



12 October 2011

PRESS SUMMARY

AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents) [2011] UKSC 46
On appeal from the Court of Session: [2011] CSIH 31

JUSTICES

Lord Hope (Deputy President), Lord Brown, Lord Mance, Lord Kerr, Lord Clarke, Lord Dyson, Lord Reed

BACKGROUND TO THE APPEALS

The appellants are insurance companies which have undertaken to indemnify employers against liability for negligence. They sought to challenge the lawfulness of an Act of the Scottish Parliament (the Damages (Asbestos-related Conditions) (Scotland) Act 2009, “the 2009 Act”) which provides that asbestos-related pleural plaques and certain other asbestos-related conditions constitute personal injury which is actionable under Scots law. Pleural plaques are physical changes in the tissue which lines the lungs and the chest wall. They do not actuate or contribute to potentially fatal conditions such as lung cancer, mesothelioma or asbestosis, but their existence evidences significant previous exposure to asbestos, which of itself represents an increased risk of contracting such diseases.

The purpose of the 2009 Act was to reverse the decision of the House of Lords in *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 29. In that case it was decided that the mere presence of pleural plaques did not constitute injury which could give rise to a claim for damages. The appellants challenge the validity of the Act on two bases:

1. that it is incompatible under article 1 of Protocol 1 (“A1 P1”) of the European Convention on Human Rights (“the Convention”) and therefore is outside the legislative competence of the Scottish Parliament under the Scotland Act 1998; and
2. that it is open to judicial review as an unreasonable, irrational and arbitrary exercise of the legislative authority of the Scottish Parliament.

The first and second respondents represent the Scottish Ministers and the United Kingdom government respectively. The third to tenth respondents are individuals who have been diagnosed with pleural plaques. These respondents have cross-appealed a court finding which held that they did not have title and interest to be parties to the case.

JUDGMENT

The Supreme Court dismisses the appeal and allows the cross-appeal by the third to tenth respondents. The leading judgments were given by Lord Hope and Lord Reed, with whom the other justices agreed.

REASONS FOR THE JUDGMENT

The Court holds that the appellants are entitled to bring these proceedings under the Convention as the effect of the 2009 Act is that they would be victims for the purposes of article 34 and that the

amount of money the appellants would be required to pay is a possession for the purposes of A1 P1 [28], [112-114]. Therefore in order for the 2009 Act to comply with A1 P1, it must be shown that the Act is pursuing a legitimate aim and is reasonably proportionate to the aim pursued.

In issues involving questions of social policy, which this is, the Court should respect the judgment of the elected body as to what is in the public interest unless that judgement is manifestly without reasonable foundation [31] – [32]. It cannot be said that the judgement of the Scottish Parliament was without reasonable foundation [33], [125]. Therefore the Court accepts that the Act pursues a legitimate aim [41], [125]. It also considers that the means chosen are reasonably proportionate to the aim sought to be realised [41], [134]. The balance is correctly struck, first because the claims will only succeed if the asbestos exposure was caused by the employer’s negligence [37]. Second, the appellants’ obligation to indemnify inevitably entailed a risk that unforeseen circumstances would increase the burden of liability [38]. And third, because the Act can be seen as preserving the *status quo* prior to *Rothwell* [129]. It follows that the 2009 Act was not outside the legislative competence of the Scottish Parliament.

Nor can it be said that the 2009 Act was a result of an unreasonable, irrational and arbitrary exercise of the legislative authority [42]. The Court finds that in principle Acts of the Scottish Parliament are subject to judicial review but not on the grounds of irrationality, unreasonableness or arbitrariness. The guiding principle is to be found in the rule of law. This is the ultimate controlling factor, and the courts must insist that it is respected by legislation that the Parliament enacts. But it would be wrong for the judges to substitute their views as to what is rational or reasonable for the considered judgment of the democratically elected legislature [47], [51] – [52], [148] and [153].

As to whether the third to tenth respondents are entitled to be parties, the test of “standing”, rather than the private law rule that title and interest has to be shown, is a more appropriate approach in judicial review proceedings [62], [171]. The third to tenth respondents have standing as they are “directly affected” by the appellants’ challenge to the 2009 Act [63] – [64] and [175].

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.gov.uk/decided-cases/index.html