Neutral Citation Number: [2022] EWHC 1992 (QB)

Case No: QB-2022-000878

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th July 2022

Before :

MRS JUSTICE YIP DBE

- -

Between :

Mr Michael Keegan

Claimant

- and -

(1) Independent Insurance Company Limited
(2) Zurich Insurance PLC

Defendants

- -
- -

John-Paul Swoboda (instructed by **Fieldfisher LLP**) for the **Claimant**
The First Defendant did not appear and was not represented
Jayne Adams QC (instructed by **Clyde & Co**) for the **Second Defendant**

Hearing dates: Tuesday 19 July 2022

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Approved Judgment

This judgment was handed down 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 27 July 2022.

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MRS JUSTICE YIP

Mrs Justice Yip DBE :

Introduction

1. This is a personal injury claim for mesothelioma resulting from occupational exposure to asbestos. The Defendants provided employer's liability insurance to the Claimant's former employer, a company which has been dissolved. The Claimant brought his claim directly against the insurers pursuant to the Third Party (Rights Against Insurers) Act 2010 ("the 2010 Act"). Shortly before trial, the Claimant and the Second Defendant, Zurich Insurance PLC, agreed a settlement. The First Defendant, Independent Insurance Company Limited, is in liquidation. The Claimant was granted permission to proceed against the company in liquidation. Notwithstanding the settlement with the Second Defendant, the Claimant wishes to obtain judgment against the First Defendant. He seeks a declaration that his former employer is liable to him, judgment for the full value of his claim and an order for costs against the First Defendant. It is his intention to seek to recover the shortfall between the total value of the claim and the settlement with the Second Defendant and the costs of proceeding against the First Defendant from the Financial Services Compensation Scheme ("FSCS").

2. The Claimant was represented at trial by Counsel, Mr Swoboda. The Second Defendant appeared by Leading Counsel, Ms Adams QC. The First Defendant has played no active part in the proceedings and was not represented at trial. The FSCS is not, and never has been, a party to these proceedings. However, a solicitor, Mr Morrow of BLM (now Clyde and Co), was instructed by the FSCS to attend a case management conference before Master Davison in May 2022. Following that hearing, Mr Morrow provided written submissions on behalf of the FSCS. In doing so, he made it clear that his submissions were not made as if the FSCS was a party nor on the basis that he was representing the First Defendant. He contended that it would be inappropriate for the FSCS to be appointed to represent the interests of the First Defendant as the FSCS does not have the same interest as the First Defendant. The First Defendant remains on the register at Companies House. Notice of the trial date was sent to its registered address. Mr Swoboda told me that the Claimant's solicitors had continued to notify the FSCS (through Mr Morrow) of the progress of the claim, albeit recognising that there had been a firm indication that they did not intend to participate further. I have therefore not heard from the FSCS but understand that their position is likely to be that they will not meet any judgment that the Claimant obtains in these proceedings. I note that Mr Morrow's written submissions concluded by asserting that the Claimant was not proceeding correctly in pursuing the insurers under the 2010 Act rather than applying to restore and issue proceedings against the employer.

3. The position of the FSCS is not a matter for me to consider now. I am required only to determine the claim which has been brought against the First Defendant. I must do so without having heard any representations on behalf of the First Defendant. I am very grateful to Mr Swoboda, who took care to outline the relevant legal principles in a fair and balanced way, recognising that the court was only hearing one side of the argument. His well-focused written and oral submissions were of considerable assistance. Given the settlement with the Second Defendant, Ms Adams QC had a limited role at trial. She attended primarily to observe how the arguments were advanced by the Claimant. Although she did provide some assistance in accordance with her duty to the court, for

which I am grateful, she was not instructed to take any active role at trial and was careful not to contribute in any way that might be inconsistent with her client's interests.

4. Given that there was no appearance by or representation on behalf of the First Defendant, the trial proceeded without any oral evidence being called. The relevant evidence was provided in a trial bundle and included statements from the Claimant and his family members and expert evidence. Mr Swoboda made submissions on the basis of the written evidence.

5. Mr Swoboda identified that the order the Claimant seeks requires the Court to be satisfied:

   i) That the claim has been correctly brought against the First Defendant; and

   ii) That it is appropriate to apply the 2010 Act so as to make the declaration sought and enter judgment against the First Defendant.

   The central issue in relation to the applicability of the 2010 Act is whether liability was incurred before or after 1st August 2016 (the commencement date of the Act). That requires consideration of when the Claimant's cause of action was complete. The claimed negligence occurred well before 2016. The issue is whether the Claimant sustained actionable damage before then.

6. As Turner J observed in *Redman v Zurich Insurance plc* [2017]EWHC 1919 QB; [2017] 1 WLR 1919, "it is well recognised that identifying the point at which the process of the development of malignancy, for example, gives rise to damage can be medically and legally controversial." Mesothelioma claims have over the years given rise to many challenges in the application of established legal principles to a disease about which much scientific uncertainty still remains. The submissions in this case necessarily touched upon issues of wider interest and importance. However, it is important to stress that my role is to decide this case on the basis of the relevant parties' positions, the evidence before me and the submissions I have heard.

The factual background

7. In the absence of any challenge to the evidence produced by the Claimant, I need only provide a short summary of the relevant facts.

8. Between 1972 and 2016, the Claimant, who is now aged 73, was employed by Jas. C. Flaxman & Sons Limited ("the employer") doing general maintenance work, much of it at Marks and Spencer stores. In the course of that work, the Claimant worked with Asbestolux sheets, either cutting them to size himself or working in close proximity to others who were doing so. He was also required to remove Asbestolux ceiling tiles, asbestos cladding and Marley floor tiles. The work in which the Claimant was engaged meant that he frequently worked in conditions where there were substantial quantities of asbestos dust and fibres in the atmosphere. Until 1984, no precautions were taken by his employer to protect him from exposure. In September 2021, the claimant was diagnosed as having mesothelioma. He has been undergoing treatment, including immunotherapy which he has funded privately. Sadly, his life expectancy is very limited.

The procedural position

9. Jas. C. Flaxman and Sons Limited is no longer trading and has been dissolved. The Claimant understandably wished to pursue a claim for compensation as quickly as possible with a view to securing funding for private medical costs and resolving the claim during his lifetime. When the 2010 Act applies, it allows a claim to be brought against insurers directly, avoiding the need to restore the defunct employer to the register in order to bring a claim.

10. The claim was issued on 17 March 2022. The Particulars of Claim identified that the Defendants had insured the employer. Insurance cover was provided by the First Defendant between May 1972 and May 1980 and by the Second Defendant between June 1980 and May 1993.

11. At the time the proceedings were issued, the First Defendant was recorded at Companies House as "a company in liquidation (subject to a winding up Order)". Its registered office address was an address of its liquidators, PWC. At the time of issuing the proceedings, the Claimant sought permission to bring the claim against a company in liquidation. Master Thornett granted permission by Order dated 29 March 2022. The proceedings were served by post to the First Defendant's registered office.

12. I am satisfied that this amounted to good service. CPR 6.3(2)(b) provides that a company may be served by any of the methods permitted under the Companies Act 2006. Section 1139(1) allows for service at a company's registered address. Although PWC have been released as liquidator on the winding up of the company, there has been no application to change the registered address. Service at that address remains good service (see *Catherineholm v Norequipment Trading Ltd* [1972] 2 QB 314).

13. While not affecting the legal position in relation to service, I note that the Claimant's representatives made genuine efforts to ensure that the proceedings came to the attention of those who might ultimately be responsible for meeting any liability against the First Defendant. As already indicated, the FSCS are aware of the proceedings and instructed a solicitor to attend the case management conference but have chosen not to be involved in the proceedings since. The Claimant's solicitor has also made use of an email address for the First Defendant linked to Capita Insurance.

14. The Particulars of Claim claimed that the rights of the employer under the contracts of insurance in respect of liability to him transferred to and vested in him pursuant to section 1 of the 2010 Act. His claim sought to enforce those rights against each Defendant by way of a declaration of the insured's liability (pursuant to section 2(2)(a)) and judgment for damages against the insurers (under section 2(2)(6)).

15. The Particulars of Claim set out the basis upon which the Claimant claimed the employer was liable. This included a clear summary of the factual position, appropriate allegations of negligence and/or breach of statutory duty and details of the injury (malignant mesothelioma) caused as a result. The pleaded case is properly supported by the evidence that has been placed before me and which has not been challenged at trial.

16. The Claimant also served a Schedule of Loss. Again, this was appropriately and clearly set out. The Claimant claimed a total of £854,076.43 plus damages to be quantified.

The claimed sum included damages for pain, suffering and loss of amenity (with interest thereon); past losses; future care and expenses during Mr Keegan's lifetime and damages for lost services and for loss of income during the 'lost years'. The total sum did not include interest on past loss or future treatment costs. These heads were left to be quantified. The settlement agreed with the Second Defendant includes an indemnity for the costs of medical treatment. On that basis, the Claimant chose not to pursue the unquantified claim for medical expenses at trial. He also chose not to press the claim for interest on past loss. It follows that the judgment sum sought by the Claimant is the sum of £854,076.43 set out in the Schedule of Loss as served upon the First Defendant.

17. The Second Defendant responded to the claim, serving a Defence dated 29 April 2022 and a Counter-Schedule of Loss and Damage, which was later updated. The Second Defendant put the Claimant to proof of his claim. Additionally, the Second Defendant expressly denied that the 2010 Act applied or operated to confer any cause of action against the insurers. The Second Defendant contended that any liability of the insured to the Claimant was (on the balance of probability) incurred prior to the commencement of the Act.

18. No acknowledgement of service, defence or other response was filed or served on behalf of the First Defendant. At the case management conference in May 2022, Mr Swoboda submitted that judgment in default should be entered against the First Defendant. Pursuant to CPR 12.3, a claimant may obtain judgment in default of an acknowledgement of service or a defence. CPR 12.4 deals with the procedure for obtaining default judgment. Where the claim is for damages only, default judgment may be obtained by filling in a request in the prescribed form. Where the claimant seeks another remedy, an application must be made in accordance with CPR Part 23. Here, an application under Part 23 would be required because the Claimant seeks a declaration. No application notice was served but Mr Swoboda's skeleton argument for the case management conference set out the basis upon which he intended to apply orally for a default judgment. It is open to the Court to dispense with the requirement for an application notice (CPR 23.3(2)(b)).

19. Master Davison considered the request for default judgment and sought further written submissions from Mr Swoboda and Mr Morrow. Having considered the submissions, the Master did not formally rule on the application but indicated by email that he would not make the declaration sought at that stage. The Master referred to another mesothelioma claim which he had listed for trial following a strike-out application (*Brooks v Zurich Insurance plc & Aviva Insurance (UK) Ltd* [2022] EWHC 1170 (QB)). The issues raised by the insurers in *Brooks* were similar to those raised by the Second Defendant in this case, in that the insurers argued that the claimant could not rely upon the 2010 Act because the cause of action had arisen before the commencement date. Master Davison had identified that the single issue in *Brooks* was whether the claimant suffered actionable damage prior to 1 August 2016. He noted that was a mixed question of law and fact and considered that the stance taken by each side was reasonably arguable so that the matter should proceed to trial. He gave directions for an expedited trial. Master Davison considered that this case should await the decision in *Brooks*. In the event, *Brooks* settled before trial and this case was listed into the trial slot which had been vacated. Shortly before trial, the Court was notified that the claim against the Second Defendant had settled, leaving only the claim against the First Defendant proceeding to trial. It was on that basis that the matter came before me.

Conduct of the trial

20. I explored the Claimant's reasons for continuing with the claim against the First Defendant in light of the settlement with the Second Defendant with Mr Swoboda, without of course straying into privileged matters. I observed that the sum claimed in the Schedule of Loss was not a liquidated claim but rather represented the Claimant's claim for damages to be assessed by the Court. Mr Swoboda acknowledged that it would be rare in any high value personal injury claim for a claimant to recover the full amount claimed in the Schedule of Loss. Far more common is for a settlement to be reached for a lesser sum, as happened with the claim against the Second Defendant. Such a settlement is likely to reflect not only the parties' views on quantum but also any arguments about liability and/or recoverability of damages. The Second Defendant agreed to pay the Claimant £650,000. That was approximately £200,000 less than the sum claimed. The settlement had another significant benefit in that the Second Defendant agreed additonally to indemnify the Claimant against the cost of private medical treatment for his mesothelioma. I am not required to approve the settlement, both parties being of full capacity. I therefore do not know the basis upon which compromise was reached. It does appear though that it was a sensible settlement, viewed from both sides. From the Claimant's perspective, I have little doubt that securing a settlement which would meet his medical costs, provide for end of life care and offer some security for his wife was very attractive. I am unsurprised that he was willing to accept a sum less than that he regarded as the full value of the claim. The settlement against the Second Defendant cannot therefore be regarded as evidence of the true value of the claim at trial.

21. Having compromised the claim against the Second Defendant, the question then arose as to what should happen in relation to the claim against the First Defendant. Had the First Defendant been represented and played a part in settlement negotiations, no doubt its position could have been considered at the same time. As it was, the claim remained listed for trial. Mr Swoboda submitted that the Claimant had acted reasonably at all times in embarking on the course that he did, namely commencing proceedings against both insurers. He contended that this was permitted by the 2010 Act. The proceedings had been brought against the First Defendant with the Court's permission and had been validly served. There was no reason why the Claimant should now abandon the claim against the First Defendant because of the settlement reached with the Second Defendant. Of course, the Claimant is not entitled to double recovery. However, the Claimant proposes that this can be dealt with by providing that he must give credit against the judgment sum for the damages paid by the Second Defendant. The Claimant therefore seeks to recover the shortfall of approximately £200,000 between the sum claimed and the sum the Second Defendant has agreed to pay, together with his costs of proceeding against the First Defendant. This cannot be viewed as an improper course.

22. A "default judgment" means a judgment without trial (CPR 12.1). As the matter had been listed for trial, I approached the case on the basis that I was being asked to give judgment following trial rather than to enter judgment in default. However, in determining how the trial should proceed, I was conscious that had the claim been one for damages only the Claimant could have obtained judgment in default by filing a notice in the prescribed form. Consistent with the overriding objective, I considered that it would not be appropriate to conduct a detailed analysis of the claim. The Court

must focus at trial on the real issues in the case. The Claimant had set out his case against the employer clearly, making allegations which, if substantiated by evidence, would establish breach of duty and causation. He had provided evidence in the form of witness statements and expert evidence to prove his claim. The evidence was uncontroverted. The Claimant's case was compelling. In the absence of any challenge to it, there was no sensible reason to devote additional court time to exploring the liability of the employer. The Claimant had plainly presented sufficient evidence to prove the case he advanced.

23. Although the claim for damages does not represent a liquidated sum, the Claimant had clearly specified the amount claimed by way of his Schedule of Loss. The Claimant did not seek to proceed with the heads of loss which remained unquantified in the Schedule. The claim was set out on a sensible and reasoned basis. It was supported by evidence contained in the witness statements and expert reports. Again, that evidence was uncontroverted and the claim was not subject to any challenge on behalf of the First Defendant. It may well be that, had the First Defendant been represented at trial and had submissions been made on its behalf, damages would have been assessed in a lesser sum than that claimed. However, I did not consider it appropriate to devote significant additional court time to a detailed analysis of quantum. I am likely to have taken a different view had the claim obviously been inflated or unsupported by proper evidence. That was not the case though and where there was no Defence or Counter-Schedule, I considered that it would be appropriate to assess damages as set out in the served Schedule of Loss.

24. Had this been a straightforward claim for damages against an employer who had failed to respond to it, I consider it would have been appropriate to enter judgment in default in the sum sought. The reason that course was not appropriate here was that the Court was required to consider whether the claim had been properly brought against the First Defendant pursuant to the 2010 Act before entering judgment and making the declaration sought. The focus of the trial was therefore upon that issue. As Master Davison identified in *Brooks,* that is a mixed question of law and fact. It is a question that could be determined by submissions on the written evidence placed before me.

The applicability of the 2010 Act

25. The provisions of the 2010 Act do not apply retrospectively (*Redman v Zurich Insurance plc*, (above)). The Act applies only in cases where liability was incurred after 1st August 2016 (the commencement date of the Act). As set out above, that requires consideration of when the cause of action became complete. The essential issue is whether the Claimant sustained actionable damage before the relevant date.

Actionable damage – legal principles

26. The question of what constitutes "actionable damage" has been the subject of much consideration at the highest appellate level. In his skeleton argument, Mr Swoboda helpfully reviewed the relevant House of Lords and Supreme Court decisions: *Cartledge v E Jopling & Sons Ltd* [1963] AC 758; *Pirelli General Cable Works Ltd v Oscar Faber & Partners (A firm)* [1983] 2 AC 1; *Hicks v Chief Constable of South Yorkshire Police* [1992] P.I.Q.R. p433; *Rothwell v Chemical & Insulating Co Ltd* [2008] AC 2981; *Dryden v Johnson Matthey PLC* [2018] UKSC 18.

27. In *Cartledge*, Lord Reid said:

> "It is too late now for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when the injury is unknown and cannot be discovered by the sufferer …"

28. In the same case, Lord Pearce said:

> "It is a question of fact in each case whether a man has suffered material damage by any physical changes in his body. Evidence that those changes are not felt by him and may never be felt tells in favour of the damage coming within the principle of de minimis non curat lex. On the other hand, evidence that on unusual exertion or at the onslaught of disease he may suffer from his hidden impairment tells in favour of the damage being substantial."

He concluded that:

> "The cause of action accrued when it reached a stage, whether then known or unknown, at which a judge could properly give damages for the harm that had been done."

29. The House of Lords rejected the claim for pneumoconiosis as being statute barred pursuant to the Limitation Act 1939. In doing so, Lord Pearce said that when a defendant raised a limitation defence:

> "the initial onus is on the plaintiff to prove that his cause of action accrued within the statutory period. When, however, a plaintiff has proved accrual of damage within the six years (for instance, the diagnosis by X-ray in 1953 of hitherto unsuspected pneumoconiosis) the burden passes to the defendants to show the apparent accrual of a cause of action is misleading and that in reality the causes of action accrued at an earlier date."

In that case, the trial judge had found as a fact that the plaintiff was suffering from pneumoconiosis before the relevant date, therefore the question of onus was not a deciding factor.

30. In *Rothwell*, the House of Lords decided that the presence of pleural plaques in a claimant's lungs, following exposure to asbestos dust, did not amount to actionable damage. It was notable that the plaques caused no symptoms, would never cause symptoms and did not increase susceptibility to other asbestos-related disease or shorten life expectancy. Their detection did though cause anxiety and in one case led to clinical depression. It was said that the risk of future disease is not actionable and neither is a psychiatric illness caused by contemplation of that risk. Lord Hoffman stressed that a claim in tort is incomplete without proof of damage. He said:

> "Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy."

Lord Hoffman said that the test for whether a claimant had suffered damage was whether he was "appreciably worse off."

31. The Supreme Court considered the concept of actionable damage in the context of personal injury in *Dryden*. Lady Black JSC, giving the judgment of the court, reviewed and applied the authorities including *Cartledge* and *Rothwell.* The claimants had developed sensitivity to platinum salts in the course of their employment at chemical plants. That sensitivity having been discovered by screening, they were redeployed or dismissed from their employment and suffered loss of earnings as a result. The Court found that the effect of their sensitisation was that their bodily capacity for work with platinum salts had been impaired such that they were significantly worse off and therefore entitled to compensation, notwithstanding that they had no symptoms.

The evidence in this case

32. The Claimant's evidence is that he had always been fit and healthy. He retired in the tax year 2015/16. In retirement, he has worked as a Stand Steward at Lord's Cricket Ground. During 2020, he was diagnosed with a squamous cell carcinoma of the left axilla. This was successfully treated. He first experienced pain in his chest in January 2021. He underwent a chest X-ray and blood tests in March 2021. Further investigations led ultimately to the diagnosis of mesothelioma in September 2021.

33. The Claimant relied upon expert medical opinion from Dr Andrew Leonard, a consultant physician with particular expertise in lung cancer and mesothelioma. Dr Leonard confirmed the diagnosis and attributed the condition to the Claimant's exposure to asbestos during his employment.

34. Review of the Claimant's medical records demonstrates that the Claimant underwent a CT scan of his thorax in October 2020 as part of the investigations for the unrelated carcinoma of the axilla. This scan revealed pleural plaques characteristic of asbestos exposure. It also revealed a tiny right pleural effusion. At that stage, neither caused concern. By May 2021, the effusion was still "very small" but it had grown appreciably by the time of images taken on 9 July 2021.

35. In a report dated 28 May 2022, Dr Leonard provided evidence as to the carcinogenesis of malignant pleural mesothelioma (MPM) based upon current medical and scientific understanding.

36. Dr Leonard stated that:

    i) Only a small percentage of subjects exposed to asbestos will develop MPM.

    ii) The process of developing symptomatic MPM appears in most cases to take decades after the onset of exposure to asbestos.

iii) Not all cells that reach the point of malignant transformation will go on to develop into MPM. Medical science cannot state the percentage of such cells which will eventually give rise to symptomatic MPM.

iv) There is almost no information available as to how long the process might take in living human subjects.

v) Medical science currently has no way of identifying when the point has arrived at which a transformed cell progresses into a collection of cells with all the characteristics required to become a successful tumour.

vi) Incidental detection of MPM is rare. On the few occasions when this has happened, MPM has been detected at a stage where symptom development was imminent.

37. The Second Defendant had obtained expert medical evidence from Dr John Moore-Gillon, another experienced consultant respiratory physician. Pursuant to Part 35.11, any party to the proceedings may make use of an expert's report at trial. Mr Swoboda did address the contents of Dr Moore-Gillon's evidence in his written submissions. His position was that the medical evidence of both experts supported the Claimant's position that the cause of action was not complete before 1 August 2016. However, Mr Swoboda made it clear at trial that the Claimant did not rely on Dr Moore-Gillon's evidence. Rather, he relied upon Dr Leonard for the necessary expert support for his claim. Ms Adams QC also stressed that Dr Moore-Gillon's evidence had been obtained by the Second Defendant, who was not a party to the trial. Dr Moore-Gillon's evidence had not been adopted by the Claimant or by the First Defendant. It was not open to the Claimant to rely on some parts of Dr Moore-Gillon's evidence without adopting his evidence in its entirety.

38. In my view, Ms Adams QC was right to sound that note of caution. Although, as might be expected, there was much agreement between the experts on the medical issues, there were some differences. In the course of a fully contested trial, those differences might have been explored further. Without hearing from the experts, I consider it would be inappropriate for me to seek to resolve any differences of opinion between them and I am not doing so. However, the final piece of the expert evidence relied upon by the Claimant was the joint statement of Dr Leonard and Dr Moore-Gillon. This completes and neatly encapsulates Dr Leonard's views and so it is appropriate I consider it.

39. From a purely medical perspective, Dr Leonard and Dr Moore-Gillon agreed that they would not regard the Claimant as being "injured" before – at the earliest – a microscopic tumour escaped at least some of the body's immune defences and began to develop into the mesothelioma which eventually became clinically obvious. They also agreed that the Claimant could not be regarded as "uninjured" after – at the latest – he had a pleural effusion, albeit asymptomatic at the time. However, they agreed that the issue of when "actionable damage" had occurred was for legal determination and was not something on which definitive medical advice could be given. Dr Leonard's view was summarised as being:

> "There is only one point of timing we can be absolutely certain of, and that is when the mesothelioma became apparent, either from symptoms or on imaging."

40. Dr Moore-Gillon made a perfectly reasonable observation about that:

> "For clinicians … this has of course always been the critical point. It is only in the medico-legal setting that we (and all other experts in the field) have regularly been asked to look back beyond this point to earlier timings."

This makes obvious sense. The role of the clinician is to diagnose and treat. Until mesothelioma manifests itself either through symptoms or radiological findings, there is nothing to diagnose or to treat.

Factual findings

41. On the evidence before me, the first manifestation of the Claimant's mesothelioma was the "tiny" pleural effusion visible on the CT scan in October 2020. The Claimant was asymptomatic at the time. Symptoms attributable to the mesothelioma did not come on until January 2021 when he noticed chest pain. At the time the pleural effusion was first identified, it was not recognised as signalling the onset of mesothelioma. There is no suggestion that it should have been. It was considered a clinically insignificant finding. It is only with hindsight that this tiny effusion can be recognised for what it was.

Discussion

42. I strongly agree with the view expressed by Lord Reid in *Cartledge* [p772]:

> "It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and, therefore to raise any action."

As he observed:

> "The common law ought never to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided."

However, the decision in *Cartledge* depended on statute, as does this case. Lord Reid said that the mischief in that case could only be prevented by further legislation (and the modern position reflected in the Limitation Act 1980 has achieved that). Likewise, Turner J declined to interpret the 2010 Act in a way that was "tantamount to judicial legislation." The Act and the relevant transitional provisions allow for its application only if liability is incurred after the commencement date. It does not provide for its application where the cause of action is complete before the relevant date but where the Claimant's date of knowledge was later. My approach must therefore follow that in *Cartledge*.

43. In different contexts, the courts have been required to consider the pathogenesis of mesothelioma. Notably, much attention was given to this in "The Employers' Liability Policy Trigger Litigation": *Durham v BAII (Run Off) Ltd* [2010] EWCA Civ 1096;

[2011] 1 All ER 605 and [2012] UKSC 14; [2012] 1 WLR 867. Summarising the findings of Burton J at first instance, Rix LJ (at paragraph 52 of the Court of Appeal judgment) referred to "the unknowability and indescribability of much of the pathogenesis of mesothelioma" as being common ground. It is important to note that in the Trigger Litigation and in other litigation in which the science was considered in detail the point at which actionable damage was sustained by a Claimant was not the issue being determined. The Trigger Litigation required the interpretation of clauses in insurance policies. The Supreme Court construed the policies so as to give effect to the purpose of the Employers' Liability (Compulsory Insurance) Act 1969 and the underlying purpose of the insurance policies. They concluded that a disease could be said to have been "sustained" or "contracted" when it was caused or initiated, even though it only developed or manifested itself subsequently. In this context, it is entirely logical to look backwards and consider when the process which ultimately led to the employees developing mesothelioma began. That is something that can be done with the benefit of hindsight once the mesothelioma is diagnosed and by reference to the occupational history.

44. It is not logical to apply the same principles to determining when a claimant's cause of action accrued. Without the benefit of hindsight it cannot be said that the claimant has suffered injury or disease until the mesothelioma has developed. The fact that changes may be going on in the body and that such changes may eventually result in mesothelioma does not allow a claimant to look forwards and identify any damage for which he could bring a claim for compensation. It is only when the mesothelioma manifests itself by radiological changes and/or symptoms that actionable damage occurs. Until then, the claimant is not appreciably worse off either physically or economically. Lord Mance JSC said in the Trigger Litigation [at 65]:

> "The actual development of mesothelioma is an essential element of the cause of action."

Lord Clarke JSC stressed the point further [at 76]:

> "An employer who, in breach of duty, has exposed an employee to asbestos is liable in damages if the employee subsequently suffers the disease. The employee's cause of action is not that he was exposed to the risk of mesothelioma. He has no claim unless he in fact suffers the disease. It is the disease which represents the damage which completes the cause of action and it is only then that his cause of action accrues and the relevant time limit begins to run."

45. In *Cartledge* the plaintiffs had pneumoconiosis before they discovered it. The damage had already been done. The lungs were scarred. The trial judge found on the medical evidence that the ordinary man while young had a "substantial surplus of lung capacity upon which he need never call save in the exceptional case of severe illness or extraordinary exertion." However, the damage had been done and would not deteriorate further in the absence of further exposure, nor would treatment repair it. In *Dryden* the claimants had developed platinum salt sensitivity. That sensitivity caused them to sustain financial loss in the form of loss of earnings. That was the compensatable damage which gave rise to a cause of action. Both those situations are different to that of a claimant who has been exposed to asbestos and who may have

undergone some undetectable cellular changes but who has not yet developed mesothelioma.

46. The Claimant argues that he did not sustain actionable damage until January 2021. His case is that it can only be said that he suffered compensatable injury when the onset of symptoms occurred. Plainly, he did not know and could not know before then that he had mesothelioma or that it had become inevitable that he would go on to suffer from it.

47. For my part, I consider it arguable that the tiny effusion visible on the scan in October 2020 represented actionable damage, albeit that was unknown to the Claimant at the time. In light of the subsequent diagnosis, it now appears that this tiny effusion was an early manifestation of the disease. Following *Cartledge*, the fact that the condition was asymptomatic and not clinically suspected does not necessarily mean that there was no actionable harm by that stage. On the other hand, the question of when the condition "reached a stage, whether then known or unknown, at which a judge could properly give damages for the harm that had been done" (per Lord Pearce in *Cartledge*) is more difficult. Suppose the Claimant had succumbed to his unrelated cancer (or indeed had met with an accidental death) and the tiny effusion had been discovered on post-mortem examination and identified as mesothelioma, would a cause of action have accrued entitling the Claimant's estate to proceed with a claim for damages? It seems to me that it would be very difficult to assert that the Claimant had suffered anything for which damages could properly be given.

48. Had it been necessary to determine whether the cause of action accrued at the time the pleural effusion became manifest or rather at the time symptoms developed, I consider that the decision would be a difficult and finely balanced one. I note that the joint statement of the experts suggests that it is difficult to maintain from the medical viewpoint that the Claimant was "uninjured" once he had the pleural effusion. On the evidence before me, I would probably have favoured the point at which the pleural effusion could be detected as representing the point in time at which it could be said as a matter of fact that the Claimant had suffered material damage such as to complete the cause of action. However, it is not necessary for me to decide between this point and the onset of symptoms some three months later. On either basis, I am satisfied that there was no actionable damage until long after the commencement date of the 2010 Act. That is all that is necessary for me to decide the issues arising in this case.

49. In coming to the conclusion that I do, I also have in mind what Lord Pearce said in *Cartledge* about the onus of proof. The Claimant has, in my judgment, discharged the burden of proving accrual of damage around the end of 2020 or early 2021 through the radiological changes and onset of symptoms. The evidence before me identifies no other earlier point in time which should be preferred as representing the onset of damage. I have regard to the expert evidence of Dr Leonard and his view that the only point in time it is possible to be certain of is that when the mesothelioma became apparent, either from symptoms or on imaging. The First Defendant having not participated, no contrary case has been advanced at trial to show that the apparent accrual of the cause of action in 2020/21 is misleading and that in reality the cause of action accrued earlier.

Conclusions

50. I am satisfied on the basis of the evidence before me and the submissions I heard that the Claimant's cause of action in relation to his mesothelioma accrued after the commencement date of the 2010 Act. It follows that the Claimant is entitled to rely upon the Act to bring proceedings against the insurer directly without having first established the liability of the employer.

51. The Claimant obtained the permission of the Court to proceed against the First Defendant, being a company in liquidation. The proceedings were validly served on the First Defendant. I am satisfied that the proper procedural steps have been taken to allow the matter to proceed to trial.

52. On the basis of the evidence presented to me, the Claimant has established that his employer Jas. C. Flaxman & Sons Ltd is liable to him for the mesothelioma which he contracted as a result of exposure to asbestos dust and fibres in the course of his employment.

53. The evidence presented by the Claimant substantiates his claim for damages as set out in the served Schedule of Loss. In the absence of any defence, Counter-Schedule of representations from the First Defendant, I conclude that the Claimant is entitled to damages in the sum claimed (£854,076.23), subject to the appropriate deductions for recoverable benefits.

54. In light of those conclusions, I will make a declaration of the employer's liability and will enter judgment for the Claimant against the First Defendant in the sum claimed.

55. It will then be up to the Claimant to seek to enforce the judgment. The Claimant must plainly give credit for compensation received from the Second Defendant to avoid double recovery. I note that the judgment sum does not include any claim for future medical costs which are to be covered by an indemnity from the Second Defendant and as such fall outside the damages awarded against the First Defendant. The position of the FSCS in relation to the judgment is not a matter for consideration at this stage.