

## DOLMANS FOCUS ON

### MESOTHELIOMA “SCHEME OF LAST RESORT” LAUNCHED FOR NEWLY DIAGNOSED CASES

One of the perennial difficulties (for both Claimants and Defendants) in mesothelioma litigation is the situation where there are a number of employers during the course of the Claimant's employment history, some of which may have the lion's share of exposure, but have long since ceased trading and their insurers cannot be traced. Very often this leaves one employer as “last man standing” and following the statutory dis-application<sup>1</sup> of the case of *Barker v Corus*<sup>2</sup>, this Defendant is required to meet the entire cost of the claim.



Theoretically, this Defendant can then recoup those costs from other employers (or their insurers), albeit this is very much more often a hope than an actual result. The situation of untraced Defendants and/or their insurers causes, therefore, injustice to both parties, most obviously in situations where a mesothelioma victim is unable to identify a single extant former employer against whom a claim for damages can be made.

Arguably, this has led to claims against employers (who still exist) upon the basis of very minimal or tenuous exposure histories.

For a number of years, there have been calls for “a scheme of last resort”, akin to the Motor Insurers’ Bureau scheme in respect of untraced/uninsured drivers. This scheme was first mooted by Andrew Dismore MP (via a potential private member’s bill) and has been discussed on a number of occasions since that time. Following an announcement by the DWP in July 2012, this scheme has now been enacted and will receive £300 million in funding over the next 10 years<sup>3</sup>.

<sup>1</sup> Via the Compensation Act 2006.

<sup>2</sup> Which allowed for the apportionment of mesothelioma damages relative to the culpability of the Defendant(s) consistent with the case of *Holtby v Brigham and Cowan* which, perversely, still operates in the context of other types of divisible asbestos related disease.

<sup>3</sup> According to the DWP press release, the insurance industry already pays £200m annually in mesothelioma claims.

## DOLMANS FOCUS ON

### Operation of the Scheme

As hinted at above, the scheme is intended to operate as a scheme of last resort in relation to Claimants who are unable to claim compensation for their mesothelioma from another source. The scheme is to be funded via a levy to be applied to the employer's liability insurance industry as a whole and will be run jointly between the ABI and the DWP.

The scheme will operate in relation to all new diagnoses of mesothelioma from 25 July 2012 onwards. Diagnoses prior to that date will be outside the scheme and, therefore, presumably, subject to the existing situation of seeking to claim damages from extant employers and/or their insurers.

In respect of all such new diagnoses of mesothelioma, in the event that an extant former employer and/or their insurers cannot be traced, a Claimant will be entitled to make a claim for scheme compensation via the DWP.

### Motivation Behind the Scheme

The motivation behind the scheme is, obviously, to deal with the injustice of mesothelioma victims having no right of redress in circumstances where they cannot identify a successor to their former employer, a former trading employer or insurers of such an employer.

In conjunction with the ELTO insurance tracing scheme, it is felt that this scheme will ensure that mesothelioma victims will now be able to obtain appropriate compensation in all circumstances, whether via the scheme, or via the tracing of insurers via the ELTO database (which has recently been expanded).

### Effects of the Scheme

From the Defendant perspective, the primary potential beneficial effect of the scheme is the discouragement of tenuous claims in relation to very brief periods of employment or questionable histories of exposure. The problem of private sector employers becoming untraceable and/or ceasing trading, has been a significant problem for the public sector as a whole. The Writer has seen a number of cases, and is currently dealing with several more, where very brief histories of exposure within the public sector are being utilised to obtain damages largely because more culpable private sector employer/s is/are no longer available for a claim.



## DOLMANS FOCUS ON

Accordingly, the existence of this scheme might serve to reduce the numbers of such claims. What is not clear, however, is the extent to which the scheme will "run in tandem" with civil action damages, in the manner that the pneumoconiosis (Workers Compensation) Act (PWCA) scheme currently operates.

The PWCA scheme was intended, to some extent, to be a scheme of last resort and was designed to deal with situations where a culpable party could not be identified in relation to asbestos exposure. Very often, however, a PWCA claim is made at the very outset, before the situation has been clarified in terms of viable Defendants. PWCA compensation is then recoupable from the ultimate Defendant in due course.

What is not clear, therefore, is whether this scheme of last resort will give rise to similar issues of recoupment for Defendants subsequently identified in the context of the self same claim.

What the existence of this scheme might conceivably cause debate on, however, is the existing regime of the identifiable Defendant being "last man standing" in the context of a given claim. This situation has arisen because of the aforementioned statutory dis-application of Barker (which was on the basis that Claimants would be under compensated if Defendants were entitled to apportion damages according to their relative culpability). The existence of a scheme of last resort in this situation tends to undermine this argument, although, Parliament would need to interfere given the manner in which Barker was overruled. Given that scheme compensation is likely to be lower than common law damages (see below), this does seem unlikely.



The extent of compensation payable under the new scheme is equally unclear at present. Compensation payable under the PWCA scheme is fundamentally lower than common law damages and/or special damages. Accordingly, provided some kind of viable claim for common law damages can be made against an extant party, it seems to the Writer that the overwhelming likelihood is that Claimants will opt for that route, rather than the compensation scheme route.

A more interesting question, perhaps, is what will happen when a Claimant is faced with a situation of a number of culpable (but non traceable) employments and a single traceable, but arguably non-culpable employment. One could speculate that in this situation, the existence of a fund of last resort might actually discourage a claim against that Defendant/employer.

Accordingly, although the scheme has the potential to reduce the number of claims arising from low level exposure and/or short duration employment, whether in practice this has that effect is a matter of considerable speculation at present.

## DOLMANS FOCUS ON



### Conclusions

This scheme obviously represents justifiable good news for Claimants/victims. It will be perceived to level the playing field in terms of the so-called compensation lottery in the sense that Claimants will no longer be reliant upon whether their former employer is still trading in order to claim compensation. Arguably, this development, therefore, represents good news for certain Defendants, particularly those Defendants in the public sector and/or the quasi public sector (the former centralised power generation industry, for example) who are habitually named as Defendants often on the basis that other elements of the Claimant's history of employment cannot be taken forward in terms of relevant extant successors (the employers in question having ceased trading long ago).

However, whether the scheme actually represents good news for such Defendant organisations is a matter of some speculation. The extent of compensation under the scheme is likely to be lower than common law damages and will, therefore, provide a disincentive to Claimants to claim under the scheme unless, genuinely, they have no option. However, the existence of such an option is likely to be evidentially dependent as much as anything else (ie - the Defendants' ability to provide evidence as to culpable exposure becomes even more important).

Given the findings of the Higher Courts in relation to any possible de minimis threshold in relation to asbestos exposure giving rise to mesothelioma (notably the *Sienkiewicz* and *Willmore* cases), the extent of exposure required to obtain damages remains very low (consistent, in fairness, with the potential aetiology of the condition). Accordingly, again, whether this actually represents good news for Defendants is a matter of some speculation.

The other point to make is that any scheme reliant upon a levy upon the insurance industry will have to be paid for, to some extent, from current premiums.

**Peter Bennett**  
Partner  
Dolmans Solicitors

For further information regarding this article, please contact  
**Peter Bennett** at [peterb@dolmans.co.uk](mailto:peterb@dolmans.co.uk)  
or visit our website at [www.dolmans.co.uk](http://www.dolmans.co.uk)