" than that which had been contained in the initial assessment of the effects of the whole of the reforms to civil litigation funding in Part 2 (and, separately, the effects of the whole of the legal aid reforms in Part 1). The class of people potentially affected was enormous: at the very least, all individual litigants in civil proceedings and their lawyers throughout England and Wales.

59. Mr Hyam did not shrink from the fact that the promise was to a large and diverse group but submitted that this was not a barrier to the court finding that the promise gave rise to a substantive legitimate expectation. He referred us to the decision of the Court of Appeal in *R (Save Britain's Heritage) v Secretary of State for Communities and Local Government* [2019] 1 WLR 929 where Coulson LJ said at 35-39:

"35. There are two different ways in which a legitimate expectation claim can arise. The expectation can be generated by an express promise: see *AG of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629. The principle behind the promise cases was broadly summarised by Lord Neuberger in *United Policyholders Group v A-G of Trinidad and Tobago* [2016] UKPC 17 at paragraph 37 as being based on the proposition that "where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts". Secondly, a legitimate expectation can be generated by a practice, even where there has been no promise or assurance that a particular procedure will be followed: see for example *CCSU v Minister for the Civil Service* [1985] AC 374.

…

36. These two types of case are different, and it is important to keep their differences in mind. Many of what might be termed the practice cases, such as those concerned with a failure to consult prior to a change of policy or procedure, stress the omission of any relevant promise or assurance: see, for example, the decision of this court in *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755. In my view, the present case is a straightforward promise case, so the different considerations introduced by the practice cases do not arise here.

37. The two principal promise cases are *AG of Hong Kong*, and *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245. In the former, a senior immigration officer announced that government policy was that each illegal entrant from Macau would be interviewed and his case 'treated on its merits'. The applicant was detained and not given the opportunity of making representations as to why he should not be removed. The House of Lords held that, where a public authority charged with the duty of making a decision promised to follow a certain procedure before reaching that decision, good administration required that it should act by implementing the promise, provided the implementation did not conflict with the authority's statutory duties. Lord Fraser of Tullybelton said (page 638 E – G):

> "The justification for it is primarily, that when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have

> considered that it would be assisted in discharging its duty fairly by any representation from interested parties and as a general rule that is correct.
>
> In the opinion of their Lordships the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty, it is applicable to the undertaking given by the Government of Hong Kong to the applicant, along with other illegal immigrants from Macau, in the announcement outside the Government House on 28 October, that each case would be considered on its merits…"

38. In *Lumba*, the Supreme Court arrived at the same answer, albeit by a different route (indeed, it appears that *AG of Hong Kong* was not cited to them). In that case, the published policy was that prisoners who were foreign nationals would be detained only when their continued detention was justified. However, between 2006 and 2008 the Home Secretary had applied an unpublished policy of blanket detention. Lord Dyson JSC said at paragraph 26 that "a decision-maker must follow his published policy…unless there are good reasons for not doing so". This statement of principle was not linked to specific knowledge of the policy on the part of any individual. He went on:

> "35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. In *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, para 26 Lord Steyn said:
>
> > "Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice.
>
> 36. Precisely the same is true of a detention policy. Notice is required so that the individual knows the criteria that are being applied and is able to challenge an adverse decision. I would endorse the statement made by Stanley Burnton J in *R (Salih) v Secretary of State for the Home*

> *Department* [2003] EWHC 2273 at para 52 that "it is in general inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by statute." At para 72 of the judgment of the Court of Appeal in the present case, this statement was distinguished on the basis that it was made "in the quite different context of the Secretary of State's decision to withhold from the individuals concerned an internal policy relating to a statutory scheme designed for their benefit". This is not a satisfactory ground of distinction. The terms of a scheme which imposes penalties or other detriments are at least as important as one which confers benefits. As Mr Fordham puts it: why should it be impermissible to keep secret a policy of compensating those who have been unlawfully detained, but permissible to keep secret a policy which prescribes the criteria for their detention in the first place?"
>
> 39. Accordingly, there is the highest possible authority for the proposition that, if a public body indicates a clear and unequivocal policy that will be followed and applied in a particular type of case, then an individual is entitled to expect that policy to be operated, unless and until a reasonable decision is taken that the policy be modified or withdrawn (United Policyholders), or implementation interferes with that body's other statutory duties *(A-G of Hong Kong*)."

60. Mr Hyam pointed to the fact that in both of what Coulson LJ described as "the two principal promise cases" the promise was to a large group, if not to the public as a whole. But we do not think that either case assists him. In the *Attorney General of Hong Kong*'s case the promise gave rise to a procedural, not a substantive, legitimate expectation: where a public authority charged with the duty of making a decision promises to follow a certain procedure before reaching that decision, good administration requires that it should put it into conflict with its statutory duties. *Lumba* is an example of the important proposition that where a minister has a published policy, that policy should be followed unless there are good reasons to the contrary. Neither of these cases detracts in our view from what was said by Laws LJ in the *Bhatt Murphy* case.

Conclusion on substantive legitimate expectation

61. We do not consider that the contents of paragraph 7 of the PLM, referring to an analysis of the effects of Part 2 of LASPO "in the manner of an impact assessment", and to the intention of the Ministry of Justice that this would be a "more thorough and substantive analysis" than that contained in the preliminary assessment sections of the PLM, come close to establishing a substantive legitimate expectation on the part of the Claimant that there would be detailed consideration in the PIR of the alleged adverse effects of LASPO Part 2 on access to justice by claimants with non-

mesothelioma asbestos related diseases. We reach this conclusion for the following reasons:

a) This was not a clear and unambiguous promise of any kind, and certainly not a clear and unambiguous promise to deal with the effects of LASPO on each significant class of litigation (whether ARDs or otherwise) individually;

b) It was not a specific undertaking directed at a particular individual or group;

c) The failure to deal with the concerns raised by the Claimant and Leigh Day was not equivalent in any sense to a breach of contract or breach of representation;

d) It cannot be described as unfairness amounting to an abuse of power;

e) In any event, it appears to us to be self-evident that the degree to which the PIR could be a thorough and substantive analysis would depend on the quality of the data available to the MoJ at the time of the review.

Failure "to engage conscientiously"

62. It is undoubtedly good practice for the effects of a major statute to be reviewed by the Government after it has been in operation for a period to see whether it has had unforeseen or undesired effects. But there is no legal or constitutional obligation to do so at all, let alone to do so in a particular degree of detail. We accept the submission of Mr Auburn that the "*Gunning* requirements" are not directly applicable to a consultation of this kind. Laws and Treacy LJJ observed in the *West Berkshire* case at [60]-[63]:

> "A consideration of whether a non-statutory consultation process such as this contravened the requirements of procedural fairness will always be fact and context sensitive. As Burnett LJ identified in the *London Criminal Courts Solicitors' Association* case, the test is whether the process has been so unfair as to be unlawful …
>
> 62. Turning next to the question of whether appropriate consideration was given to the consultation responses, we do not accept that that obligation translates into an obligation on the Minister to adopt the submissions made to him by respondents. In our judgment the Minister was entitled to consider the whole range of responses made to him, (together with all relevant information), and to form his own conclusion independently of the views of any particular section of consultees or indeed the views of his own advisers. The Response at paragraph 20 appears to us to represent the balance struck by the Minister after weighing up the various submissions made to him. …

> 63. Insofar as the judge was critical of a failure of the Response document to explain why a threshold of three units was not used instead of 10 units, as had been mooted at one stage, we do not consider that is was necessary for the Secretary of State to descend to that level of particularity. The requirements of a fair consultation do not require that sort of detailed analysis of options before the Minister. As Silber J observed in *R (Maureen Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin) at paragraph 78 "There is no obligation for a party to consult on each and every item of detail when there is a series of different models available as options." Moreover, the observations of Lord Woolf in *Coughlan* cited above reinforce this point. Those observations, it seems to us, are equally applicable to the process of consideration of consultation responses."

63. It is unnecessary to decide whether the PIR would have been judicially reviewable if there had been no consultation at all with stakeholders: there was quite extensive consultation, including the meeting of 28 November 2018 between the Claimant and Leigh Day on the one hand and Mr Wright and some colleagues on the other at which the Claimant's concerns were aired: see paragraph 35 above.

64. Mr Wright's witness statements are not admissible as an aid to construction of the alleged promise relied on in Ground 1. But they are, as Mr Hyam accepted, admissible on the issue of whether he and his colleagues engaged with the concerns raised by the Claimant. The Lord Chancellor and his advisers (notably Mr Wright) were entitled to take the view that the data supplied, principally by the Claimant and Leigh Day, relating to ARDs did not amount to a sufficient body of evidence that LASPO Part 2 had seriously restricted access to justice for ARD claimants. They were not obliged to set out that view in the PIR, any more than they were obliged to set out and deal with any other particular response to the PIR consultation. Although ARD claims are often tragic cases, they are not the only type of personal injury litigation where entirely blameless claimants face great difficulties in obtaining compensation for their injuries. The PIR is a broad brush document addressed to the Justice Select Committee dealing with some of the major themes of LASPO. In the phraseology of *West Berkshire*, its failure to go into greater detail was not so unfair as to be unlawful.

Conclusion

65. The application for judicial review must be dismissed.

ORDER

UPON the Claimant's claim for judicial review dated 21 May 2019

AND UPON permission to bring judicial review proceedings being granted by Mrs Justice Steyn DBE on 6 December 2019

AND UPON a costs capping order being made by Mr Justice Martin Spencer on 27 April 2020 (the "**CCO**")

AND UPON hearing Leading Counsel for the Claimant and Counsel for the Defendant

IT IS ORDERED THAT:

1. The claim for judicial review is dismissed.

2. Permission to appeal to the Court of Appeal is refused.

3. The Claimant is to pay the Defendant's costs of the proceedings, summarily assessed in the sum of £5,000 pursuant to the CCO, within 14 days of the date of this Order.