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Case No: QB-2021-004430

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 November 2022

Before:

HIS HONOUR JUDGE FREEDMAN
(Sitting as a Judge of the High Court)

Between:

**JENNIFER CUTHBERT (Executrix of the Estate of
DEREK BARRY CUTHBERT, deceased)**

Claimant

- and -

**TAYLOR WOODROW CONSTRUCTION
HOLDINGS**

Defendant

Max Archer (instructed by **Boyes Turner LLP**) for the **Claimant**
Catherine Foster (instructed by **Clyde & Co Claims LLP**) for the **Defendant**

Hearing dates: 31 October and 1 November 2022

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on Wednesday 30 November 2022.

His Honor Judge Freedman:

Introduction

1. This is a claim for damages arising out of the death Mr Derek Cuthbert (“the deceased”) from mesothelioma on 5 April 2022. The claim is brought by the deceased’s widow as executrix of his estate pursuant to the Law Reform (Miscellaneous Provisions) Act 1934 and as his dependent under the Fatal Accidents Act 1976.
2. The claimant’s case is that the deceased was exposed to asbestos dust and fibres whilst employed by the defendant between in or about 1956 and in or about 1959, engaged in construction work at Queenswood School in Cheshunt, Hertfordshire (“the school”). It is alleged that this occupational exposure to asbestos dust caused the deceased to contract mesothelioma.
3. The claim is brought both in common law negligence and under the Building (Safety, Health and Welfare) Regulations 1948. It is agreed that the latter do not impose any different or higher standard of care than that imposed at common law. Accordingly, in terms of a cause of action, this claim need only be considered in the context of common law negligence.
4. The defendant is unable to admit the deceased’s employment or the capacity in which he may have been employed: the HMRC schedule does not cover his employment before 1960 and the defendant company was dissolved on 27 May 2009. In such circumstances and whilst, inevitably, no positive case is advanced, the claimant is put to strict proof, both as to the alleged exposure to asbestos dust and as to the allegations of breach of duty.
5. No issue is taken with the diagnosis of mesothelioma. The medical reports of Dr Twort are not challenged. Quantum remains in issue, but it was agreed by Counsel that breach of duty should be determined first and then, as necessary, an assessment of quantum would follow.
6. Whilst the claimant was called to give evidence to confirm her witness statement, the only live evidence of substance received by the court was from the Occupational Hygienists, Ms Tina Conroy, instructed on behalf of the claimant, and Dr Philips, instructed on behalf of the defendant. Of critical importance were the two witness statements provided by the deceased, dated respectively 10 May and 21 July 2021, admitted under the Civil Evidence Act.
7. The principal sources of exposure to asbestos dust were said to arise from carpenters cutting Asbestolux boards whilst the deceased was supervising them and when the deceased swept up dust and debris from the cutting up of the boards.
8. There is no suggestion that the deceased was provided with overalls or protective equipment. Nor, equally, is there any suggestion that any measures were taken to reduce the levels of exposure to asbestos dust.

Issues

9. Assuming that I find (as I do) that the deceased was employed by the defendant during the late 1950s at the school, the central issues may be summarised as follows:
 - (i) The extent, degree and frequency of the deceased's exposure to asbestos dust;
 - (ii) Whether any such exposure amounted to a breach of duty, having regard to what was known or ought to have been known by the defendant as to the risks of injury consequent upon exposure to asbestos dust.

The deceased's evidence

10. The deceased was born on 14 December 1938. Between 1952 and 1953, he was employed at a coffin factory doing sawing and cutting work. Thereafter, between 1953 and 1955, he worked in a wood factory. According to his statement, he then worked in a bread factory engaged in painting and decorating. In none of those employments was there any exposure to asbestos dust.
11. Before turning to his employment with this defendant, it is to be noted that the deceased spent the majority of his working life in the construction trade. Up until 2000, he was employed by various contractors. Thereafter, he ran his own business. The only other employments where he describes exposure to asbestos was when he worked for Davey Estates Limited between in or about 1962 and 1964 and Tillott Shopfitter Limited between in or about 1964 and 1966. Specifically, he recalled the cutting up of asbestos sheets.
12. As to his employment with this defendant, the deceased gave the following account in his first statement:

“... I was not doing a proper apprenticeship, but I was learning the trade of building. In fact, my job was really ‘Trainee Supervisor’. This is the job where I recall coming into contact with asbestos on a daily basis. I worked on a job at Queenswood School in Cheshunt which was a brand new construction. I worked on this job for the entirety of my employment at Taylor Woodrow which was for two or three years. I was helping with the construction of the buildings and I was looking after all of the trades. I can recall carpenters cutting up Asbestolux, asbestos sheets that measured 8ft x 4ft. They were white in colour. They were smooth on one side and had a ripple effect on the other. The carpenters were using them for soffits which they were putting in just below the roofs. I talked to them every day as they were cutting up the asbestos and effectively supervised them. I saw them every day and it was a regular occurrence to see them. I was often just a few feet away and they cut up inside or outside depending on the weather. They always cut up on the ground floor. I cannot recall whether they used power saws, but they did use electric drills. I am sure that they were using handsaws for some of the time and they may well have used electric saws too as I think it was a combination. ... They were

cutting them into strips that measured 2.4m x 300mm. The cutting of the asbestos was dusty work and I of course got covered in dust as I was walking about the site and as I was chatting to them. It was my job to sweep up as well which I did throughout the day several times, as and when needed. I simply used a broom to sweep up any asbestos and other debris. I do not think we had a skip in those days. I think I simply bagged it up or put it in a large bin. ...”

13. As indicated above, the deceased made a second statement approximately two and a half months later. It is not clear as to the circumstances in which he came to make the second statement or how it was that he was apparently able to provide further detail, in particular in relation to the extent and duration of exposure to asbestos dust. At all events, his second statement contains the following account:

“I was based at Queenswood School for the entire period of employment. As I said in my previous statement, the carpenters were cutting Asbestolux sheets. These were used on the outside of the buildings for soffits, but also in other areas. Some were used below on the ground floor for lining canopies or ‘lean-tos’. I recollect that the Asbestolux was cut inside and outside the building every day. There were a lot of soffits that needed to be cut and also a lot of flat areas that needed to be lined. It was a huge building with many canopies and ‘lean-tos’. Sometimes, the 8 x 4 sheets did not need to be cut and were fixed as is. There were about four carpenters onsite and one or two carpenters were cutting the Asbestolux daily. I visited them every day and spent about 1-2 hours each day directly supervising them. I would be in their vicinity, talking to them, answering any questions they may have. I then also cleaned up after them. Their area was a mess when I visited them. It would need cleaning up and I simply used a broom and swept up any asbestos dust and debris and put it into a bin. I also handled any asbestos offcuts and put that in the bin as well. I simply answered any questions that they had. I did not usually cut the Asbestolux myself unless they asked me a specific question and I had to show them how to do it. ...

When the Asbestolux was cut, there were clouds of dust ... I remember being dusty at the end of the day and I needed to pat down my clothes to get the dust off. I went home dusty on a pushbike.

The carpenters used to cut the Asbestolux in the basement and then they took it up to the scaffold or wherever they had to go.”

Type of asbestos material

14. Assuming that it is accepted that the carpenters cut up asbestos material, a discrete issue has arisen as to whether the carpenters were sawing Asbestolux (asbestos insulation boards, “AIBs”) or whether, more likely, the product was asbestos cement. The potential importance of this issue is that, whilst hand sawing of AIBs is thought to generate between 5-10 fibres/ml, the sawing of asbestos cement sheets would be likely to generate concentrations below 1 fibre/ml.

15. Both products were in use at the material time. Asbestos cement sheets are described as being grey and hard, of brittle material normally containing between 5 and 15 per cent asbestos fibre. Compared to AIBs, they are denser and more rigid. Dr Philips says that asbestos cement products can generally be identified by their appearance because one side shows dimples formed by the pressure of the cylinders on the wet uncured cement sheet. Within the body of his report, he has provided an image of asbestos cement material.
16. Asbestolux was a type of insulating board manufactured in the UK by Cape Asbestos from around 1953. The material specification sheet for Asbestolux boards describes both a *slightly textured* and *sanded* finish. Dr Philips refers to an advertising brochure which purports to show a smooth surface on each side of the board.
17. Dr Philips placed particular emphasis on the deceased's description of the asbestos material as having a *ripple effect*. He formed the view that that description was more consistent with asbestos cement sheets rather than AIBs. However, he conceded that the deceased's reference to Asbestolux could be correct. Ms Conroy was equivocal: it was her view that the materials being worked upon by the carpenters could have been either asbestos cement sheets or Asbestolux.
18. Mr Archer encourages me to the view that, on the balance of probabilities, the deceased's description of the asbestos materials was indeed correct. He points out that it is notable that the deceased specifically mentions the brand name, Asbestolux, as opposed to simply referring to the material as AIBs. He also points out that the AIBs were whitish in colour whilst the cement sheets were grey, this again being more consistent with the deceased's account. A further point is relied upon by Mr Archer: HSE asbestos notification sheets submitted in or about 2015 identify Asbestolux as being contained within the school building. He submits that this tips the balance in favour of Asbestolux being installed at the material time.
19. As to the latter point, Miss Foster submits that, on closer analysis, the notification sheets do not demonstrate the use of Asbestolux at any of the locations specified by the deceased in his witness statements. Moreover, she submits that it is just as likely that the AIBs were installed at a later time for reasons of fire protection. Miss Foster also relies upon the deceased's description of the *rippled effect* as pointing towards the material being asbestos cement sheets. Additionally, she points out that asbestos cement sheets were more weather resistant and, therefore, more likely to be used for external fittings such as soffits. It is also the case that, at least at this time, AIBs were a little more expensive than concrete sheets and this may have made it more likely that the latter were being used.
20. I am bound to say that I find it difficult to come to a conclusion on this aspect of the case, even on the balance of probabilities. It seems to me that the issue is very finely balanced, having regard to the competing arguments.
21. In such circumstances, it would be tempting to say that the claimant has not discharged the burden of proof. However, I am unpersuaded that that is a fair way to proceed. It seems to me that, in relation to this particular aspect of the case, the fair approach is to give the claimant the benefit of the doubt. But, in the end, and given my findings on the frequency and duration of exposure, it is of marginal importance. I should stress that

just because I am willing to accept the deceased's evidence about the type of asbestos material, it by no means follows that the totality of his evidence falls to be accepted.

Claimant's factual analysis

22. Mr Archer urges me to accept the deceased's two statements at face value. In essence, he says that there is no reason for the court to depart from anything which the deceased has put in his witness statements. He relies, not unnaturally, on the fact that there is no direct evidence to controvert what the deceased says. Moreover, he points out that the defendant could have posed Part 18 requests for further information but chose not to do so. Equally, there was no application for evidence to be given on Commission.
23. Accordingly, it is submitted that the deceased's exposure to asbestos dust should be assessed by reference to what appears in his witness statements, without qualification or reservation.

Defendant's factual analysis

24. Miss Foster, whilst of course accepting that there is no available evidence directly to contradict what the deceased says, argues that the court should proceed with the utmost caution when considering the accounts provided by the deceased. In this regard, she points out that, when first asked by a doctor as to whether he had been exposed to asbestos at the time when he was being investigated for his lung disease, he replied in the negative. This inconsistency is explained by the fact that, at the time, he was focusing only on whether he himself had worked with asbestos products. Subsequently, he recalled, as appears from his statements, that he was in the vicinity of others who were cutting up asbestos materials. Nevertheless, Miss Foster says that this is a material inconsistency.
25. Moreover, when applying for Industrial Injuries Disabled Benefit, under the employment history section, it was stated that the deceased worked for the defendant between 1960 and 1963. The claimant confirmed that this information was not written down by the deceased himself, but he has signed the form.
26. Miss Foster points out that this error is illustrative of the fallibility of memory. The deceased was being asked to provide information about his working history going back some 65 years. She also makes the valid point that, at the time when he made his two witness statements, he was symptomatically unwell and, doubtless, traumatised as a result of being informed of the very gloomy prognosis.
27. Miss Foster also points to the fact that the deceased spent much of his working life in the construction industry; and that there was, therefore, scope for confusion as to what precisely he did in which job. Further, she notes the apparent error when the deceased makes reference to working with Supalux when employed by Tillott Signs in the 1960s. Dr Philips provides evidence that Supalux did not become available until the 1970s.
28. Coupled with these matters, Miss Foster says that, on close analysis of his two statements, there are components of it which are hard to accept. For example, she queries how he could have been given the title of the job title of "trainee supervisor" given that he was only 17 years of age at the time, with very limited experience. Additionally, Miss Foster queries how it could be that the deceased was "supervising"

carpenters who themselves, presumably, had served their apprenticeship. A point is also made by Miss Foster as to the construction works being undertaken at the material time. It seems that the school itself was built in 1925 or thereabouts. It may well be, therefore, that the deceased was engaged in building new wings for the school (Miss Foster's search of the internet would suggest that a science block and library were added on to the existing building at about the time of the deceased's employment with the defendant). But, if the latter be right, she calls into question how the deceased could have been engaged on this project for such a long period of time.

29. Miss Foster invites the court to proceed with particular care in relation to the second statement. She says that this second statement amounts to an over-focusing on his employment with the defendant and, in particular, on his contact with asbestos dust and fibres. She points out that only in this second statement does he attempt to quantify the period of his exposure, but no information is given as to how he arrived at an estimate of one/two hours. There is, in addition, an inconsistency between the first and second statement insofar as, in the first statement, the deceased said that the cutting always happened on the ground floor whereas, in the second statement, it is said to have taken place in the basement, when not done outside.
30. Generally, Miss Foster submits that the court should be very slow to accept, at face value, what the deceased says, in particular, about his exposure to asbestos dust and fibres. Specifically, she says that the assertion that he was exposed to asbestos dust for one/two hours every day as a result of being in close proximity to the carpenters is inherently implausible. In short, absent specificity and a detailed description of what the deceased was doing, she submits that the court cannot proceed on the premise that the deceased's account of his asbestos exposure is accurate.

My analysis of factual evidence

31. The court is undoubtedly required to look critically at the deceased's two statements and to consider, from an objective standpoint, whether what he said accords with common sense and, generally, whether his description of working practices is plausible. I should make it clear, at the outset, that I consider that there is substantial force in the submissions made by Miss Foster. The starting point must be that the deceased was being asked to recall matters which occurred more than 60 years ago, in the context of a working life in the construction industry. Furthermore, at the time when he was trying to remember his working conditions when employed by the defendant, he was acutely unwell and in a state of shock. There is also evidence that his memory had failed him, to some extent, although that is hardly surprising, given the circumstances, and the time which has elapsed.
32. I agree with Miss Foster that it is highly debatable whether the deceased was employed in a supervisory capacity, even as a "trainee supervisor". It seems to me to be much more likely that, given his age and singular lack of experience, his true job description was that of "general labourer".
33. In any event, I query how it could be that the deceased was supervising the carpenters. As Miss Foster rightly observes, it is likely that they will have served their apprenticeships. There is no indication that the deceased himself had had any experience of carpentry. Accordingly, it is difficult, if not impossible, to see how he

was in a position to supervise the carpenters, far less to tell them how to resolve any particular problem.

34. Further, I struggle to see how it was that the deceased spent between one/two hours standing around the carpenters. Given the lack of any information from the deceased himself as to what he was doing during that time, in my judgment, it is improbable that the description in his witness statement is accurate. I also think that there is force in Miss Foster's submission that it is, at the very least, surprising that in his second witness statement he is able to give an estimate of how much time he spent with the carpenters, whilst his first statement is silent about this. In this regard, I also note what was recorded on the application form for IDB, "I came into contact with asbestos while working in the building industry. On occasions, I recall working alongside carpenters cutting up asbestos sheets which were used for soffits." (My emphasis). It is of note that the deceased does not there say that he had daily contact with the carpenters or that he spent significant periods of time in close proximity, when they were cutting up asbestos sheets.
35. I also have difficulty in accepting that, over a period of two years or more, on every day, the carpenters were cutting up asbestos materials for use in soffits. It seems to me that this defies common sense, even in the context of new buildings being built. There must have been a limit to the number of asbestos materials which were being incorporated into the building or buildings. Whilst I accept that the carpenters may have spent some of their working time engaged in this activity, I do not accept that it was a daily occurrence or that this activity was continued over a period of two or three years.
36. It seems to me that, looking at the matter objectively and applying common sense, the overwhelming probability is that the deceased had no more than sporadic contact with the carpenters - perhaps, he did see them every day or most days, but I do not find that he spent anything close to one/two hours standing around them whilst they carried on with their tasks. I have already made it clear that I do not accept, in any event, that the carpenters were engaged each and every day cutting up asbestos materials. It is also questionable whether this work was being carried out over a two/three year period. Overall, it seems to me much more likely that the deceased had irregular and intermittent contact with the carpenters and that, at times, they were engaged in cutting up asbestos materials when he was in their vicinity. Moreover, on the deceased's own account, depending upon the weather, the cutting of asbestos boards took place outside.
37. As to sweeping up, I am willing to accept that this was a task which the deceased undertook from time to time and, maybe, on occasions, a number of times per day. What I am unable to accept is that he was the person who always swept up after the carpenters, once they had cut up the asbestos materials. Experience would suggest that they probably did some of their own sweeping. Furthermore, whatever his job description, it is difficult to understand how or why he would have been allocated the specific task of sweeping up once the carpenters had cut up the asbestos materials. Further and in any event, the sweeping up undertaken by the deceased will have involved not only asbestos dust but other types of dust.
38. The deceased himself does not give any information as to over what period of time, on each working day, he spent sweeping up dust. Even if I were to conclude that he did do sweeping up on a fairly regular basis, it seems to me probable that this would have

only occupied a very small portion of his working day. Indeed, I would not disagree with the suggestion made by Miss Foster that, perhaps, he spent in the order of ten minutes per day sweeping up.

39. I do bear in mind that, in his second statement (although not in his first statement), the deceased says that there were clouds of dust when the Asbestolux was cut up. This is perhaps not surprising, but it does not follow that the deceased was thereby covered in such dust. Indeed, if there were visible clouds of dust, then I would have expected the deceased to keep his distance. There was no good reason for him to be standing so close to the carpenters that he became covered in dust. Insofar as he says that his clothes were covered in dust, again this may well have been the case, but building sites are dusty environments and it does not follow that the dust which he brushed off his clothes was asbestos.
40. Overall, I find the account given by the deceased, particularly in his second statement, to be implausible. Rather, I am driven to the conclusion that his exposure to asbestos when employed by the defendant was of a low order, light and intermittent and, in the main, as a bystander.

Expert evidence in relation to asbestos exposure

41. Both Ms Conroy and Dr Philips acknowledged that there is a degree of artificiality in seeking, retrospectively, to measure the levels of asbestos dust to which the deceased was exposed. Essentially, there is a large element of speculation. Nevertheless, in their respective reports, both experts attempted to produce some figures, but, of course, subject to a number of variables. On the face of it, it seemed that there was a significant difference as between the two experts in their attempts to quantify exposure.
42. However, after a very careful and skilful cross-examination by Miss Foster, it became clear that, in fact, there was very little between Ms Conroy and Dr Philips. Specifically, Ms Conroy accepted that her figures had to be adjusted to reflect the time weighted average over a working day and the fact that the majority of the deceased's exposure occurred when he was not himself handling asbestos products.
43. Assuming that the deceased was indirectly exposed to asbestos dust for one and a half hours per day as a result of the carpenters cutting up AIBs (and I have already found this to be inherently improbable) and, assuming that he spent approximately ten minutes per day sweeping up asbestos dust, Ms Conroy agreed with Dr Philips that his average daily exposure was in the order of two fibres/ml. I stress that this is no more than an approximation and, inevitably, there would be considerable variability from day to day. Nevertheless, this measurement does provide some insight into his likely overall level of exposure to asbestos dust.
44. It needs to be seen in the context that, whilst, at the time of his employment, there were no threshold limits in place, as at 1960, the threshold limit equated to 30 fibres/ml (see "Toxic Substances in Factory Atmospheres" published by HMSO in March 1960). It can be seen, therefore, on any view of the evidence, that the deceased's exposure was very substantially below the limits set by the 1960 publication, both in the short term and over the daily average levels which have to be calculated to make meaningful comparison with the 1960 limits.

45. This aspect of the case requires further consideration when I come to review the literature and the various authorities. For the present, however, I am able safely to conclude that the measurements agreed upon by the two occupational hygienists are entirely consistent with my own *impressionistic* assessment of the degree and extent of the deceased's exposure to asbestos dust when working for the defendant.

Review of the literature

46. A brief review of the literature in relation to the harmful effects of exposure to asbestos dust is required because, when deciding whether pulmonary damage in this case was foreseeable, the test is the conduct of the reasonable and prudent employer taking positive thought for the safety of its workers in the light of what it knows or ought to know (actual or constructive knowledge): see *Stokes v Guest, Keen and Nettlefold* [1968] 1 WLR 1776 and *Thompson v Smiths Shiprepairers* [1984] QB 405. Both experts have helpfully appended to their reports a synopsis of the literature with detailed references.
47. The literature on this subject has also, of course, been reviewed in many reported cases. In this instance, I make no apology for adopting, to some extent, the most helpful review undertaken by Swift J in the case of *Abraham v G Ireson & Sons (Properties) Limited* [2009] EWHC 1958 (QB). Even in the nineteenth century, there was some recognition of the potential harmful effects of asbestos. However, it was not until the publication in 1930 by the Home Office of a Report into "the effects of asbestos dust on the lungs and dust suppression in the asbestos industry", written by two Inspectors of Factories, Merewether and Price, was there a proper understanding of the dangers associated with the inhalation of asbestos dust. It has been recognised in the many and various authorities, and elsewhere, that this report constituted a significant landmark as to the knowledge which should be imputed to employers about the toxic effects of asbestos.
48. The Report contained no information about what might be considered to be a "safe" level of asbestos exposure. Rather, the clear message was that asbestos was harmful and the only proper precaution was to suppress it. Importantly, in the Summary and Recommendations, it was stated:

"The appropriate method for suppression of dust may only be fully determined when the harmful effects of comparatively low concentrations of asbestos dust are fully appreciated."

49. In a letter submitting the Report to the Secretary of State, the Chief Inspector of Factories said that the medical investigations had:

"... established the facts that the inhalation of asbestos dust over a period of years results in the development of a serious type of fibrosis of the lungs, that the development of the disease varies in direct proportion to the length of the exposure to the dust and that susceptibility to the disease is not affected either by age or sex."

In other words, it was established that there was a clear link between longstanding, heavy exposure to asbestos dust and the onset of asbestosis, making it clear that the disease was dose related.

50. As a direct consequence of this report, the Asbestos Industry Regulations 1931 came into being and were brought into effect in 1933. The 1931 regulations imposed strict obligations on occupiers of factories and workshops in which certain defined processes involving the handling of asbestos were carried out. The regulations provided an exemption in circumstances where a process was carried on occasionally only and where no person was employed upon it for more than eight hours in any week.
51. The next piece of legislation relating to the suppression of dust was s.47 of the Factories Act 1937. Employers were obliged to protect employees against dust which was likely to be harmful. In the Chief Inspector of Factories' Annual Report in 1938, it was observed that:
- “One of the greatest problems facing industry today is that of dust. ... We are but on the threshold of knowledge of the effects on the lung of the dust generally. ... There can be no doubt that dust if inhaled is physiologically undesirable. Moreover, dust that is thought today to be harmless may, following research, be viewed in another light tomorrow. It was not many years ago when the dust of asbestos was regarded as innocuous, while today it is recognised as highly dangerous.”
52. The 1943 annual report of the Chief Inspector of Factories referred to fatalities as a result of asbestosis. A year after the publication of that report, the Chief Inspector of Factories wrote a letter to the shipbuilding and ship repairing industries concerning the risks of exposure to substantial concentrations of dust from asbestos insulation work. Similar advice was given to the operators of power stations in 1949 and 1954. The terms of the letter of 1945 are important because they demonstrated that the Inspector of Factories was concerned about the exposure of workers other than those involved in the asbestos industry. Additionally, employers were being urged to avoid even short term exposure, bearing in mind the risk of a cumulative effect over a working life.
53. These themes continued in the 1949 Annual Report of the Chief Inspector of Factories published in 1951. In particular:
- “Those firms which have had long experience with the product and realise how the incidence of asbestosis arises are fully alive to the many problems involved and, from the inspection point of view, it is very necessary to keep an ever watchful eye for the new use of asbestos in some manufacturing or other process, for example, on ships or buildings where the work may be undertaken by someone not fully realising the necessity of preventing as far as possible the inhalation of asbestos fibre and dust.”
54. Up until 1955, the concern had been in relation to the risk of asbestosis consequent upon exposure to asbestos. However, a paper published by Professor Doll in that year confirmed a link between lung cancer and a lengthy period of heavy exposure to asbestos dust. This is an illustration of the evolving knowledge as to the harmful effects of asbestos exposure.

55. I have already referred to the publication of a booklet entitled “Toxic Substances in Factory Atmospheres” published by the Ministry of Labour in 1960. In the section on “maximum permissible concentrations”, it stated:
- “While systems of control should be as effective as it is practicable to make them, it is desirable to have some guide to which the efficiency of the control measures can be related. ... There are set out figures of maximum permissible concentrations of certain substances used in industry. For each substance, a figure of concentration in atmosphere is given. If this concentration is exceeded, further action is necessary to achieve satisfactory working conditions. ... The concentrations given ... relate to an average concentration for a normal working day. They are based on the last available information at the present time, and are subject to annual review in the light of existing scientific knowledge.”
56. I have already observed that the maximum permissible concentration identified in the 1960 publication was equivalent to 30 fibres/ml. The booklet was re-issued in 1966 and the maximum permissible concentration remained the same. However, with the introduction of the 1969 Asbestos Regulations, a reduced control limit was specified. Subsequently, there have been very significant reductions in permissible levels of exposure.
57. I have already alluded to the research which demonstrated a link between heavy exposure to asbestos and lung cancer. In 1960, a paper by Wagner and others, “Diffuse Pleural Mesothelioma and Asbestos Exposure in North West Cape Province” was published in the British Journal of Industrial Medicine. This paper identified a potential link between exposure to asbestos dust and the development of pleural mesothelioma. By 1964, there was growing research to suggest that mesothelioma could be caused by only one “slight” exposure to asbestos dust.
58. In 1965, the dangers of mesothelioma were highlighted as a result of two papers published simultaneously in the USA and the UK by Newhouse and Thompson. The Newhouse paper which was published in the British Journal of Industrial Medicine not only recognised the link between asbestos exposure and mesothelioma. It also reported on the occurrence of mesothelioma in persons with no occupational exposure to asbestos, such as those who had lived within a short distance of an asbestos factory.
59. Although my chronological review of the literature has gone beyond the date when the deceased’s employment with the defendant ceased, I have done so so as to highlight the fact that it was not until the mid-1960s that it was appreciated that even light exposure to asbestos dust could cause mesothelioma. However, it is to be emphasised that there is no requirement in this case for the claimant to establish that mesothelioma was a foreseeable consequence of the deceased’s asbestos exposure. It is, of course, sufficient if the defendant should have foreseen some pulmonary injury: see, for example, *Page v Smith* [1996] 1 AC 190.

The claimant’s case on knowledge

60. Understandably, Mr Archer’s written skeleton argument and his oral submissions at the conclusion of the trial were predicated on the assumption that the court would find that the deceased was exposed to significant quantities of asbestos dust on a daily basis. If

that had been my finding, then certainly the literature and the authorities would support the proposition that, as at the late 1950s, employers in the construction industry should have been on notice of the risk of foreseeable asbestos related injury (see, for example, *Shell Tankers (UK) Limited v Jeromson* [2001] EWCA Civ 101).

61. Inevitably, however, different considerations arise given my finding that the level of asbestos to which the deceased was exposed was of a low order and only intermittent. Mr Archer submits that even exposure at a low level should have triggered the taking of some precautions by the defendant on the basis that it was known from as long ago as 1930 that asbestos dust was harmful and precautions needed to be taken to suppress it. Further, Mr Archer relies upon the proposition that, even where the exposure was only at a minimal level, since it was not known what level was sufficient to create a danger, the only correct response to exposure to any appreciable quantity of asbestos dust was to reduce it as far as practicable: see, for example, *Hawkes v Warmex Limited* [2018] EWHC 205. That case involved the manufacture of electric blankets between 1946 and 1952.
62. To make good his submission that even low level exposure to asbestos dust gave rise to the foreseeable risk of injury in the late 1950s, Mr Archer places heavy reliance on the *Jeromson* case. This was a claim brought by two marine engineers based on exposure to asbestos dust in 1957-1961 and 1951-1957. The claimants were stripping out asbestos lagging in short bursts of activity. The claimants succeeded at first instance and the appeal was dismissed. The judgment of Hale LJ (as she then was) is both helpful and illuminating. Mr Archer invites my attention, in particular, to [51]-[52]:

“51 Having reviewed the literature, the judge referred to the different conclusions reached at first instance, by Waterhouse J in *Gunn v Wallsend Slipway & Engineering Company Ltd*, 7 November 1988, and by Buxton J, as he then was, in *Owen v IMI Yorkshire Copper Tube*, 15 June 1995. He could not agree with Waterhouse J ‘that the literature justifies the conclusion until 1960, that asbestosis was attributable only to heavy and prolonged exposure’. He preferred the formulation of Buxton J that from the beginning of Mr Owen's employment in 1951, ‘the difficulties related to and the threats posed by asbestos were sufficiently well-known, and sufficiently uncertain in their extent and effect, for employers to be under a duty to reduce exposure to the greatest extent possible.’ He did so ‘in the context of the absence of any means of knowledge of what constituted a safe level of exposure’. He accepted Mr Allan's submission that ‘a reasonable employer, being necessarily ignorant of any future potential asbestos exposure, cannot safely assume that there will never be sufficient cumulative exposure’. In an uncertain state of knowledge, the risk could not (in the words of Lord Upjohn in *Czarnikow Ltd v Koufos* [1969] 1 AC 350, at p 422C) be ‘brushed aside as farfetched’.

52 The point which impressed the judge was the certain knowledge that asbestos dust was dangerous and the absence of any knowledge, and indeed any means of knowledge, about what constituted a safe level of exposure. Mr Mackay's argument

relies heavily on the explosion of knowledge which took place during the 1960s. Only then did it become apparent that mesothelioma could result from very limited exposure. In particular, it was only then that knowledge began to develop of the risks to those outside the workplace, such as the wife washing her shipyard worker husband's overalls (as in *Gunn*) or people living near to asbestos works. But just as courts must beware using such later developments to inflate the knowledge which should have been available earlier, they must beware using it to the contrary effect. The fact that other and graver risks emerged later does not detract from the power of what was already known, particularly as it affected employees such as these, working in confined spaces containing a great deal of asbestos which might have to be disturbed at any time. There is no reassurance to be found in the literature that the level of exposure found by the judge in this case was safe and much to suggest that it might well not be so. The judge was entitled to conclude that a prudent employer would have taken precautions or at the very least made inquiries about what precautions, if any, they should take.”

63. Mr Archer make specific reference to the case of *Owen*, cited by Hale LJ (supra). Essentially, he says that this case supports the proposition that, from the mid-1950s onwards, it was known that exposure to asbestos should be kept to the lowest possible level. Mr Archer observes that Longmore LJ in *Maguire* agreed that this was the correct approach to be drawn from the contemporaneous literature (see [91]).
64. Mr Archer also takes the court to the decision of the Court of Appeal in *Maguire v Harland and Wolff PLC* [2005] EWCA Civ 1. This was a secondary exposure case in that the deceased contracted mesothelioma as a result of washing her husband’s clothes which were contaminated with asbestos dust. The exposure occurred between 1961 and 1965 at a time when the deceased’s husband was working at the shipyards as a boilermaker. Liability was denied both on the basis that no duty of care was owed by the defendant to the deceased and, further, that it was not reasonably foreseeable that the deceased was at risk of an asbestos related injury, having regard to the level of her exposure to asbestos and the state of actual or constructive knowledge of the risk of injury at that time. Mr Justice Morland gave judgment in favour of the deceased. The employer successfully appealed with Mance LJ dissenting.
65. Although Longmore LJ felt unable to find that a duty of care was owed to the deceased in these circumstances, Mr Archer nevertheless highlights the observations which he made at [89-91] to the effect that, from the mid-1950s, exposure should have been kept to the lowest possible level, given that the threats posed by asbestos were very well known. Longmore LJ in *Maguire* again approved the observations of Buxton J in *Owen*.
66. Although I do not intend to refer to all of the reported cases cited by Mr Archer, it is not unhelpful to have regard to some of the observations of the Court of Appeal in *Bussey v Anglia Heating Limited* [2018] EWCA Civ 243, albeit that the facts were very different. The deceased, who died from mesothelioma, worked for Anglia as a plumber between 1965 and 1968. The level of exposure to asbestos was variable and intermittent and probably did not fall into the category of *substantial*. The claimant failed at first instance because the trial judge found that the claimant was not exposed to levels of

asbestos dust beyond those set out in TDN 13. As at 1970, this laid down levels of 12 fibres/ml for a time weighted average of ten minutes or two fibres/ml for a time weighted average of four hours. The importance of the decision of the Court of Appeal was that there was no binding rule that employers were entitled to regard exposure levels below those identified in TDN 13 as *safe*, and that was so for the period after 1970 and for any period prior to its publication. The judge had understood that the decision in *Williams v University of Birmingham* [2011] EWCA Civ 1242 had compelled a finding that, if the exposure was below TDN 13, then liability would not be established. Lord Justice Jackson at [47] said:

“In my view, TDN 13 does not establish a ‘bright line’ to be applied in all cases arising out of the period 1970 to 1976. Still less is a bright line to be applied to asbestos exposure in a different period whether before or after 1970 to 1974. ...”

At [49]:

“A more nuanced approach is required than that. It is necessary to look at the information which a reasonable employer in the defendant’s position at the relevant time should have acquired and then to determine what risks such an employer should have foreseen.”

In the event, in that case, the Court of Appeal allowed the appeal but remitted it for further consideration.

67. More generally, Mr Archer invites the court to reject Dr Philips’ conclusion that only “*heavy and prolonged*” exposure was known to be harmful at the material time. He says that this is not supported by the literature or the authorities. In any event, it is his submission that, where there is no way of measuring the exposure and where there is no known safe level, the employer was under a duty to reduce the exposure accordingly. His case can be summarised by what Ms Conroy notes at [119]:

“Where exposures to asbestos dust (or dust containing asbestos) were appreciably hazardous in the context of the knowledge of the day, all exposures to asbestos dust should, in my opinion, have been reduced so far as was reasonably practicable.”

The defendant’s case

68. Without, I hope, doing any injustice to Miss Foster’s detailed written and oral submissions, the defendant’s case can be summarised succinctly. Her starting point is that, if I accept the measurements agreed by Dr Philips and Ms Conroy, it must necessarily follow that the exposure was at a very low level. Miss Foster adopts the observations of Dr Philips to the effect that exposure to asbestos at this kind of level in the construction industry, in the late 1950s would not have provoked any action on the part of employers.
69. In essence, it is submitted that, whilst there was general knowledge within the industry that exposure to asbestos could be harmful, at the material time, there was not an appreciation that intermittent, sporadic exposure carried with it any or any significant

risk of harm. This was true both of the individual activities of the carpenters cutting up asbestos boards and in relation to sweeping up dust. The point is all the stronger given that the deceased himself was not engaged in the cutting up of asbestos boards. The court should be very slow to displace what was considered to be recognised and established practice at the material time and to impose a higher standard on an employer. In this regard, she places heavy reliance upon the observations of Simon J in *Asmussen v Filtrona (UK) Limited* [2011] 2 All ER 42, who, in applying the guidance provided by the Supreme Court in *Baker v Quantum Clothing Group Limited* [2011] UKSC 17, stated:

“Foreseeability of injury is to be tested against the standard of the well-informed employer who keeps abreast of the developing knowledge and applies his understanding without delay, and not by the standard of omniscient hindsight. An employer can rely upon a recognised and established practice to exonerate itself from liability and negligence for failing to take precautionary messages unless (a) the practice is clearly bad practice or (b) ... a particular employer acquired greater than average knowledge of the risk.”

70. In the context of this case, Miss Foster submits that it cannot be said that the practice of the industry at the time was *bad practice*; nor that this defendant should have had a greater than average knowledge of the risks.

71. By way of illustration of the proposition that exposure to relatively modest quantities of asbestos dust in the 1950s should not give rise to a breach of duty, Miss Foster cites *Heward v Marks & Spencer Plc (DH Allan, Third Party)* [2014] EWHC 3183 (AB). In that case, the court found that the defendant had not breached its common law duty of care in respect of a worker who had developed mesothelioma following exposure to asbestos whilst working at its premises between 1967 and 1990. At [90], it was said:

“I do not consider that, assessed by the standards of the time, it was reasonably

foreseeable that the defendant should have appreciated that the presence of asbestos dust was likely to be injurious to the health of other contractors on site, who came into contact with asbestos dust, certainly not in the quantities which the experts are agreed were involved.”

72. Miss Foster places particular reliance on the case of *Abraham* (supra). In that case, the exposure was found to be “*very light and occurring intermittently and infrequent*”. After discussing the Court of Appeal judgment in *Jeromson* (to which I shall return), Swift J concluded that, given the low level of exposure, the defendants could not have known that they might have been exposing the claimant to the risk of an asbestos related injury.

73. Generally, Miss Foster invites the court to accept the evidence of Dr Philips to the effect that the construction industry, at this time, would not have been alert to the dangers associated with intermittent and comparatively low level exposure to asbestos dust. He was very clear in his evidence that he would not have expected any employer to have

taken precautions to protect someone such as the deceased from the asbestos dust to which he was exposed. Of course, the position might have been otherwise if the deceased had been, on a regular basis, working with asbestos materials.

Discussion

74. Since the question of knowledge of risk goes to the heart of this case, it is helpful to keep in mind the well-known dicta of Swanwick J in *Stokes* (supra) where he said that against a backdrop of developing knowledge:

“The overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and, where he has, in fact, greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions.”

75. Accordingly, it needs to be stressed that recognised and general practice at the material time is of relevance and importance, although it may not be the sole test. It is worth emphasising, however, that foreseeability of injury must not be judged with the benefit of hindsight, rather by reference to the standards of the time: see *Baker* (supra).
76. With those preliminary observations, I turn to what the defendant should have known in the mid to late 1950s about exposure to asbestos dust. Undoubtedly, the message that was to be taken from the literature to which I have referred was that asbestos dust was highly dangerous and that its inhalation was to be prevented as far as possible. But it needs to be emphasised that that message was delivered in the context of the known risk of asbestosis and of occupational exposure to significant quantities of asbestos dust. As in *Abraham*, the question which needs to be asked is whether the information then available should have alerted an employer to the possibility that an employee whose exposure to asbestos was light and intermittent might have been at risk of contracting an asbestos related injury.
77. I respectfully agree with Swift J that the approach of Buxton J in *Owen*, as approved by the Court of Appeal in *Jeromson*, might suggest that the employer should have been aware of such a risk. I bear in mind the submission made by Mr Archer that the question needs to be posed in the context that it was not known what levels of exposure were safe and what levels were not safe. I agree, however, with Swift J that the judgments in *Owen* and *Jeromson* must be seen in the context of the findings in both cases that there was significant exposure to asbestos dust. Such is to be contrasted with my finding in this case.
78. In *Owen*, it was found that the processes carried out in a casting shop produced very substantial amounts of dust, including asbestos dust. The expert evidence indicated that, on a number of occasions, the concentrations of asbestos dust would have given rise to a breach of the Asbestos Regulations 1969.

79. In *Jeromson*, the judge at first instance found that:

“... marine engineers employed by Shell were liable and likely to encounter intense concentrations of asbestos dust, on a regular basis. In the most part, these exposures would be for minutes rather than hours, but on occasion, both at sea and in dry dock, the exposures would be for hours and at even higher intensity.”

This is markedly different in quantitative terms to the exposure to which the deceased was subject.

80. Swift J. attached weight to the observations of the judge at first instance in *Jeromson* where he said that “If the exposure had been ‘*limited, intermittent or occasional*’ ... then a different conclusion might have been justified.”

81. There can be no doubt but that the degree of exposure is relevant to the question of foreseeability of risk. Lady Justice Hale was explicit about this at [35] of her judgment in *Jeromson*: “The issue was whether the degree of exposure in this case was such that a reasonable employer should have identified a risk.” (My emphasis).

82. Before I go any further, I should mention that Mr Archer boldly submits that *Abraham* is an “outlier” and that, in fact, it was wrongly decided. He goes further and submits that, if *Maguire* had been brought to the attention of the trial judge, the outcome would have been different. He argues that *Abraham* was not faithful to what was said in *Jeromson*. It seems to me inconceivable that Swift J would not have been familiar with the judgment and decision in *Maguire*, even though she did not make specific reference to that case. In any event, as I read the judgment of Swift J, she has very carefully analysed the judgment of Hale LJ in *Jeromson*, but (as she was entitled to) she has drawn a distinction because of the very different factual matrix. In short, I reject the submissions of Mr Archer insofar as he submits that *Abraham* was wrongly decided.

83. I Indeed, to the contrary, I adopt the approach of Swift J and, in the event, reach the same conclusion. After considering the relevant literature and the relevant authorities, I consider that a reasonable employer keeping abreast of the available knowledge could not reasonably have foreseen that there was a significant (i.e more than fanciful) risk of injury as a result of the exposure to asbestos at the level to which I have found the deceased was subjected. Whilst it is correct that there was no *safe* level of asbestos exposure at the material time, nevertheless, even the permissible level of exposure which was set in 1970 was far in excess of the levels to which the deceased was exposed. This is not conclusive, but it points strongly in favour of the proposition that, at the material time, as a matter of Law, the defendant was not fixed with knowledge that asbestos exposures at the levels to which the deceased was subjected gave rise to the foreseeable risk of injury.

84. In view of my findings as to the levels of asbestos dust to which the deceased was exposed and my findings on reasonable foreseeability of risk, it necessarily follows that the defendant is not to be criticised for failing to give any warning or failing to take any precautions. With the benefit of hindsight, it might seem obvious that the deceased should have been afforded some protection, but the state of knowledge was such as at

the late 1950s that, in my judgment, as a matter of Law, there was no breach of duty where the exposure was light and intermittent.

Conclusion

85. In every 'mesothelioma' case, there is overwhelming sympathy for the victim and his or her family. This case is no exception. But, whilst extending every sympathy to the claimant, I am constrained to find that liability is not established in this case. In the circumstances, there must be judgment for the defendant.
86. Finally, I wish to extend my gratitude to both counsel for their most helpful presentation of their respective cases, both orally and in writing.