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PRESS SUMMARY

Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales (Applicant) and The Association of British Insurers (Intervener) [2015] UKSC 3

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Hodge, Lord Thomas

BACKGROUND TO THE REFERENCE

The Counsel General for Wales (“the Applicant”) is, by section 112 of the Government of Wales Act 2006, empowered to refer the question whether a proposed Act of the Welsh Assembly is within its devolved legislative competence to the Supreme Court for decision.

In the present case, the Applicant referred to the Supreme Court the question whether the Welsh Assembly has the legislative competence to enact the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill [1].

The Bill has two provisions of particular importance. Section 2 makes persons “*by whom or on whose behalf*” compensation payments are made to victims of asbestos-related diseases (“compensators”) liable to Welsh Ministers for the cost of NHS services provided to such victims. Section 14 extended the scope of the compensators’ liability insurance policies to cover the sums which they would be required to pay under section 2 [2]-[8].

In determining this reference, the Supreme Court therefore has to decide two issues:

- (1) Whether the Bill comes within the legislative competence of the Welsh Assembly concerning the “*organisation and funding of [the] national health service*” under the Government of Wales Act 2006 (“GOWA 2006”) section 108(4)-(5) and paragraph 9 of Part 1 of Schedule 7; and
- (2) Whether the Bill is nonetheless outside the legislative competence of the Welsh Assembly by virtue of section 108(6) of the GOWA 2006, on the grounds that it was incompatible with the rights of compensators and insurers under article 1 of Protocol 1 of the European Convention on Human Rights to the peaceful enjoyment of their possessions (“A1P1 rights”) [9].

JUDGMENT

The Supreme Court unanimously finds that the Welsh Assembly lacks legislative competence to enact the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill in its present form.

Lord Mance (with whom Lords Neuberger and Hodge agree) gives the lead judgment and holds that the Bill is:

- (1) Outside the legislative competence of the Welsh Assembly concerning the “*organisation and funding of [the] national health service*” [34]; and
- (2) Incompatible with the A1P1 rights of compensators and insurers to the peaceful enjoyment of their possessions [65]-[69].

Lord Thomas (with whom Lady Hale agrees) concurs in the result set out in the judgment of Lord Mance for narrower reasons [71].

REASONS FOR THE JUDGMENT

The reasoning of the majority in the lead judgment is as follows:

- (1) The critical phrase, in determining the legislative competency of the Welsh Assembly to enact the Bill, is “Organisation of funding of the National Health Service” in paragraph 9 of Part 1 of Schedule 7 to the GOWA 2006 [13]. It is common ground that Welsh Ministers do not have general fiscal powers [17] and even assuming (without deciding) that the Welsh Assembly has competence to levy charges for Welsh NHS services, the Bill is not sufficiently “*related to*” the “*organisation of funding of the National Health Service*” under section 108(4) of the GOWA 2006 to come within that competence. The charges provided for by the Bill are to be imposed on compensators and insurers rather than patients and lack any direct or close connection with the provision of Welsh NHS services. The Bill seeks to impose what are in effect new tortious or statutory duties on third parties to pay for the relevant Welsh NHS treatment [24] and [27].
- (2) The Bill also interferes with the A1P1 rights of compensators and insurers to the peaceful enjoyment of their possessions. The new financial liabilities of compensators and insurers would arise from asbestos exposure and liability insurance policies which long pre-dated the Bill [36] and [41]. The retrospective effect of the Bill requires special justification, which is absent in the present case [53], [57] and [65]-[69].

Lord Thomas and Lady Hale agree that the Bill is beyond the competence of the Welsh Assembly, but on narrower grounds. Section 2 of the Bill is within the competence of the Welsh Assembly, because the “organisation of funding of the National Health Service” encompasses a general power to raise funds for the Welsh NHS through the imposition of charges on patients, who could recover those charges from an employer who has exposed him to asbestos. The employer could then claim indemnification from its liability insurer [83] and [96]. It is therefore open to the Welsh Assembly to impose charges directly on the employer/compensator [100]-[102]. The interference of the Bill with the A1P1 rights of employers/compensators is proportionate to its economic and social purpose of funding Welsh NHS services for asbestos victims [108], [124] and [128]. However, section 14 of the Bill is outside the competence of the Welsh Assembly because its effect is retrospectively to extend or override the provisions of existing liability insurance policies, contrary to section 108(5) of the GOWA 2006 and the A1P1 rights of insurers [133] and [138]-[140].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.uk/decided-cases/index.html