Neutral Citation Number: [2020] EWHC 1625 (QB)

Case No: QB-2018-00444

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 June 2020

Before:

GEOFFREY TATTERSALL QC
(Sitting as a Deputy Judge of the High Court)

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Between:

VALERIE BANNISTER (Widow and Executrix of the Estate of DENNIS CHARLES BANNISTER, Deceased)	**Claimant**
- and -	
FREEMANS PUBLIC LIMITED COMPANY	**Defendant**

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Harry Steinberg QC and Gemma Scott (instructed by **Fieldfisher LLP**) for the **Claimant**
David Platt QC (instructed by **BLM LLP**) for the **Defendant**

Hearing dates: 16-18 March 2020

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JUDGMENT
Approved by the court for handing down

GEOFFREY TATTERSALL QC:

Introduction

1. On 19 May 2020 I dismissed the Claimant`s claim, as widow and executrix of the estate of the Deceased, her late husband, on the grounds that I was *not* satisfied on the balance of probabilities that:

[i] the Deceased was exposed to asbestos dust when he returned to work on the Monday morning immediately after the removal of the infill panels in his office, as was alleged by him; and

[ii] any exposure which the Deceased suffered in the Defendant`s employment caused a material increase in the risk of him developing mesothelioma and that any such exposure was therefore *de minimis*.

2. In this judgment references in bold type in square brackets are references to such judgment.

3. I gave directions for determination on written submissions of any contested application made by either party.

4. The Claimant has made an application for permission to appeal. Such application is resisted by the Defendant. I now adjudicate upon such application.

5. I do so with the benefit of lengthy and detailed written representations made by Mr Steinberg QC and Ms Scott dated 2 June 2020 and those of Mr Platt QC dated 15 June 2020. I have read and carefully considered all the matters raised in such detailed representations, and although this judgment does not set out a verbatim recital of such representations, I have taken all of such representations into account in reaching my decision on the Claimant`s application.

Detailed consideration of the submissions

6. The Claimant`s grounds of appeal may be summarised thus:

[i] Ground 1: the court failed to consider the witness evidence on its own merits and erred in taking a different approach to the consideration of `historical lay evidence` and thus effectively applied a special and more onerous standard of proof to evidence of the Claimant.

[ii] Ground 2: there was no evidence to support the court`s inference that the Defendant engaged a specialist contractor to remove the asbestos boards.

[iii] Ground 3: the court made a serious procedural error in finding that the Deceased`s complaint about the dust was on another occasion. Such a case was not put to the Deceased and there was no evidence to support such a finding.

[iv] Ground 4: the court`s finding that the Deceased`s exposure would have been reduced was on the basis of a case which was not put to the Deceased.

[v] Ground 5: the court erred in concluding that it was bound by *Williams v University of Birmingham* to make a precise finding of the dose to which the Deceased was exposed.

[vi] Ground 6: the court`s approach to medical causation was wrong in principle and unworkable.

[vii] Ground 7: the court misunderstood the evidence in relation to risk, placed excessive weight on epidemiological evidence and failed to take into account the effect of individual susceptibility.

[vii] Ground 8: the causation test applied by the court meant that the Claimant was not able to establish the cause on the basis of current medical science, contrary to *Fairchild v Glenhaven Funeral Services*.

7. Mr Platt correctly observed that Grounds 1-4 relate to my finding of fact that the Deceased was not exposed to asbestos dust in the course of his employment by the Defendant and that Grounds 5-8 relate to my finding of fact that any exposure which the Deceased suffered in the Defendant`s employment [for this purpose assumed] did not cause a material increase in the risk of him developing mesothelioma because it was *de minimis*.

8. I remind myself that in deciding whether I should grant permission to appeal I should apply the test set out in CPR 52.6, namely that permission to appeal should be given only where the court considers that the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard.

9. Mr Platt reminded the court that, in so far as the Claimant`s application sought to challenge the court`s findings of fact, in *Wheeldon Brothers Waste Ltd v Millennium Insurance Co Ltd* [2018] EWCA Civ 2403 Coulson LJ, in summarizing the principles to be applied when determining applications for permission to appeal, had referred to dicta of Lewison LJ in *Fage UK Limited & Another v Chobani Limited & Another* [2014] EWCA Civ 5 in which Lewison LJ had stated, at para 114:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23 [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include
> i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
> ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

10. Having considered further authority Coulson LJ had concluded thus:

> "10.In short, to be overturned on appeal, a finding of fact must be one that no reasonable judge could have reached. In practice, that will usually occur only where there was no evidence at all to support the finding that was made, or the judge plainly misunderstood the evidence in order to arrive at the disputed finding."

11. It is convenient to consider each individual ground of appeal seriatim, setting out the Claimant`s submissions, the Defendant`s submissions and my determination.

Ground 1: the court failed to consider the witness evidence on its own merits and erred in taking a different approach to the consideration of `historical lay evidence` and thus effectively applied a special and more onerous standard of proof to the Claimant

12. Mr Steinberg submitted that, by referring to authority which dealt with `historical lay evidence`, the court erred and effectively applied a modified test for proof for claimants in mesothelioma cases. He further submitted that:

[i] the court misinterpreted the passage in *Sienkiewicz v Grief* [2011] 2 AC 229 that judges should resist the temptation to take `a lax approach to the proof of the essential elements` cited at para 73 of its judgment in that such was simply an exhortation to apply the general rules rather than imposing more onerous requirements of proof in mesothelioma cases.

[ii] the court, by finding at [**81**] that it was not reasonable to expect the Defendant to have kept records `from such a long time ago`, which finding it was submitted could not be correct in respect of work involving asbestos in the 1980`s, had given the Defendant `the benefit of the doubt on the central factual issues`, contrary to *Keefe v Isle of Man Steam Packet* [2010] EWCA Civ 683

13. Mr Platt submitted that this was merely an attempt to disguise as a matter of law what are in truth findings of fact made by the court. He submitted that the court`s reference to the judicial observations in *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066, *Gestmin SPGD SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 and *Sloper v Lloyd Bank Plc* [2016] EWHC 483 was fully justified.

14. In my judgment I expressly acknowledged [**82**] that such judicial observations were in no way binding on me. However, I regarded them as a helpful and cautionary guide to evaluating the oral evidence and the accuracy or reliability of memories. I am satisfied that I was entitled to adopt such an approach. I agree with Mr Platt that the court would have been

remiss not to have taken note of such dicta. The court was mindful of the risk of elevating such principles to make them a `first line of defence` for a defendant, as this was expressly referred to Mr Steinberg in his closing submissions, and I am satisfied that I did not so elevate them.

15. I did not find the decision or reasoning of the Court of Appeal in *Keefe* to be of assistance. That case was about particular statutory obligations of measurement in noise cases which had not been undertaken and was not about where documents could not be produced from very many years ago, particularly when there was no requirement to maintain documents.

16. I am thus satisfied that I should not grant permission to appeal on this ground.

Ground 2: there was no evidence to support the court`s inference that the Defendant engaged a specialist contractor to remove the asbestos boards

17. Mr Steinberg submitted that the court made a number of unsupported findings of fact relating to the asbestos removal works, namely that the Defendant probably used reputable and specialist contractors to undertake such works and that they would have undertaken `all appropriate and necessary precautions`. He further submitted that such findings were untenable because there was no evidence to support such findings.

18. Mr Platt submitted that the court was justified in drawing an inference that the contractor engaged by the Defendant took precautions so as to ensure that asbestos dust was not left all over the Deceased`s office and emphasised that at para 14 of their Joint Statement Mr Raper and Mr Stear had themselves drawn an inference that the existence of the memo showed `*at least* a degree of asbestos awareness`. Moreover, he reminded me that at [**98**] the court had expressly referred to the fact that in drawing such an inference the court was saying only that it was very likely that the Defendant would have appreciated the need to instruct a specialist contractor to undertake all appropriate and necessary precautions although such did not mean that such contractor would necessarily have undertaken the work competently and/or properly.

19. As to my finding that the Defendant probably used reputable and specialist contractors to undertake such works and that they would have undertaken `all appropriate and necessary precautions`, this was an inference I drew from the fact that the Defendant`s memo expressly referred to the fact that the infill panels contained asbestos and it was that material which was being removed. I drew such inference because there would have been little point in it advising employees such as the Deceased of the presence of such asbestos for it then to ignore the risks associated with asbestos and engage non-reputable contractors who might not have understood such risks [**118**]. I believe that I was entitled to draw such an inference.

20. Although I agree that the Deceased was not cross-examined on this issue, as I observed I found as a fact [**93**] that the Deceased had no significant independent recollection of being exposed to asbestos. I thus could see no reason, even absent such cross-examination, why I should not draw such an inference.

21. In any event, the fact that I drew such inference is immaterial given my finding that the Deceased was not exposed to asbestos dust when he returned to work on the Monday

morning as was alleged by him. Even had I not drawn such inference, I would have made such finding.

22. I am thus satisfied that I should not grant permission to appeal on this ground.

Ground 3: the court made a serious procedural error in finding that the Deceased`s complaint about the dust was on another occasion. Such case was not put to the Deceased and there was no evidence to support such finding

23. Mr Steinberg submitted that the inference that the Deceased told Mr Ford that he could taste dust in his mouth *after* the subsequent replacement of the infill panels in his office was untenable, unsupported by any evidence of fact and was not a finding which could reasonably have been made on the evidence, because it arose out of a `concession` made by Mr Ford in cross-examination and the Deceased had not been cross-examined on that basis.

24. Mr Platt submitted that there is no merit in this submission because:

[i] the court determined that the evidence of the Deceased could not be relied upon because he had no independent memory of relevant events;

[ii] the cross-examination of the Deceased was consistent with the asbestos removal and dust generation being on separate occasions; and

[iii] the Deceased`s evidence on commission was given before any party had obtained or served its expert evidence.

25. I am satisfied that this ground is misconceived.

26. I was well aware that the Deceased had not been cross-examined on this particular issue [**117**]. I bore such in mind in reaching my finding that I was not satisfied on the balance of probabilities that the Deceased was exposed to asbestos dust on the Monday morning immediately after the removal of the infill panels.

27. I carefully assessed Mr Ford`s evidence, both in cross-examination and re-examination, and set out the material parts of his evidence [see **61** and **63**]. Having carefully considered such evidence, I was not persuaded by Mr Ford`s evidence that the Deceased was exposed to asbestos dust as he had alleged and I was unconvinced by Mr Ford`s answers in re-examination. I believe that I was entitled to make such a finding of fact.

28. I am thus satisfied that I should not grant permission to appeal on this ground.

Ground 4: the court`s finding that the Deceased`s exposure would have been reduced was on the basis of a case which was not put to the Deceased

29. Mr Steinberg submitted that since the Deceased had not been cross-examined about how much time he spent in his office after the removal of the infill panels, the court should not have allowed Mr Ford to be cross-examined on this point.

30. Mr Platt submitted that the evidence on commission was long before the expert evidence of Mr Raper and Mr Stear and their respective assessment of the cumulative dose and that in any event in the light of the court`s subsequent finding that, even had the Deceased been exposed to asbestos dust, there was no material increase in the risk of him developing mesothelioma and that any such exposure was *de minimis*, this cannot be relevant.

31. I have consulted the transcript and I cannot see that Mr Steinberg objected to any questions about how long the Deceased`s spent in his office. I do not think that it was thus inappropriate for me to allow Mr Ford to be cross-examined on this issue, particularly since both experts had attempted to assess the Deceased`s cumulative dose.

32. Moreover, as I observed at [**135**], Mr Ford`s evidence as to how long the Deceased spent in his office might not be entirely reliable and I thus regarded the assessments of cumulative dose as only rough and ready indications of such dose rather than defined quantified estimates.

33. I am thus satisfied that I should not grant permission to appeal on this ground.

Ground 5: the court erred in concluding that he was bound by Williams v University of Birmingham to make a precise finding of the dose to which the Deceased was exposed

34. Mr Steinberg submitted that the court erred in concluding that it was required to make a precise finding of the dose to which the Deceased was exposed. In *Williams*, Aitkens LJ was considering what the claimant needed to show to establish a breach of duty and held that it was not sufficient that the exposure to asbestos had materially increased the risk but, rather, whether it was reasonably foreseeable that such exposure would have given rise to a risk of personal injury. Moreover, the court declined to follow *Rolls Royce Industrial Power (India) Ltd v Cox* which Mr Steinberg submitted had expressly warned against making a precise finding of the dose to which a claimant was exposed.

35. Mr Platt submitted that the court had properly applied dicta of Lord Phillips in *Sienkiewicz*, namely that exposure is a question of fact for the judge in each case which might or might not be assisted by mathematical comparisons and that he was unaware of any case where dose evidence, if available, was rejected in principle. Moreover, Mr Steinberg`s submissions, he contended, ignored the fact that the estimated dose was to a large measure agreed by Mr Raper and Mr Stear and Mr Steinberg`s submission in relation to *Rolls Royce v Cox* was misconceived because in that case the dose was such that a material increase in risk could readily be inferred.

36. I accept Mr Platt`s submission as to *Rolls Royce v Cox*.

37. At [**27**] of my judgment I cited dicta of Lord Phillips that, whilst it may be doubtful whether it is ever possible to define in quantitative terms what is *de minimis*, that must be a question for each judge to apply on the facts of a particular case and at [**157**] I concluded, I believe justifiably, that I should make findings as to the Deceased`s level of exposure albeit that such might be imprecise.

38. Moreover, although the dose estimates given by Mr Raper and Mr Stear were similar, particularly after amendments were made to Mr Raper`s estimate to reflect the errors in his calculation referred to at [**146** and **147**], so that although it was probably unnecessary to

choose whose evidence I should prefer, at [**159**-**161**] I set out why I preferred the evidence of Mr Stear.

39. I am thus satisfied that I should not grant permission to appeal on this ground.

Ground 6: the court`s approach to medical causation was wrong in principle and unworkable

40. Mr Steinberg submitted that the court erred in rejecting his submission that causation was an issue of fact and that the Claimant `need only show that the exposure was not `insignificant`. Further, he submitted that the court erred in holding that causation was one of mixed fact and law and applied a legal test agreed by both the respiratory physicians.

41. Mr Platt submitted that to `show that the exposure was not insignificant` would involve a test to demonstrate what was `significant` and that Dr Rudd`s inability to explain on what principled basis an assessment could be made as to whether there was a *material* increase in risk had been rejected by Swift J in the *Phurnacite* litigation as lacking any justifiable rationale. In any event the court was entitled to conclude that an annual risk to the Deceased by reason of the alleged exposure of 1 in 50 million, which Dr Rudd agreed in cross-examination constituted `a very small risk`, was not a material increase in risk and *de minimis.*

42. I accept all of Mr Platt`s submissions. Moreover, I had to determine whether the level of exposure gave rise to a *material* increase in the risk of the Deceased suffering from mesothelioma. For the reasons set out in my judgment, I concluded that such exposure did not give rise to such a material increase and was *de minimis*. I had regard to the dicta of Lord Pentland in *Prescott v The University of St Andrews* as to the approach to be adopted when reaching such a decision.

43. I am thus satisfied that I should not grant permission to appeal on this ground.

Ground 7: the court misunderstood the evidence in relation to risk, placed excessive weight on epidemiological evidence and failed to take into account the effect of individual susceptibility

44. Mr Steinberg submitted that the court placed excessive weight on epidemiological evidence by accepting at face value the Defendant`s estimate that the annual risk to the Deceased arising out of the alleged exposure was 1 in 50 million [or 1 in 64 million reflecting Mr Ford`s evidence about the time the Deceased spent in his office] and misunderstood the whole basis of the Claimant`s expert evidence and case on causation. He further criticised the court`s finding [**189**] that Dr Rudd had made an assertion which he realised could not properly be made.

45. Mr Platt submitted that here the court heard medical and epidemiological evidence [whereas in *Sienkiewicz* the judge relied only on epidemiology] and treated epidemiological evidence with appropriate caution, particularly when Dr Rudd conceded that the *Hodgson & Darnton* paper was `all we have` and was useful as a `rough indicator of the magnitude of

risk` [**183 iii)**]. Accordingly, the court`s approach in [a] determining the Deceased`s cumulative dose, [b] using epidemiological evidence to obtain a broad estimate of the risk; [c] considering medical evidence as to the reality and nature of the risk and [d] determining whether in all the circumstances was material or *de minimis*, was correct.

46. I accept Mr Platt`s submission that the approach I adopted in this case was correct. I heeded the caution expressed obiter by the majority in *Sienkiewicz* about reliance on epidemiological evidence, but I believe that I was justified in concluding that such evidence had a part to play, albeit a limited part, in my determination as to whether the Deceased`s alleged exposure to asbestos [which I had found not to be established] was material or *de minimis*.

47. As for my conclusion [**189**] about Dr Rudd, I accepted at [**188**] Dr Rudd`s outstanding track-record of research but I found his evidence in this case unsatisfactory for the reasons stated in my judgment, particularly in his cross-examination by Mr Platt as set out in [**188**]. My conclusion that Dr Rudd was `hoping that I would rely on his consummate experience to justify an assertion which he realized could not properly be made` was not made lightly, but that was the clear impression I gained during his cross-examination.

48. I am thus satisfied that I should not grant permission to appeal on this ground.

Ground 8: the causation test applied by the court meant that the Claimant was not able to establish the cause on the basis of current medical science, contrary to Fairchild v Glenhaven Funeral Services

49. Mr Steinberg submitted that, in the light of the agreement of the medical experts that there was no threshold dose of asbestos below which there was no increase in the risk of contracting mesothelioma, the effect of the court`s decision was that the claim failed because medical science is currently unable to say whether or not this exposure caused the Deceased`s mesothelioma, contrary to *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32.

50. Mr Platt submitted that this submission was misconceived because *Fairchild* established that to establish causation it was necessary for a claimant to prove a *material* increase in risk as opposed to *any* exposure to asbestos.

51. I accept Mr Platt`s submission. If it were otherwise, *any* exposure to asbestos would establish causation, whether or not it created a *material* increase in risk and that is not consistent with my analysis of the law set out in my judgment [**20-29**] which has given rise to no criticism by Mr Steinberg in the grounds of appeal. It is only a material risk which satisfies the test of causation. A *de minimis* risk does not.

52. I am thus satisfied that I should not grant permission to appeal on this ground.

The cumulative effect of all the grounds of appeal

53. My two findings set out in para 1 above constitute two separate bases on which I dismissed the Claimant`s claim.

54. For the avoidance of any doubt, although I have considered the grounds of appeal one by one, I have also reflected on the cumulative effect of grounds 1-4 and grounds 5-8 and I am satisfied that, even taken together, I should not grant permission to appeal my judgment.

55. In particular I have considered whether there are other compelling reasons why permission to appeal should be granted and have considered reference to Mr Platt`s chambers` website and the response of insurers to my judgment in other mesothelioma claims. None of these matters persuade me that I should grant permission to appeal.

56. I am satisfied that any appeal against my judgment does not have a real prospect of success and there is no other compelling reason for such an appeal to be heard.

Disposal

57. For the reasons set out above I can find no merit in the Claimant`s application for permission to appeal and it is dismissed.

58. There being no other applications made by either party, it necessary follows that I order that the claim is dismissed and that the Claimant shall pay the Defendant`s costs on the standard basis, to be the subject of detailed assessment if not agreed.