

Case No: K49YX224
Neutral citation: [2024] EWCC 21

IN THE County Court at Caernarfon

Between:

Caernarfon Justice Centre
Date: 18 July 2024

Before :

HHJ Owen

Between :

Mark Edwards (1)
Glynne Roberts (2)
Nia Williams (3)
Brian Perry (4)

Claimants

- and -

2 Sisters Food Group Limited

Defendant

Mr Gray for the Claimants / Respondents
Miss Adams KC for the Defendant / Applicant

Hearing date: 13 June 2024

Judgment

Her Honour Judge Owen:

Introduction

1. I am concerned with the defendant's ("D") application dated 18 January 2024 for the following orders:

- (a) A strike out of the Claimants' ("C") claims under CPR 3.4(2)(a) on the basis that the statement of case and supporting medical evidence disclose no reasonable grounds for bringing the claims against the D.
 - (b) In the alternative, an order for summary judgment under CPR 24.2 on the basis that the Cs have no real prospect of succeeding on the claim and there is no other compelling reason why the case should be disposed of at trial.
- 2. For the purpose of the application, I have been provided with two lever arch bundles of documents. The first contains the pleadings and includes the application, the statement of Shelley Hawker, solicitor on behalf of D, dated 18 January 2024 in support of the application and the statement of Charlie Rose, Cs' solicitor, dated 4 June 2024 in response to the application. The other was provided to me by leading Counsel for the D and contains her skeleton argument as well as the authorities on which she relies in support of the application.

Background

- 3. The Cs bring claims for damages for injuries and losses following development of symptoms of Covid 19, which they say they contracted as a result of their employment with the Defendant at its then chicken processing factory in Llangefni in or around June 2020. The factory has since closed. The Cs all contend that they contracted the virus as a result of their employment with D and as a result of D's breach of duty.

4. Proceedings were issued in this matter on 25 July 2023. The Cs have provided reports in support of their claims from Dr Adrian Rees who is a GP, in which he confirms that each claimant developed Covid 19 in or around June 2020.
5. Each claimant brings a claim for damages for the development of Covid 19 in June 2020 in circumstances where they allege that inadequate safety provisions were in place during their working shift to protect them from the development of the disease.
6. The initial medical evidence annexed to the particulars of claim did not reference positive Covid 19 tests in each case and did not address causation. The revised reports, served with Cs' solicitors statement dated 4 June 2024, clarify the issue of the Covid 19 diagnosis but do not address causation.
7. The C's solicitor states at paragraph 11 of his statement that it is outside of Dr Rees' expertise to comment on causation and *"that appropriate commentary and opinion should be obtained from an expert Occupational Hygienist."* At paragraph 16 of his statement, he goes on to say that *"at the stage of proceedings we find ourselves at it would not be appropriate nor cost effective for the Claimants to have obtained a report from an Occupational Hygienist. In order to come to a fully informed view and opinion an Occupational Hygienist will need sight of full disclosure documents and full witness statements from both parties."* At paragraph 18, he states that *"it would have been premature and cost-ineffective to have obtained a Breach and Causation report from an Occupational Hygienist before full disclosure and exchange of witness evidence had taken place."*
8. I must at this stage, take issue with what Mr Rose says. Firstly, it seems to me that an Occupational Hygienist would be able to comment on hygiene standards in place at

the factory at the material time and as to whether the appropriate measures were in place to reduce the risk of Covid 19 spreading around the factory based on Welsh government regulations and guidelines in force at the material time. I do not, however, understand how an Occupational Hygienist would be able to advise on the issue of causation, specifically whether as a result of any breaches of duty by the D, the Cs developed Covid-19. Surely that would be a matter for a medical specialist in Covid 19 to advise upon?

9. What also concerns me is that the particulars of claim, settled by leading Counsel, specifically plead that *“the Claimants contend that they contracted the virus as a result of breach of statutory duty, breach of contract and negligence on the part of the Defendant”* and goes on to detail those breaches. It then proceeds to state that *“as a result of the said incident the Claimants have suffered personal injuries and loss.The Claimants have all suffered from a serious respiratory illness, now known to have been caused by infection with the Covid-19 virus....”*.
10. Whilst I appreciate that it may be possible to draft the allegations of breach of duty section of the particulars of claim by reference to information provided by the Cs in the first instance, I do not understand how it is possible to plead a causal link between any such breach and the development of Covid-19 without any medical causation evidence.
11. Those are merely preliminary observations. I turn now to the application itself.

The application

12. Leading Counsel for D submits that the application for summary judgment is more appropriate in the case than the strike out application. I do not think that there is any

real resistance to that from Counsel for Cs and I therefore propose to deal with that first and to move on to the strike out application afterwards if it is necessary.

Application for summary judgment

13. The relevant test is set out in CPR 24.3:

“The court may give summary judgment against a claimant.... On the whole of a claim or on an issue if –

- (a) it considers that the party has no real prospect of succeeding on the claim,....or issue; and
- (b) there is no other compelling reason why the case or issue should be disposed of at a trial”.

14. Leading Counsel for D submits that Cs’ claim cannot succeed on causation grounds, that covid is, as far as we are currently aware, an indivisible “injury” and that, as a result, even if Cs were to establish a breach of duty on the part of D, Cs would be unable to establish that such breach caused or materially contributed to the injury. Covid – 19 is a virus over which it has no control. She has taken me through a line of authorities, many of which relate to industrial disease claims, in support of this argument.

15. Counsel for Cs responds that these are claims which should be allowed to go to trial. Investigations are at an early stage. There has been no disclosure yet and the Cs need to see that before they can then proceed to instruct an occupational hygienist to advise and investigate causation. Dr Rees is not qualified to address causation.

16. He also raises a potential scenario where one of the Cs may have lived alone, travelled to work alone and not gone out at all. He submits that in such circumstances, such a C would be able to prove that his sole exposure to the virus was in the workplace and that the claim should be allowed to proceed on that basis alone.

Causation

17. Leading Counsel for D submits that Cs cannot establish that any breach of duty (which is not admitted) on the part of D caused or materially contributed to the “injuries” (in this instance, Covid-19). They would only possibly be able to succeed if they were to argue successfully that any breach of duty on the part of D increased their risk of contracting Covid-19. For that to happen, they would need an extension of **Fairchild v Glenhaven Funeral Services Ltd (2002) UKHL 22**. Such an extension has not been given in any case outside of the asbestos arena.
18. I note that in **Fairchild**, the court was dealing with multiple tortfeasors whose breaches of duty caused C to be exposed to asbestos as a result of which C developed mesothelioma. C was unable to prove which tortfeasor’s breach had resulted in C developing mesothelioma. It is clear that in **Fairchild**, Lord Bingham is stressing that this is a very specific exception to the causation test where he states at para 8 of his judgment that *“in the generality of personal injury actions, it is of course true that the claimant is required to discharge the burden of showing that the breach of which he complains caused the damage for which he claims and to do so by showing that but for the breach he would not have suffered the damage. The issue in these appeals does not concern the general validity and applicability of that requirement, which is not in question, but is whether in special circumstances such as those in these cases there should be any variation or relaxation of it. The overall object of tort law is to*

define cases in which the law may justly hold one party liable to compensate another. Are these such cases? A and B owed C a duty to protect C against a risk of a particular and very serious kind. They failed to perform that duty. As a result the risk eventuated and C suffered the very harm against which it was the duty of A and B to protect him. Had there been only one tortfeasor, C would have been entitled to recover, but because the duty owed to him was broken by two tortfeasors and not only one, he is held to be entitled to recover against neither, because of his inability to prove what is scientifically unprovable. If the mechanical application of generally accepted rules leads to such a result, there must be room to question the appropriateness of such an approach in such a case.”

19. At paragraph 34, he makes it clear that his finding that C is entitled to recover against both A and B is confined to cases in which each of 6 conditions are satisfied (they are not relevant here) “*and to no other case*”.
20. It seems to me that the case with which I am concerned is very different from the above scenario. Covid-19 is a virus over which an employer would not be able to exercise control in the way an employer would be able to prevent someone developing mesothelioma by ensuring that they did not come into contact with asbestos. Covid-19, in contrast to asbestos over which there can be control with proper health and safety measures in place, is a virus to which the public at large are exposed. No doubt, safety measures at the chicken processing were or should have been introduced to minimise the risk of the virus spreading but ultimately, this workforce was exposed to covid everywhere, not just in the chicken processing plant.
21. Counsel for D submits that this case is similar to the leading clinical negligence claim of **Wilsher v Essex Area Health Authority (1988) AC 1074** in that the claim failed

in circumstances where one of several potential causes for injury was caused by breach of duty and no one could tell if that breach of duty did or did not cause or contribute to the injury. That must be right where covid 19 is prevalent in the community at large as well as in the D's chicken processing plant.

22. Lord Scott of Foscote sums up the need to take care before one expands the causation test in his judgment in **Barker v Corus UK Ltd (HLE) (2006) 2AC** where he says at para 64 that “*Fairchild did not establish an overarching principle. It established a narrow exception to the causation requirements applicable to single agent cases. I would not extend the exception to cover multi-agent cases as well. One reason why I would not do so is that the identification of the proportion of risk of the eventual outcome attributable to each particular agent would, to my mind, be well nigh impossible and highly artificial. At least in the asbestos cases it is known that asbestos was responsible for the eventual outcome and that the negligent defendants are to be held liable for subjecting the victim to a risk that has materialised.*” I agree with Counsel for D that this is directly applicable to this scenario where there are various strains of covid-19 and Cs would not be able to establish whether they contracted that strain in the community or in the workplace.
23. Baroness Hale's observation at para 128 of the **Barker** judgment also assists in explaining the narrow remit of **Fairchild** where she states that “*one way of explaining Fairchild is that all were in breach of duty and one of them must be guilty, so that it made sense that all should be liable, That rationale does not apply, or certainly not with the same force, if there are other, non tortious causers in the frame.*” Which is precisely the scenario in which Cs may find themselves here.

24. It is also of significance that in **IEC v Zurich Insurance PLC (SCE) (2016) AC 509** Lord Neuberger urges caution in courts developing the law “*on a case-by-case basis, pragmatically but without any clear basis in principle, as each decision leads to a new set of problems requiring resolution at the highest level, as has happened in relation to mesothelioma claims, is not satisfactory either in terms of legal certainty or in terms of public time and money*”.
25. In conclusion, it seems to me that the Cs are going to face a nigh on impossible task in establishing a causal link between any breach of duty on the part of D and their contracting Covid-19. It would require significant development of the law for any claim to succeed and such developments by courts have been strongly discouraged by the most senior courts in the land. I have included just a sample of such observations in my judgment.
26. Having addressed the causation point, I move on to consider the application itself.

Application for summary judgment – the legal principles

27. The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success; **Swain v Hillman (2001) 1 All ER 91**.
28. A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable; **ED and F Man Liquid Products v Patel (2003) EWCA Civ 472**.
29. In **Elite Property Holdings Ltd v Barclays Bank Plc (2019) EWCA Civ 204**, Asplin LJ expands on the above and states that “*a claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not*

*have material to support at least a prima facie case that the allegations are correct; and / or (c) the claim has pleaded insufficient fact in support of their case to entitle the Court to draw the necessary inferences: **Three Rivers District Council v Bank of England (No.3) (2003) 2 AC 1.***”

30. Counsel for Cs argues that the application should be dismissed and the matter should be determined at a trial. By then, the medical expert in Covid-19 and the occupational hygienist will have reported based on disclosure. He gives the example, which I quoted above, of one of the Cs not having been anywhere except for the workplace and not having been to exposed to any other individuals other than in the workplace. Counsel for D makes the point that if that were the case, one would have expected that to have been pleaded. It does seem odd that Mr Rose has not referred to this in his statement if there were such a C in existence. This issue is addressed by the Supreme Court in **Okpabi v Royal Dutch Shell Plc (2021) UKSC 3** where Lord Hamblen stated that the correct approach, when asking whether the position might change from how it appears at the summary judgment stage, was not to ask whether there was “*a clear prospect that new material will become available before the trial which is likely to give the claimants a real prospect of success*” but rather to ask whether there are reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success. In **King v Stiefel (2021) EWHC 1045** Cockerill J held that “*it is not enough to say, with Mr Micawber, that something may turn up.*”
31. It seems to me that that is precisely what Counsel for Cs is saying, namely that something may turn up. With respect, something should have turned up before proceedings were issued. Cs’ solicitors understood that this was a potentially

important case. Why else would he have instructed leading Counsel to settle pleadings in what are relatively low value claims? The matter should have been investigated properly prior to the issue of proceedings. An application for pre action disclosure could have been made if Cs had encountered difficulty seeking disclosure from the D. Causation was a crucial element which should have been investigated pre issue and yet it would appear that it has not been.

32. However, even if causation were to be investigated, I am satisfied based on my consideration of the caselaw referred to above that the Cs have no real prospect of succeeding on the claim.
33. I am also satisfied that there is no other compelling reason why the case should be disposed of at trial. The higher courts have made it clear that the courts are not the venue to try to develop cases in non asbestos related cases and open up a field of litigation as happened in relation to mesothelioma cases.
34. As part of my decision making process, I have also considered the overriding objective (CPR 1.1). By giving summary judgment against Cs on the whole of the claim as opposed to allowing the matter to continue to trial, I am dealing with these cases, which are of a relatively low value given that all but one C appear to have made a complete recovery, justly and at proportionate cost.
35. Accordingly, I give summary judgment against the claimant.
36. In the circumstances, I do not need to consider the strike out application.
37. I will arrange for the draft judgment to be sent to Counsel for the parties. I invite them to let me have a joint documents with any corrections within 7 days of receipt.

38. I will deliver the judgment at 10 am on 18 July 2024 and invite the parties to agree an order if they are able.
39. I will deal with any consequential matters which cannot be agreed at that hearing.