



Neutral Citation Number: [2021] EWHC 1461 (QB)

Case No: QB-2019-003773

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/05/2021

Before:

HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THIS COURT

Between:

NORMA JACKMAN
(suing as widow and administratrix of the estate of
Bernard Jackman deceased)
- and -

Claimant

HAROLD FIRTH & SON LIMITED

Defendant

Peter Cowan (instructed by **Irwin Mitchell LLP**) for the **Claimant**
James Murphy (instructed by **Kennedys**) for the **Defendant**

Hearing date: 15 March 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THIS COURT

His Honour Judge Bird:

Introduction

1. Bernard Jackman died on 4 November 2016 of mesothelioma. He was 76 years old. This claim is brought by his widow, Norma Jackman on her own behalf and on behalf of his estate. The claim was issued on 24 October 2019 against Harold Firth & Son Limited. It is accepted that Mr Jackman was exposed to asbestos whilst working at ICI in Huddersfield. The defendant, whilst making no formal admissions, accepts if I find that at the time of the exposure Mr Jackman was its employee, breach and causation (and so liability) are likely to follow. The evidence on this central issue was relatively limited. I only heard oral evidence from the claimant. Mr Jackman died before seeking any advice and so there is no statement from him. Because the defendant ceased to trade many years ago, it has provided no disclosure. Neither side has sought any disclosure from ICI.

The evidence

2. I heard oral evidence from Mrs Jackman. Whilst there was no suggestion that she was anything other than a helpful and honest witness, Mr Murphy who appeared for the defendant, rightly pointed out that her recollection of events and conversations was to be treated with careful caution. I deal with this aspect in more detail below. She produced some handwritten notes which it was accepted were contemporaneous notes made between 1972 and 1983.
3. I read witness statements from Mr Alan Gautry and Mr Archie McGill. Each worked at ICI Huddersfield, Mr Gautry from 1969 to 1970 and Mr McGill from 1956 to 1981 and each is able to recollect general working conditions at the plant at those times. Each statement was prepared to support a claim brought by each for losses sustained as a result of negligent exposure to asbestos fibres. Regrettably each has since died. No point was taken about my considering that evidence and I was told that each man had consented to the use of his statement in these proceedings. Mr Jackman's medical records were produced as were documents from HMRC which deal with his work record.

The undisputed facts

4. HMRC records show that between 1961 and 1975 Mr Jackman worked for a number of employers. The records relate to tax years running from April to April, so that a reference to a date in the year 1968 might be a date between somewhere around 6 April 1968 to 5 April 1969. It is important to bear this in mind. He started to work for the defendant at some point between April 1968 and April 1969 and left at some point between April 1972 and April 1973.
5. Mrs Jackman's notes show that between April and October 1972 (other than a period of 7 days in September 1972) Mr Jackman was unwell and unable to work. Having left the defendant, he worked for John Radcliffe and Sons Limited, then for Armocrete Developments Limited (for a short spell between 2 April 1973 and 22 June 1973). Between 22 June 1973 and 5 November 1973, he was unemployed or unable to work. He started to work for B & S Blakely on 5 November 1973 and for F Dyson &

Sons Limited on 1 July 1974 to 2 August 1974. Mr Jackman's mental ill-health prevented him from working after that date.

6. The undisputed documentary evidence does not shed much light on the precise period over which Mr Jackman was able to work for the defendant. It does however show that from at least April 1969 to around April 1972 he was working for the defendant. The notes show (other than one week in September) he did not work between April 1972 and October 1972. It is not clear if in that September week he went back to work for the defendant, and it is not clear when he left the defendant save that by 2 April 1973 he had taken up and left another job (with John Radcliffe and Sons Limited).

The evidence of Mr McGill and Mr Gautry

7. The clear impression from each statement is that over a long period and at least covering the period from 1969 to 1972 labourers, ladders and maintenance engineers working at the ICI plant at Huddersfield were exposed to asbestos fibres. Some of the workers were subcontracted and not employees of ICI. Pipes at the factory carrying acid and hot water were insulated with asbestos. If a pipe leaked or a pipe needed maintenance, its asbestos insulation had to be removed and replaced. Asbestos had to be swept up and disposed of. Mr McGill recalls that asbestos could be seen outside on a breezy day being carried along on the wind and recalls that there was no "damping down" of any asbestos clumps or dust before it was swept up. Mr Gautry recalls that his boiler suit at the end of the day was "usually" covered in dust.

Mrs Jackman's oral and written evidence

8. Mrs Jackman prepared 2 witness statements. In the first statement she recalls that her husband worked for the defendant and was sent to work at ICI in Huddersfield and recalls that he did not like the work and talked about Eddie Firth (his boss at the defendant) "for ages afterwards". She goes on to recall that Mr Jackman was given a potential mesothelioma diagnosis on 16 May 2016. That fact is corroborated by the medical records. Her evidence was that when he was given that diagnosis, he told her that "he would have been exposed to asbestos when he worked at ICI [for the defendant] cleaning pipes out". She goes on to say: "when he told me this, I remembered that he had mentioned at the time, in the 1970's while he had been working at ICI [for the defendant] that he had been working cleaning out pipes. When he mentioned this to me again following his potential diagnosis, I recalled that he had described his work to me" and "after his diagnosis Bernard only mentioned being exposed to asbestos during his employment at ICI with [the defendant]". When cross examined about this part of her evidence Mrs Jackman told me that her husband "had mentioned over the years working at ICI. It was a filthy job – he said this quite often. He would chunter on about it."
9. In her second statement, prepared more than 3 years later, Mrs Jackman says "when my husband was employed [by the defendant] I knew he was going to work at the ICI premises because he told me that is where he had gone to work after his first day there. I knew he definitely did not like either the job or Eddie Firth himself". She went on to say that when Mr Jackman returned home from work "he said to me that he was working with asbestos. I understood that he was cleaning asbestos out of pipes. I

imagined him working inside a pipe. I do not remember if this is specifically what he said he was doing, working inside a pipe, or if this just what I pictured”

10. Mrs Jackman accepted that her husband bore a grudge and could be resentful. He would often talk to himself and complain. She told me that he would complain about politicians, particularly incumbent Prime Ministers and also about her. Eddie Firth, his boss at the defendant was a recurrent target for his criticism. Eddie Firth, she said, was “one of his things”. He would talk about the dirty job and the pipes. Mrs Jackman told me that she would never mention the name Firth (and avoided mention of a relative with the same surname) because her husband “would explode”. She told me he would “chunter on” often when in an attic room where he kept a large model railway. She told me that the attic was reached by a door from a landing which he would sometimes leave open. He often went to the attic at night. It was above their bedroom and she could hear him especially if the door was left open. She told me that neighbours could hear him.

The relevant medical evidence

11. On 16 May 2016 Mr Jackman saw Dr Naseer in clinic at the department of respiratory medicine at the Calderdale and Huddersfield NHS Trust Hospital in Halifax. In a letter written to Mr Jackman’s GP Dr Naseer notes under the heading “social history” that Mr Jackman “worked in construction industry and also worked with asbestos pipes in the 1970’s at ICI”. Mr Naseer was concerned that a CT scan showed a possible cancer of the lining of the lung. The letter records that Dr Naseer had explained that this could be mesothelioma as a result of asbestos exposure.

The fallibility of memory

12. I was referred to a number of authorities which highlight the danger of treating honest recollection of events that happened a long time ago as firm evidence.
13. In particular I was referred to the decision of Geoffrey Tattersall QC sitting as a Deputy Judge of the High Court in *Bannister v Freemans* [2020] EWHC 1256 QB. The facts of the case and its outcome are not of central relevance. However, at paragraphs 73 to 77, the Deputy Judge sets out a helpful and detailed summary of the relevant cases. I have considered those paragraphs carefully. From them I derive the following principles:
 - i) A strong recollection of events expressed in evidence with confidence is not a reliable guide to the accuracy of the recollection (see paragraphs 74 and 75)
 - ii) The fact that a witness has a considerable amount to gain if his or her recollection of events is accepted by the court as fact, means that the witness’ recollection is very likely to be biased towards that which supports the outcome he or she seeks (see paragraph 75)
 - iii) When a witness recalls events from the past, he or she is in fact unconsciously reconstructing those events. The description the witness provides of the relevant event or events is in fact a description of the reconstruction undertaken at that point (see paragraphs 73 to 77 but in particular paragraph 76).

- iv) Testing recollection against contemporaneous documentation is a very useful and important exercise (paragraph 77). Testing in this way at least gives the court an opportunity to compare a near contemporaneous version of events (subject to no or little reconstruction) with a re-constructed version of events.
14. In my judgment the principles which are germane to my approach to the findings of fact in this case are neatly summarised at paragraph 1.3 of the Appendix to PD 57AC which will come into force on 6 April 2021, but which has received wide publicity. Although the PD and its appendix apply to proceeding in the Business and Property Courts the following principles set out in the appendix are of universal application:
- “Witnesses of fact and those assisting them to provide a trial witness statement should understand that when assessing witness evidence, the approach of the court is that human memory:
- (1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but
- (2) is a fluid and malleable state of perception concerning an individual’s past experiences, and therefore
- (3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration.”
15. In approaching Mrs Jackman’s evidence, I bear all of these points in mind. I also bear in mind that I must not allow the tragedy inherent in every mesothelioma case and the natural “desire to assist in any proper way” to lead to a “lax” approach to fact finding (see Lord Rodger’s important reminder set out in *Sienkiewicz* - see paragraph 73 of *Bannister* - and reframed by Spencer J in *Sloper v Lloyds Bank* [2016] EWHC 483 (QB) - see paragraph 77 of *Bannister*).
16. Finally, I bear in mind that Mrs Jackman’s evidence must be looked at in context and as part of the entire evidential picture available to me. The overall picture requires me to take account of the fact that the defendant has presented no factual evidence of its own. However, the absence of direct evidence from the defendant does not mean that I must accept what Mrs Jackman says. The claimant must still prove her case.

My findings

17. The authorities on the fallibility of memory serve to underline the importance of contemporaneous written records. The best contemporaneous record I have is the letter written by Dr Naseer after his consultation on 16 May 2016. The record was not created at the key time between 1968 and 1972 when Mr Jackman worked for the defendant and so is not created at the time of key events, but it is a clear and reliable record of what Mr Jackman told Dr Naseer on 26 May 2016. There is no mention of the defendant but there is reference to working on pipes at ICI in the 1970s.
18. Mrs Jackman’s evidence falls chronologically into 3 parts. First, she deals with her recollection of events post 2016 and the conversations she had with her husband up to

his death on 4 November 2016. Secondly, she deals with her recollection of conversations from 1968 to 1973 and thirdly she deals with her general recollection of matters after 1973.

19. Dealing with the first part, she recalls that immediately after the diagnosis (in May 2016, about 14 months before the witness was prepared) he said that he had been working for the defendant at the relevant time. In other words, if Mrs Jackman's recollection is correct, Mr Jackman himself recalled who had employed him when he was exposed to asbestos. She also recalled that in the 6 months between diagnosis in May 2016 and his death on 4 November 2016 Mr Jackman spoke about being exposed to asbestos whilst working for the defendant at ICI.
20. It seems that her recollection of events about the second part was triggered by what Mr Jackman said after his diagnosis. This part of her evidence needs to be viewed with particular caution for the reasons cited in the authorities.
21. The third part of her evidence, dealing with his general "chuntering" and general complaints about the defendant centred on his complaints about the nature of the job he did for the defendant and how dirty and unpleasant it was. I was struck that Mrs Jackman recalled in evidence that her husband would "explode" if the name "Firth" was mentioned and that she went out of her way not to mention a relative by marriage who had the same surname.
22. I found Mrs Jackman to be a careful honest and impressive witness. I noted that she had corrected her second witness statement with care in pen before signing it. This is the hallmark of a careful witness and I have concluded that she conducted herself as such. Dealing with the different parts of her evidence identified above I think it is right to regard the second part of her evidence (dealing with conversations between 1968 and 1973) with a degree of caution. I found the first part of her evidence (dealing with discussions between May and November 2016) to be more reliable. In my view this part is corroborated by the medical evidence. There is of course a risk that Mr Jackman himself had not accurately remembered who his employer was at the relevant time. However, I am persuaded by the evidence that that risk is so small that it can be ignored.

Liability

23. I have come to the clear view that on the balance of probabilities, Mr Jackman was exposed to asbestos fibres whilst working at ICI for the defendant. I am satisfied that he was not cleaning asbestos from inside pipes but rather dealing with the lagging of pipes and the removal of lagging. I find that in the circumstances the defendant was in breach of the duty owed to Mr Jackman and that that breach caused Mr Jackman to suffer personal injury. It follows that judgment will be entered for the claimant.

Quantum

24. I now turn to deal with quantum. There are 3 issues that remain outstanding: the award in respect of pain, suffering and loss of amenity, the award for care and the award (if any) in respect of the loss of the services of a husband.

25. In respect of the first issue the claimant contends that the proper sum to award is £85,000. The defendant submits that £70,000 is appropriate. Taking account of the severity of the claimant's symptoms, the range of treatments endured and duration I have come to the view that an award of £75,000 would be appropriate. The claimant's symptoms were manifest and relatively obvious for around 7 months (from April 2016 to November 2016). His decline was particularly steep in the last 6 weeks of his life with the last week being a very difficult time. There was no invasive treatment, but I accept that Mr Jackman was likely to have downplayed his symptoms and certainly suffered from faecal incontinence, collapses and pressure sores. The range of award is between £59,730 and £107,410. I am satisfied that an award of £75,000 represents an appropriate award which adequately compensates the estate but does not overcompensate.
26. As to the loss of the services of a husband I accept Mr Cowan's argument that this head of loss is recoverable (in light of, as he puts it, the "overwhelming" trend of the case-law against *Mosson v Spousal* [2015] EWHC 53 (QB)) to compensate the claimant for losses that are not caught elsewhere. The claimant helped around the house but not to a great extent. Awards under this head are generally low and the defendant did not strenuously argue that if I decided that any sum could be awarded, the sum of £2,000 was inappropriate. I award £2,000.
27. As to the sum to be awarded in respect of care and assistance I accept Mrs Jackman's frank evidence that between April 2016 when symptoms first became obvious and July 2016 some 2 hours per day were devoted to his care. From July 2016 Mrs Jackman did not leave her husband. Until 1 November 2016 he was able to get to the loft to his model trains. After that date he could no longer reach the loft. It is clear that the levels of care increased until his death in November 2016 and from the end of October he stayed in bed and was unable to come downstairs. Mr Cowan has pointed out that with inflation an average award of care in a mesothelioma case might be in the region of £18,750. The root of the calculation stems from *Rothwell v Chemical & Insulating Limited* [2006] EWCA Civ 27 where an award of £12,500 for care was described as "in line with the amounts awarded in such cases". I am satisfied that an award of £13,000 would be appropriate in this case for this heading of loss. That sum takes account of the limited care between April and July and takes account of the increase of time needed thereafter and the increase in care in the latter weeks and days of Mr Jackman's life.
28. The remaining sums were agreed between the parties. Interest needs to be calculated. I will leave that to the parties. If the terms of an order can be agreed I will be content to hand down judgment in the absence of representatives.
29. I am grateful to both counsel for their assistance.