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Upper Tribunal

*DP *v* TopMark Claims Management Ltd

[2020] UKUT 106 (AAC)

2020 Jan 15;
B April 2

Upper Tribunal Judge Markus QC

Limitation of action — Personal injuries — Mesothelioma compensation scheme — Scheme administrator refusing application under compensation scheme on ground applicant "able to bring action for damages" in respect of disease — Applicant appealing to First-tier Tribunal — Limitation period for bringing action for damages in respect of disease expiring before hearing — Whether
C *tribunal to take account of facts as at time of its decision or time of administrator's decision — Whether applicant unable to bring action for damages "for any other reason" — Whether applicant "able to bring action" after expiry of limitation period — Limitation Act 1980 (c 58), s 12(2) — Mesothelioma Act 2014 (c 1), ss 3(1)(c), 18(3) — Diffuse Mesothelioma Payment Scheme Regulations 2014 (SI 2014/916) regs 7, 25*

D The applicant applied for compensation under the Diffuse Mesothelioma Payment Scheme, which was contained in the Diffuse Mesothelioma Payment Scheme Regulations 2014[1], made under the Mesothelioma Act 2014[2]. The application was made on the basis that the applicant was an eligible dependant of a person who had died with diffuse mesothelioma, his wife having died of the disease. The administrator of the scheme notified the applicant that his application was refused and confirmed this in a review two days later, finding that since the wife's employer was still in existence, the applicant did not satisfy the condition of eligibility set out in
E section 3(1)(c) of the 2014 Act, namely that no one was "able to bring an action for damages in respect of the disease" against the relevant employer or insurer. The applicant appealed to the First-tier Tribunal, pursuant to regulation 25 of the 2014 Regulations. By the time of the hearing the three-year limitation period for bringing a claim under the Fatal Accident Act 1976, contained in section 12(2) of the Limitation Act 1980[3], had expired. The tribunal dismissed the applicant's appeal on the basis that it should consider the position as at the date of the review decision, which was
F before the expiry of the limitation period.

On the applicant's appeal—

Held, dismissing the appeal, (1) that, since there was no contrary indication in the Mesothelioma Act 2014 or the Diffuse Mesothelioma Payment Scheme Regulations 2014, the First-tier Tribunal should approach an appeal under regulation 25 of the 2014 Regulations in the same way as the scheme administrator had on review; that, therefore, just as an administrator would on review, the tribunal should take into
G account all relevant evidence and determine eligibility in the light of the circumstances

[1] Diffuse Mesothelioma Payment Scheme Regulations 2014, reg 7: see post, para 15.
Reg 25: see post, para 16.
[2] Mesothelioma Act 2014, s 3(1): see post, para 13.
S 18(3): see post, para 14.
[3] Limitation Act 1980, s 12(2): "None of the time limits given in the preceding provisions of this Act shall apply to an action under the Fatal Accidents Act 1976, but no such action shall be brought after the expiration of three years from— (a) the date of death; or (b) the date of
H knowledge of the person for whose benefit the action is brought; whichever is the later."
S 33(1): "If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which— (a) the provisions of section 11 . . . or 12 of this Act prejudice the plaintiff or any person whom he represents; and (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents; the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates."

as at the date of its own determination; and that it followed that in the present case the tribunal had erred in approaching the appeal on the basis of the circumstances as they had been at the time of the review decision (post, paras 21–27).

(2) That section 3(1)(c) of the 2014 Act was only satisfied where a person was unable to bring an action for one of the reasons specified there, namely that the employer could not be found or no longer existed or for "any other reason"; that section 18(3) of the 2014 Act did not provide for the addition of further categories of reason but simply provided that the scheme could specify circumstances in which a person was, or was not, to be treated as able to bring an action for the purposes of section 3(1)(c); that regulation 7 of the 2014 Regulations, which specified such circumstances, was not exhaustive of what constituted "any other reason", so it was not determinative that the applicant's circumstances did not fall within that regulation; that the phrase "any other reason" in section 3(1)(c) took its colour from the first two reasons specified in paragraph (c) and did not extend to reasons of a wholly different kind to those two reasons; that those two reasons related to the situation where there was no tortfeasor or insurer capable of satisfying a judgment and were not concerned with the circumstances of the applicant; that, therefore, since the applicant had never suggested that his wife's employer or its insurer was not able to satisfy a judgment should he succeed, section 3(1)(c) was not satisfied; that, in any event, the fact that the three-year limitation period under section 12(2) of the Limitation Act 1980 had expired could not mean that an applicant was not "able to bring an action" for the purposes of section 3(1)(c) because section 12(2) of the 1980 Act did not create an absolute bar to bringing an action but only a bar to his remedy, if pleaded by the defendant and if the court did not exercise its discretion to exclude the time limit pursuant to section 33 of the 1980 Act; and that, accordingly, the First-tier Tribunal had not erred in finding that the applicant was not eligible for compensation under the scheme and the error in its approach to the appeal was not material (post, paras 33–37, 39–44, 47–54, 56).

Dicta of Smith LJ in *Cain v Francis* [2009] QB 754, para 65, CA and *Richards v McKeown* [2017] EWCA Civ 2374, CA applied.

The following cases are referred to in the judgment:

Cain v Francis [2008] EWCA Civ 1451; [2009] QB 754; [2009] 3 WLR 551; [2009] 2 All ER 579, CA
Gloucestershire County Council v EH [2017] UKUT 85 (AAC); [2017] ELR 193, UT
Lachaux v Independent Print Ltd (Media Lawyers Association intervening) [2015] EWHC 2242 (QB); [2016] QB 402; [2016] 2 WLR 437; [2016] 4 All ER 140
R (DLA) 3/01 (unreported) 7 February 2000, Social Security Comrs
R (Mirza) v Secretary of State for the Home Department [2011] EWCA Civ 159; [2011] Imm AR 484, CA
R (Westminster City Council) v National Asylum Support Service [2002] UKHL 38; [2002] 1 WLR 2956; [2002] 4 All ER 654, HL(E)
Richards v McKeown [2017] EWCA Civ 2374, CA
Wilkin v Goldthorpe [1998] ELR 345

The following additional cases, supplied by courtesy of counsel, were cited in argument or referred to in the skeleton arguments:

Halki Shipping Corpn v Sopex Oils Ltd [1998] 1 WLR 726; [1998] 2 All ER 23, CA
Pepper v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] ICR 291; [1993] 1 All ER 42, HL(E)

APPEAL from the First-tier Tribunal (Social Entitlement Chamber)

On 21 September 2016 the applicant, DP, applied for compensation under the scheme set up by the Diffuse Mesothelioma Payment Scheme Regulations 2014 in respect of the death of his wife, JP, on 11 September

2014 from mesothelioma due to asbestos exposure. By a decision 22 March 2017 and confirmed in a review decision dated 24 March 2017, the respondent, TopMark Claims Management Ltd, the Diffuse Mesothelioma Payment Scheme administrator ("the scheme administrator") refused the application on the ground that one of the conditions of eligibility, namely that the applicant was unable to bring an action against the wife's employer, did not apply since the employer was still in existence. By a decision dated 25 January 2018 the First-tier Tribunal (Social Entitlement Chamber) (First-Tier Tribunal Judge Hindley) upheld the administrator's refusal.

By a notice of appeal dated 13 April 2017, and pursuant to permission granted by the First-tier Tribunal on 12 April 2018, the applicant appealed on the grounds that (i) the tribunal had erred in considering the position as at the date of the scheme administrator's review decision, rather than the date of the tribunal's determination, by which time the statutory limitation period for bringing an action against the employer had expired, (ii) once the limitation period had expired the applicant was not "able to bring an action for damages . . . for any other reason" within section 3(1)(c) of the Mesothelioma Act 2014, (iii) that any circumstance whatsoever (subject to reasonableness) was relevant for that purpose whether or not specified in regulation 7 of the 2014 Regulations, and (iv) specifically that the condition applied where an applicant's claim was statute-barred.

The facts are stated in the judgment, post, paras 2–7.

Charles Bagot QC and *Leon Glenister* (instructed directly through the *Free Representation Unit*) for the applicant.

Jerome Silva (instructed by *Plexus Law*) for the scheme administrator.

The court took time for consideration.

2 April 2020. **UPPER TRIBUNAL JUDGE MARKUS QC** promulgated the following judgment.

1 This appeal is concerned with some difficult questions of statutory interpretation of the legislation establishing the Diffuse Mesothelioma Payment Scheme ("the Scheme"). The respondent, TopMark Claims Management Ltd, is the appointed administrator of the Scheme. The appeal arises out of a tragic personal situation.

Factual background

2 The appellant is the husband of JP. JP had worked as a healthcare assistant in a residential care home since the age of 19. Works were carried out in the loft of the home as a result of which she was exposed to asbestos. She was diagnosed with mesothelioma on 4 April 2014 and died five months later on 11 September 2014 when she was 37 years old. The record of inquest states that JP "was exposed to asbestos whilst working as a care worker".

3 The appellant had instructed solicitors four days after JP's diagnosis regarding a possible claim against her former employer. On 21 September 2016, two years after JP's death, the solicitors informed him that there was insufficient prospect of success and declined to act further. The appellant applied for compensation under the Scheme.

4 On 22 March 2017 the respondent notified the appellant that the application was refused and confirmed this in a review decision dated 24 March 2017. The respondent's decision was that one of the conditions of eligibility, that the appellant was unable to bring an action against JP's employer did not apply as the employer was still in existence. The appellant contacted solicitors recommended to him by an adjuster for the respondent, regarding a civil claim. Those solicitors declined to assist because there was less than six months before the limitation period expired and they did not have capacity to complete the necessary work during that time. The limitation period within which to bring a civil claim expired on 11 September 2017.

5 In the meantime, on 13 April 2017, the appellant had appealed to the First-tier Tribunal ("FTT") against the respondent's decision. In the response to the appeal the respondent accepted that JP had been exposed to asbestos. By a decision dated 25 January 2018 the FTT refused the appeal. In the statement of reasons the tribunal explained that it had considered the position as it was at the date of the respondent's decision, 24 March 2017. At that date the limitation period for bringing a claim had not expired and so the appellant was not "unable" to bring an action for damages against the employer. The tribunal did not need to decide whether other eligibility conditions applied.

6 The FTT gave the appellant permission to appeal to the Upper Tribunal ("UT") on 12 April 2018. The appellant sought assistance from the Free Representation Unit ("FRU") and the UT extended time to enable a representative to be found and to make submissions in the appeal. The appellant was put in touch with solicitors who engaged in pre-action correspondence with JP's former employer. The UT stayed the proceedings for some months on the basis that the outcome of the correspondence might render the appeal academic. The appellant's solicitor issued proceedings against the employer in August 2019. The employer indicated that it would plead limitation as a defence and at that time it was anticipated that that matter would be considered at a preliminary hearing in the summer of 2020 (I do not know how this date has been affected by the coronavirus pandemic). FRU requested a further stay which I refused as I did not consider that the outcome of the preliminary issue would be relevant to the issues in this appeal and a further lengthy delay was undesirable.

7 An oral hearing of the appeal took place before me on 15 January 2020. I directed further written submissions on matters that had arisen in the course of the hearing and this further delayed the determination of the appeal (as have the limitations arising from the coronavirus pandemic). On 25 March 2020 the Chamber President of the UT (Administrative Appeals Chamber) issued a general stay on all proceedings for a period of 21 days. I have lifted the stay so as to make and issue this decision. I have done so because the appeal was ready for determination and the outcome of the appeal may be relevant to the ongoing civil proceedings.

Background to the Diffuse Mesothelioma Payment Scheme

8 In February 2010 the Department for Work and Pensions ("DWP") published a consultation paper, "Accessing Compensation: Supporting people who need to trace Employers' Liability Insurance". The problem identified was that, given the time that it generally takes for some industrial

A diseases to appear, by the time of diagnosis the records relating to the employers' liability insurer may have been lost or destroyed. In July 2012 the Government recommended a compensation scheme for people with mesothelioma who were exposed to asbestos through their employer's negligence and who were unable to trace a liable insurer or employer.

9 The Mesothelioma Bill was introduced in the House of Lords in
B May 2013. The Explanatory Notes to the Bill described its background, commencing with the introduction in 1969 of the statutory requirement on employers to hold employers' liability ("EL") insurance which "enables employees to be compensated for injuries or illnesses arising through their employment and ensures that employers are able to cover the cost of their negligence". The Notes continued:

C "5. In cases of employer negligence, the majority of individuals are able to make a claim for injury or disease directly against their current or former employer, or where their employer no longer exists they can claim against the employer's EL insurer. A number, however, have difficulty in tracing the EL insurance policy where they need to claim directly against their former employer's insurer. This is partly because some diseases caused by employer negligence or breach of statutory duty,
D including in particular diffuse mesothelioma, do not manifest themselves until several years after the employment has ceased. This can be decades in some instances. An employee in this situation is unlikely to have known who the EL insurer was. By the time when they are diagnosed with the disease many years later, the relevant insurance records may have already been lost or destroyed. Employers also may not retain out-
E of-date EL insurance details, especially once their business has ceased trading."

10 The Notes went on to describe earlier attempts to address the problem through a voluntary code and the DWP consultation which preceded the Bill, and then summarised the measures in the Bill:

F "11. The Bill is intended to address a particular issue in relation to those diagnosed with diffuse mesothelioma who were negligently exposed by their employer to asbestos. Diffuse mesothelioma is a 'long-tail disease': it materialises decades after the exposure to asbestos which caused it. It is a disease which, once diagnosed, is rapidly terminal and is caused almost exclusively by exposure to asbestos.

"12. Although such employees would in principle have a good claim in
G negligence against their employer, they are often in practice unable to recover compensation: by virtue of the passage of time no solvent employer remains to be sued, and the employee is often unable to trace any insurer who was providing EL insurance to their employer at the material time, despite the fact that (as explained above) from 1 January 1972 the employer would have been required to have such EL insurance
H pursuant to the ELCI Act (or from 29 December 1975 pursuant to the Northern Ireland Order), and that even before that date the vast majority of such employers are thought to have held EL insurance. Thus although it may be highly likely that premiums were paid by the employer to insure against the risk of the employee's health being damaged by virtue of the employer's negligence, and although that risk subsequently materialises,

the employee remains uncompensated because of the lack of effective record-keeping identifying the insurer responsible for covering the risk.

"13. The Bill provides that the Secretary of State may establish a scheme, which will make payments to eligible people with diffuse mesothelioma and eligible dependants of people who have died from diffuse mesothelioma before making an application to the scheme . . . The scheme will only be open to people who have not brought an action against a relevant employer or employer's EL insurer because they are unable to do so."

11 One of the conditions of eligibility for a dependent, contained in clause 3(1)(b) of the Bill (which became section 3(1)(c) of the 2014 Act), was that the person was unable to bring an action for damages because the employer and insurer could not be found, nor longer exist or for any other reason. Clause 18(3), the precursor to section 18(3), was explained in the Notes as follows:

"87. Subsection (3) allows the Secretary of State to make regulations to specify the circumstances in which a person is or is not to be treated as able to bring an action for the purposes of the eligibility conditions at clause 2(1)(c) or clause 3(1)(b). Those conditions are set out in general terms because there are a number of different reasons why a person may be unable to bring proceedings against a former employer or that employers' EL insurer for example where the employer has ceased trading, or where the identity of his EL insurer is unknown or the policy document cannot be traced, but it is very difficult to predict in advance what all those reasons may be. If it should prove to be necessary, for example if unforeseen difficulties arise because those conditions are set out in general terms, the Secretary of State will make regulations under this provision."

12 Shortly before the Bill was introduced, the DWP provided a Memorandum to the House of Lords Select Committee on Delegated Powers and Regulatory Reform. The stated purpose of the Memorandum included identifying the provisions for delegated legislation in the Bill, the purpose of the powers and the reason why they were left to delegated legislation. In relation to clauses 3 and 18(3), the Memorandum repeated much of what was said in the Explanatory Notes cited above and added:

"26. The power at clause 18(3) has been taken in relation to the conditions at clause 2(1)(c) and 3(1)(b). Those conditions are set out in general terms because there are a number of different reasons why a person may be unable to bring proceedings against a former employer or that employers' Employers' Liability Insurance ("EL") insurer for example where the employer has gone bankrupt or been wound up or otherwise ceased trading, or where the identity of his EL insurer is unknown or the policy document cannot be traced, but it is very difficult to predict in advance what all those reasons may be and it would be very complex to try to do so. This power has been taken in case it is needed in order for the Secretary of State to be able to set out when the Scheme administrator should treat an applicant as able or not able to bring an action for the purposes of the conditions, should unforeseen difficulties arise at the margins because of the generality of the main test."

The Mesothelioma Act 2014 and Diffuse Mesothelioma Payment Scheme Regulations 2014

13 The Mesothelioma Act 2014 closely followed the terms of the Bill. It is the framework for the Secretary of State to set up the Diffuse Mesothelioma Payment Scheme. Section 2 sets out the conditions of eligibility for people diagnosed with mesothelioma and section 3 provides for eligible dependants:

"2 *Eligible people with diffuse mesothelioma*

"(1) A person diagnosed with diffuse mesothelioma is eligible for a payment under the scheme if— (a) a relevant employer has negligently or in breach of statutory duty caused or permitted the person to be exposed to asbestos, (b) the person was first diagnosed with the disease on or after 25 July 2012, (c) the person has not brought an action for damages in respect of the disease against the relevant employer or any insurer with whom the employer maintained employers' liability insurance at the time of the person's exposure to asbestos, (d) the person is unable to bring an action for damages in respect of the disease against any employer of the person or any insurer with whom such an employer maintained employers' liability insurance (because they cannot be found or no longer exist or for any other reason), and (e) the person has not received damages or a specified payment in respect of the disease and is not eligible to receive a specified payment."

"3 *Eligible dependants*

"(1) A dependant of a person who has died with diffuse mesothelioma is eligible for a payment under the scheme if— (a) the person with the disease was eligible for a payment under the scheme (see section 2) but did not make an application in accordance with the scheme, (b) no one has brought an action for damages in respect of the disease under the fatal accidents legislation, or on behalf of the estate of the person with the disease, against the relevant employer or any insurer with whom the employer maintained employers' liability insurance at the time of that person's exposure to asbestos, (c) no one is able to bring an action for damages in respect of the disease under the fatal accidents legislation, or on behalf of the estate of the person with the disease, against any employer of that person or any insurer with whom such an employer maintained employers' liability insurance (because they cannot be found or no longer exist or for any other reason), and (d) no one has received damages or a specified payment in respect of the disease or is eligible to receive a specified payment."

14 The other relevant provision of the 2014 Act is section 18(3) which provides: "The scheme may specify circumstances in which a person is, or is not, to be treated as able to bring an action for the purposes of section 2(1)(d) or 3(1)(c)."

15 The Scheme is contained in the Diffuse Mesothelioma Payment Scheme Regulations 2014. Regulation 7 provides for the circumstances in which a person is to be treated as unable to bring an action:

"(1) For the purposes of section 18(3) of the Act, the circumstances in which a person is not to be treated as able to bring an action are that an employer against whom the person is able to bring an action in respect of diffuse mesothelioma can be found or does exist, but— (a) that employer

is a person whose circumstances are such that they fall within any of the relevant provisions; and (b) no other employer or insurer can be found or exists against whom the person can maintain an action for damages.

"(2) In this regulation 'relevant provisions' means . . . (c) sections 4 to 7 of the Third Parties (Rights against Insurers) Act 2010; (d) section 130 of the Health and Social Care Act 2012 and any regulations made under that section; (e) articles 41 to 43 of the Water and Sewerage Services (Northern Ireland) Order 2006; or (f) section 17 of the Energy Act (Northern Ireland) 2011."

16 The 2014 Act and 2014 Regulations provide for review of a decision made by the Scheme administrator, pursuant to which the administrator may confirm the original determination or make any other determination which the administrator had power to make on the original application. Section 6(1) provides that "The scheme must confer a right of appeal to the First-tier Tribunal against a decision taken on a review". Regulation 25 provides for the right of appeal as follows:

"(1) An applicant may appeal to the First-tier Tribunal from a determination which has been reviewed under regulation 24(3).

"(2) An appeal under this regulation is to be conducted in accordance with the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008."

Discussion

The relevant date

17 The FTT approached the case on the basis that it had "to consider the position as at the date of the decision under appeal", that is the date of the Scheme's review decision. Mr Bagot submitted that was incorrect and that the tribunal should have considered the position as it was at the date of its determination. He submitted that that could have made a difference because at the date of the Scheme's decision the statutory limitation period had not expired but it had done so by the time the FTT determined the appeal.

18 The legislation, the relevant parts of which I have set out above, does not state the date by reference to which an appeal is to be determined. The reference to the 2008 Rules does not assist. Rule 15(2)(a)(ii) of the 2008 Rules referred to in regulation 25(2) provides that the tribunal may admit evidence whether or not it was available to a previous decision-maker. I do not agree with Mr Bagot's submission that this supports his case that the FTT must consider the circumstances as at the date of the tribunal's determination. Rule 15(2)(a) is concerned with the FTT's power to admit evidence. Where an appeal has to be determined on the basis of circumstances at a particular time in the past, evidence which arose after that time may be admitted if it relates to the relevant time: *R (DLA) 3/01* (unreported) 7 February 2000, at para 58. Thus the power to admit later arising evidence of itself says nothing about the relevant date for the purpose of an appeal. That date is determined by reference to the statutory provisions conferring the right of appeal.

19 In the case of the Diffuse Mesothelioma Payment Scheme, an appeal is against a determination taken on review (section 6(3) of the 2014 Act). Neither the 2014 Act nor the 2015 Regulations say anything about the date

A by reference to which a review is determined. Regulation 24 makes provision for the conduct of the review. Regulation 24(2) provides that "Regulations 10 to 13 apply in relation to a review of a determination as they apply in relation to the original determination". Regulations 10 to 13 confer power on the Scheme administrator to obtain documents or evidence, impose duties on applicants to provide relevant information to the B administrator including any relevant matter which comes to an applicant's attention, and require the review to be conducted on the basis of the information which is before the administrator. These powers and duties indicate that the review is to be conducted on the basis of the circumstances as at the time of the review.

20 Consistently with this, regulation 24(3) provides that on review the administrator may confirm the original determination or make any other C determination which the scheme administrator has power to make on an application, and regulation 24(6) provides that a determination may be confirmed on review "for reasons that differ in any respect from the reasons given in relation to that determination." So far as review is concerned, therefore, the statutory provisions are for a fresh consideration of the application, based on all available relevant information.

D **21** On appeal the FTT is concerned with whether the decision appealed against was right or wrong. In effect the FTT stands in the shoes of the administrator on review. As there is no contrary indication in the legislation, the tribunal should approach the appeal in the same way that the administrator did on review and so is not limited to considering eligibility as it was at a particular date. Just as the administrator must do on review, the FTT should take into account all relevant evidence and determine eligibility E in the light of the circumstances as at the date of its determination.

22 I have reached this conclusion by construing the statutory language. It is supported by the fact that, generally, when Parliament intends an appeal to be conducted by reference to a particular date or period, express provision is made. Thus section 12(8) of the Social Security Act 1998 provides that in considering appeals to which it applies, the FTT "shall not take into account any circumstances not obtaining at the time when the decision appealed F against was made". The same provision is made in paragraph 6(9) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 in relation to housing benefit appeals, and in section 5B of the Pension Appeal Tribunals Act 1943 in relation to war pensions.

23 Mr Bagot quite properly referred me to section 85(4) of the Nationality Immigration and Asylum Act 2002 which provides that in an G immigration appeal a tribunal may consider matters arising after the date of the decision where it is relevant to the substance of the decision. However, this is in the context of the specific intent in that legislation "to deal compendiously with all issues concerning the lawfulness of a person's continued residence in the United Kingdom" (*R (Mirza) v Secretary of State for the Home Department* [2011] Imm AR 484, para 41). It does not affect my analysis above in relation to the legislation in hand.

H **24** The only other legislation to which I have been referred is that relating to special educational needs appeals. The High Court in *Wilkin v Goldthorpe* [1998] ELR 345 addressed the position under the legislation pertaining to special educational needs at that time, the Education Act 1996. The Act provided a right of appeal to the tribunal and was silent as to the

date by reference to which an appeal should be determined. Kay J said at p 349 that:

> "when an appeal of this kind comes before the tribunal, the tribunal is bound at that stage to look at the overall picture as to the particular special needs of the child at that time. It is not for the tribunal simply to address the issues as at the stage when the statement is drawn or when the appellant lodges her appeal."

25 It is important to put this in context. *Wilkin v Goldthorpe* concerned the educational provision to be made for a child who had only a very short time left at primary school. The tribunal had declined to consider what should happen thereafter. The issue was not posed as being whether the tribunal was required to determine the appeal on the basis of the circumstances pertaining at the time of the decision which was being challenged.

26 The approach in *Wilkin v Goldthorpe* was applied by UT Judge Mitchell in *Gloucestershire County Council v EH* [2017] ELR 193 in relation to an appeal brought under the Children and Families Act 2014, the current legislation governing special educational needs and appeals. As the parties were in agreement on the point, Judge Mitchell did not hear argument to the contrary. The context was very different to that in the present appeal.

27 In the light of my analysis, I conclude that the FTT should have approached the appeal on the basis of the circumstances as they were at that time. However, the error by the tribunal would only be material if the appellant could have succeeded on the basis of the circumstances as they were at the time of the tribunal's decision. For reasons which I now explain, I reject the appellant's case in this regard. It follows that the tribunal's error as to the date for consideration was immaterial.

Application of section 3(1)(c) of the Mesothelioma Act 2014

28 Mr Bagot's main submission on behalf of the appellant was that, once the limitation period had expired (which it had, by the time of the FTT's determination), the appellant was not "able to bring an action for damages . . . for any other reason" within section 3(1)(c) of the 2014 Act. He said that any circumstance whatsoever (subject to reasonableness) was relevant for that purpose, whether or not specified in regulation 7, and specifically that the condition applied where an applicant was statute-barred. His fall-back position was that, even if he was wrong about the relevant time for the tribunal's consideration, the appellant had been unable to bring an action at the date of the Scheme administrator's review decision because, in all the circumstances including the advice that the appellant had been given and the fact that his solicitor had declined to act, it was not practicable for him to do so.

(a) Whether the circumstances in regulation 7 are exhaustive of "any other reason"

29 Mr Bagot submitted that as at the date of the FTT's or the Scheme's decisions, the appellant's reasons for not bringing a claim amounted to "any other reason", a phrase which was to be given its natural meaning

A unconstrained by the words in brackets that preceded that phrase or by regulation 7 of the 2014 Regulations.

30 Mr Silva submitted that "any other reason" in section 3(1)(c) was limited to the circumstances specified in regulation 7. As none of those circumstances applied to the appellant, and as the employer existed and could be found, section 3(1)(c) did not apply.

B **31** Mr Bagot resisted Mr Silva's submission on two bases. First he said section 18(3) and regulation 7 were irrelevant to the scope of "any other reason". Second, he said that in any event the circumstances specified under section 18(3) were not exhaustive of the meaning of "any other reason".

32 As to the first submission, Mr Bagot said that section 3(1)(c) listed three categories of case in which a person was unable to bring an action and that regulations under section 18(3) added a further category of a person C who was *treated* as unable to do so. He said that those who were treated as unable to bring a claim were "individuals who are *able* to bring a claim pursuant to sections 2 and 3 but are then *treated as unable* by section 18(3) and regulation 7".

33 As Mr Silva pointed out, this submission would lead to the nonsensical situation that, although someone was able to bring an action within the meaning of section 3(1)(c), that same person would be treated as D unable to do so for the purpose of the same provision. Parliament could not have intended to legislate for such a situation. The phrase "to be treated as" is a deeming provision. It means the same as "to be regarded as" (*Bennion on Statutory Interpretation*, 7th ed (2017), para 17.8). Furthermore, section 18(3) allows for circumstances to be specified "for the purposes of section 3(1)(c)". Section 3(1)(c) *only* applies where a person is unable to E bring an action for one of the two reasons specified there or for "any other reason". It leaves no room for the addition of further categories and there is nothing in the terms of section 18(3) to indicate that it provides for the addition of further categories.

34 I conclude, therefore, that section 18(3) does not add a further category to those in section 3(1)(c) and that regulation 7 prescribes circumstances which constitute "any other reason" within section 3(1)(c). F However, as I now explain, I conclude that those circumstances are not exhaustive of what constitutes "any other reason".

35 The legislative drafting does not support the specified circumstances being exhaustive. Section 18(3) does not use the definite article; the phrase "may specify circumstances" leaves open the possibility of other circumstances which are not specified. There is nothing else in the wording G of section 18(3) or elsewhere in the Act to suggest that circumstances which are specified under that subsection are to be exhaustive. If the intention had been to limit the circumstances to those specified, it would have been easy for section 3(1)(c) to have been drafted so as to provide a third category of "for such reason as is specified in regulations" or similar. This analysis is unaffected by the reference in regulation 7 to "*the* circumstances". The circumstances referred to there are those "for the purposes of section 18(3)", H and so the regulation takes its scope from that of section 18(3).

36 Further, it is significant that section 18(3) creates a power not a duty to specify circumstances. The fact that Parliament left open the possibility that no circumstances will be specified is inconsistent with any specified circumstances being exhaustive of the scope of "any other reason".

37 Finally, the background legislative material set out above makes it clear that the purpose of section 18(3) was to clarify that circumstances which had not been foreseen at the time of drafting were included within section 3(1)(c), but that it was not intended to limit the generality of the main test.

(b) The meaning of "any other reason"

38 As the circumstances specified in regulation 7 are not exhaustive of what is "any other reason", it is necessary to determine what the scope of that phrase is. Mr Bagot contended that it is to be construed according to its natural meaning, which he says is that *any* reason for being unable to bring an action will fall within section 3(1)(c).

39 Mr Bagot's approach is not supported by the language of the legislation. If the meaning of "any other reason" was without limit, there would have been no need to include the more specific first two reasons ("cannot be found or no longer exist") nor would there have been any need for section 18(3) to permit other matters to be specified. If no limitation had been intended, the drafter could simply have said "not able to bring an action . . . for any reason".

40 More significantly, in my judgment, Mr Bagot's submission is inconsistent with the clear intention of Parliament underlying this legislation. Both parties agreed that it was permissible to take into account the Explanatory Notes and Memorandum in identifying the legislative intent. Lord Steyn said in *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956, para 5: "In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction."

41 See also *Bennion on Statutory Interpretation*, paras 24.9 and 24.14.

42 The passages from the Explanatory Notes and the Memorandum which I have set out make it crystal clear that the purpose of the legislation was to address the particular problems arising where tortfeasors and insurers are unable to compensate a person. The DWP identified some circumstances in which this problem would arise but, because it was "very difficult to predict in advance" what all the different reasons for being unable to bring proceedings may be, a general category was created. However, it is also clear that all the reasons within section 3(1)(c) were intended to relate to the core problem identified in the Notes at paras 11 and 12, in essence those cases where there is no tortfeasor or insurer capable of satisfying a judgment. Such cases formed the examples given in para 26 of the Memorandum. The statement in that paragraph that "it would be very complex to try" to predict all the reasons why a person would be unable to bring proceedings was a practical acknowledgment of the complexities of company, insurance and reinsurance law, particularly in the light of the effect of the passage of time on historic liabilities over the passage of time and that companies may have been wound up, merged or taken over. Consistently with that intent the circumstances actually specified in regulation 7 are all ones in which a tortfeasor or insurer can be found but cannot satisfy a judgment as a result of insolvency, dissolution or similar circumstances. The Regulations were made only shortly after the Act and provide some assistance in that regulation 7 confirms my understanding of the legislative intent.

43 In summary therefore, the above shows that the general words were inserted in order to guard against an unforeseen omission or to enable clarification, but not to extend the application of section 3(1)(c) to circumstances of a wholly different kind to the two specified reasons. The meaning of the phrase "any other reason" takes its colour from the first two circumstances specified in the brackets at the end of section 3(1)(c). Section 3(1)(c) is concerned with the circumstances of the putative defendant, as discussed above, not of an applicant. The words "any other reason" are to be construed accordingly.

(c) Whether a person who is statute-barred is "able to bring an action"

44 On the basis of my conclusion above, the appellant's circumstances do not fall within the scope of the scheme. He has never suggested that the employer or insurer was not able to satisfy a judgment should he succeed.

45 However, in case I am wrong in my construction of "any other reason", I address whether the appellant can fulfil the condition of being not "able to bring an action for damages". The appellant's principal case was that he was not able to bring an action because, assuming he does not obtain an extension of time from the High Court, he is barred from bringing civil proceedings by reason of the operation of the Limitation Act 1980.

46 I start by observing that the Mesothelioma Act 2014 does not provide an alternative to a civil remedy where that is available. It was common ground in these proceedings that it creates a scheme of last resort. If a claim cannot be made because the employer or insurer cannot be found, no longer exist or for any other reason (as construed by me), the Scheme provides a remedy because the civil justice system cannot be used to obtain compensation. The appellant's suggested approach would mean that the 2014 Act operates to provide a different result from that delivered in the civil justice system. There is nothing in the Act which sanctions such an extreme and frankly bizarre outcome and it is contrary to the manifest intention of the Scheme as explained in the background materials.

47 More specifically, I am entirely satisfied that being statute-barred pursuant to the Limitation Act 1980 does not mean that a person is not "able to bring an action" for the purpose of section 3(1)(c).

48 In that regard Mr Bagot relied on the provisions of sections 12 and 33 of the Limitation Act 1980. Section 12 applies to actions under the Fatal Accidents Act 1976. Section 12(2) provides that "no such action shall be brought after the expiration of" the specified time limit. Section 33 provides for the discretionary exclusion of that time limit. The court may direct that section 12(2) should not apply to an action if it appears equitable to allow the action to proceed, and the section sets out the matters to which the court will have regard.

49 Mr Bagot submitted that "bring an action" in section 3(1)(c) of the 2014 Act should be given the same meaning as it has in section 12(2) of the 1980 Act, as it can be assumed that at the time it passed the 2014 Act Parliament was aware of the provisions of the earlier one and the meaning that has been ascribed to that legislation: *Lachaux v Independent Print Ltd (Media Lawyers Association intervening)* [2016] QB 402, para 44. It followed, he submitted, that if a claimant was unable to bring an action by reason of the limitation period having expired, they were not able to "bring an action" for the purpose of section 3(1)(c).

50 Mr Silva submitted that the effect of the Limitation Act on an out of time claim was settled by the Court of Appeal in *Richards v McKeown* [2017] EWCA Civ 2374, which held that a defendant had to plead limitation as a defence to a claim and a claimant could then plead section 33 in reply. A claim was not automatically barred by section 11 (or, by the same reasoning, 12). This was reinforced by the observation in *Cain v Francis* [2009] QB 754, para 65 that: "The effect of the limitation provision was not to extinguish the claimant's right of action, only to bar his remedy." The availability of a limitation defence did not mean that an action could not be brought; the position was no different to the effect of any other defence. Mr Silva submitted that the opening words of section 3(1)(c) of the 2014 Act were concerned with the originating capabilities of the claimant not the merits or prospects of a claim, but that the potential effect of limitation related to the latter not the former. Mr Bagot attempted to circumvent the obvious difficulty for his case created by *Richards v McKeown* by submitting that it simply showed that a claimant may issue a claim but nonetheless be barred from bringing an action by the Limitation Act.

51 I have concluded that Mr Silva's submissions are correct. I do not agree with Mr Bagot that "bring an action" in section 3(1)(c) must mean the same as in section 12(2). It is only where the same expression is used in similar contexts that the statutory definition in one context may be persuasive in the other: *Craies on Legislation*, 11th ed (2017), para 20.1.38. The observations of Warby J in *Lachaux* do not suggest otherwise. The contexts of the two statutes in play in this case are not similar and the particular provisions are concerned with entirely different situations and matters.

52 Moreover it is clear from *Richards v McKeown* that section 12(2) does not create an absolute bar to bringing an action. Section 33 means that a claimant may be able to bring an action out of time. Moreover, if the defendant does not plead limitation section 12(2) presents no obstacles whatsoever to bringing an action.

53 Mr Bagot's submission is inconsistent with the legislative intention underlying the Scheme as I have analysed above. In addition to the matters already addressed by me, I take into account that limitation is (and was in 2013) a well-known concept and it was clearly foreseeable that some claimants would be unable to obtain a remedy because they were statute-barred. This would have been particularly apparent in the case of industrial disease litigation, given the long latency period. Indeed, as we have seen, the problem to which the 2014 Act was directed arose from the consequences of the long latency period. Had Parliament intended that the Scheme should be available where a claim was barred by the Limitation Act, it would have said so. Not only does the Act make no provision for that situation, but there was no mention of limitation in any of the pre-legislative materials.

54 Accordingly I reject the appellant's submission that being statute-barred by reason of the Limitation Act 1980 means he is not able to a bring a claim for the purpose of section 3(1)(c) of the Mesothelioma Act 2014.

55 In the light of my conclusion regarding the relevant date for the tribunal's consideration, there is no need to consider the appellant's fallback position which was concerned with the circumstances at the date of the Scheme's decision. But in any event it cannot succeed in the light of my construction of "any other reason". Moreover and as a matter of fact the

appellant was able to bring a claim even though he faced practical difficulties in doing so. Indeed, subsequent events have shown that he could do so and he could have done at the time. As I have said, the Scheme does not provide an alternative route to civil litigation.

56 For all these reasons, therefore, I dismiss the appeal.

Appeal dismissed.

JEANETTE BURN, Barrister

Supreme Court

*Regina (Monica) *v* Director of Public Prosecutions

2020 June 1 Lady Black, Lord Lloyd-Jones, Lord Sales JJSC

APPLICATION by the claimant for permission to appeal from the decision of the Divisional Court of the Queen's Bench Division [2018] EWHC 3508 (Admin); [2019] QB 1019; [2019] 2 WLR 722

Permission to appeal was refused.
