IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2019] EWHC 1108 (QB)

No. QB/2018/0265

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 20 March 2019

Before:

MR JUSTICE TURNER

B E T W E E N :

ANDREW GEOFFREY HELM	Claimant / Respondent
- and -	
(1) WILLIAM KENYON & SONS LIMITED	Defendant
(2) SOMEWATCH LIMITED	Defendant / Appellant

MR J. SWOBODA (instructed by Pattinson Brewer) appeared on behalf of the Claimant/Respondent.

MS J. ADAMS QC (instructed by Horwich Farrelly) appeared on behalf of the Second Defendant/Appellant.

J U D G M E N T

(Please note this transcript has been prepared without the aid of documentation)

MR JUSTICE TURNER:

1 This is an appeal against the decision of Master Davison within the context of the mesothelioma claims procedure laid down in Practice Direction 3D.

2 The sad background to this case is that the original claimant, now deceased (to whom I shall continue to refer to as 'the claimant' for convenience of reference) was employed in a series of employments at least some of which had the potential to expose him to asbestos. As is well-known, one of the potential consequences of such exposure is the development, usually many, many years later, of the malignant condition of mesothelioma. Tragically, the claimant contracted mesothelioma almost certainly as a result of exposure to asbestos during one or more of his employments and has since the decision of the Master last September died.

3 The procedure under PD 3D is intended to identify at a very early stage mesothelioma claims, and in the light of the relatively and tragically short life expectancy predicted in those claims, is aimed toward dispatching those cases in which there are no reasonable prospects of maintaining a defence at an early stage in order to avoid the time and increased costs of applications made under CPR Part 24 or otherwise. In this case, therefore, following upon the diagnosis, the claimant, as laid down within the procedure, found his case brought before Master Davison, who is one of the allocated Asbestos Masters, for that procedure to be followed.

4 An integral feature of Practice Direction 3D is the "show cause" part. The show cause is aimed at identifying promptly those defences that have no real prospect of success. In formal terms, the obligation remains on the claimant through the presentation of credible evidence to establish a prima facie case following which an evidential burden then shifts to the defendant to demonstrate, notwithstanding, that there are reasonable prospects of success. In that context, 'reasonable' means more than merely fanciful.

5 The matter came before the Master and in addition to the appellant in this case, there was another defendant against whom proceedings had been brought: the first defendant, William Kenyon & Sons Limited. Accordingly, the task of the Master was to identify whether either, both, or neither had failed to establish reasonable prospects of success and I do not take it to be disputed that the claimant had provided sufficient evidence to place the burden on the defendant, at least on an evidential basis, to persuade the court that it was not appropriate for judgment to be given in accordance with the Practice Direction.

6 The matter proceeded by way of a telephone hearing which is the usual way of dealing with these matters following which the Master concluded that neither the first nor the second defendant had established such reasonable prospects of success. The first defendant has not sought to challenge the finding against it. That, on my reading of the documents in the bundle before me, is not entirely surprising. The claim in relation to the first defendant was more substantial as a matter of degree than that of the second defendant. It may be thought slightly surprising that the first defendant has not chosen to attend on this appeal because, of course, if the second were successful, there would be ramifications in terms of responsibility for the financial outlay that the first defendant's insurers would have to meet. Be that as it

may, opposition to the appeal is centred on the claimant. Both sides have provided me with helpful skeleton arguments which I have read and I have also read all of the documents in the bundle before me.

7 Over the course of time, quite appropriately, the appeal grounds have consolidated and become more focused on particular aspects of the Master's judgment. The Master, having set out the background and having explained why he felt that the first defendant had not established a real prospect of success, went, during the course of his judgment at paragraphs 10 to 13 inclusive, to identify the basis upon which he concluded that the second defendant too had failed to discharge that evidential burden.

8 The first criticism that is made of the Master's analysis is one that arises out of paragraph 6 of his judgment. In that, he says as follows:

> "If, as he alleges, the claimant was working with asbestos, then there could not be any real question that liability in respect of both of these defendants would follow and there would be three routes to that: first, the familiar provisions of section 63 of the Factories Act; second, the 1931 and the 1969 Asbestos Regulations; and third, the common law, this being exposure after 1965 which, in terms of developing knowledge, is a watershed."

9 The appellant argues that that is a mischaracterisation of the basis upon which liability is to be established in relation to working with asbestos and I accept, if that paragraph were treated as if it were a statute, that submission would be right. I have to bear in mind, however, that this was an experienced Asbestos Master and this was an *ex tempore* judgment. One has to be somewhat more forgiving in terms of how judges express themselves in themselves in those circumstances than when judgments have been reserved and more time and care can be spent phrasing the appropriate tests so as to be precisely correct. I have to say, however, on balance it is unfortunate that it was expressed in that way and I have to exercise some care in relation to my analysis of the other points against the background of what, on the face of it, might be interpreted as an overly burdensome application of strict liability. It is not, however, necessary for me to resolve that because there are other points that are raised on behalf of the appellant which are identified as points of concern.

10 One such point is the finding made by the Master, and I quote from paragraph 10 of his judgment:

> "I mention immediately that the evidence is that respirators were not introduced until 1976."

This is a finding which is based upon, at least in part, statements provided by the claimant himself. There are two relevant statements. One of some considerable antiquity, which was identified as one that the claimant had drafted in support of a claim brought by a former work colleague. During the course of that statement, the claimant said the following:

> "Before I went abroad in 1972, I do not remember any precautions being taken at all. We were not provided with masks or washing facilities."

The period prior to 1972, it is now uncontroversial, was one during the course of which the claimant was not working for the appellant in this case. So the allegation in that context of a failure to provide masks or washing facilities is not one of direct relevance to the case against the appellant. He goes on to say:

> "After 1973, Cape supplied us with overalls. We had to go to collect them. The overalls were supplied for the stripping work. They were blue, with hoods and grips. We were also given gloves and masks. Before this time, we sometimes bought overalls from the Shell workers at the refinery."

11 From that, it may have been inferred that the gloves and masks were provided at the same time as the overalls which would have coincided with the period in 1973 when his employers were the appellants. He goes on, however, to say the following:

> "I remember having a mask with a canister in front which unscrewed so that the filter could be changed. It had a glass visor to see through. I know that I had a mask at the time of the ladybirds, 1976, but I do not recall when we were first supplied with them. The masks were made by the MSA Mining Services. I also remember masks made with aluminium with cotton wool padding in front. They were held on with elastic. I do not remember when we were first supplied with them. The masks were made by MSA Mining Services. I also remember masks made of aluminium with cotton wool padding in front. They were held on with elastic. I do not know when we had these masks."

12 This is not the easiest text to decipher but at least one can be relatively confident that what the claimant was intending to convey was that there was a particular incident in the hot summer of 1976 which resulted in a memorable invasion of ladybirds and he was able to say with confidence that, by that time, he was wearing a mask. However, it is also relatively clear from what he said that he was unable to say at what stage before the invasion of the ladybirds those masks were first issued. It is ambiguous.

13 He made a further witness statement for the purposes of his own tragic claim latterly and even in the context of that claim, there was a level of ambiguity in terms of his identification of the time that the masks were issued. The upshot of that therefore is that at least it would be arguable on the part of the defendant that their own documentary records might be taken in these circumstances as a more helpful guide to the court as to the sequence of events in terms of providing respiratory protective equipment than the claimant's own memory bearing in mind what he had said in 2000 in his first statement, and also, in any event, the passage of time since he was actually doing the job to which both statements refer.

14 The evidence in relation to one particular potential source of asbestos is that concerning Caposite. Caposite, it is evident from the documents in the case, was not plainly established to be in use during the time that the claimant was working for the appellant in this case. The statement of October 2017, the second statement of the claimant, refers to Caposite but it is not, from the timing, evident from that that he is saying that he was working with Caposite from 1973 onwards when it was the responsibility of the appellant employers. Unfortunately, it does appear that the Master had assumed from the evidence that it had been established really beyond peradventure that the claimant was working with Caposite after he had started his employment with appellant. The way in which he deals with it is at paragraph 12, initially, of his judgment:

> "There is clear evidence that the claimant was using Caposite in substantial quantities. He said so in paragraph 67 and following. Caposite was a Cape product, that was common knowledge, and indeed Mr Kenyon for the first defendant says as much."

15 That, of course, was a matter that he was fully entitled to take into account in relation to the first defendant. However, his discussion of the role of Caposite is firmly embedded within those paragraphs directed towards the potential liability of the second defendant. By the time the Master had concluded his deliberations against the first defendant and decided that they had failed to established a real prospect of success, his judgment after that was directed and focused entirely upon the role of the second defendant and the difficulty with that is that the Caposite reference was not actually relevant although he appeared to have assumed from the evidence that it was. At paragraph 13, he said:

> "The claimant, as I said, refers to it by name and he describes shaping and cutting it, an operation which, like removing old lagging, would liberate large quantities of dust and fibres in breach of the statutory provisions I have referred to. Not only does the claimant refer to using Caposite (and that evidence is uncontradicted), the second defendant's own evidence demonstrates or confirms that he worked with asbestos for many hours in 1974, 1975, 1976, and 1977. I do not agree that the exposures which are described in the second defendant's own documents can possibly be described as 'low level' which was Mr Head's expression. So, for those reasons, I find that there is, as with the first defendant, no real prospect of the second defendant successfully defending the claim and in respect of the second defendant also, I will enter judgment at this stage."

16 It is not in issue that there are three tests which fall to be applied with respect to the assessment of the vulnerability of a potential defendant to liability in these sorts of cases. It has to be established that the claimant proved that he was exposed to asbestos during the course of his relevant employment, that he had established a breach of duty, and that the exposure, if there was any, materially increased the risk of him contracting mesothelioma.

17 I appreciate that the rate at which the procedure under Practice Direction 3D identifies defendants who have no real prospects of success is in the region of 95 percent. That, however, still leaves 1 in 20 in which the defendant has at least established a sufficiently strongly arguable case to escape the net. It is tempting, in cases in which there is only one defendant and only one potential employment when the claimant is exposed to asbestos, to work backwards from the established fact that mesothelioma, by and large, is overwhelmingly (not exclusively) caused by exposure to asbestos. So if there is only one defendant, then it equips the judge to say with relative confidence, all other things being equal, that there was exposure and that it is very likely, in those circumstances, that the claimant will establish liability.

18 In this case, however, there was exposure which the Master uncontroversially laid at the door of the first defendant which, in itself, was sufficient to provide an explanation, at least arguably, for the contracting by the claimant of the condition of mesothelioma. So this is not one of those cases in which working backwards a judge could be confident from the fact that mesothelioma was contracted that there was exposure during the course of the employment of both defendants.

19 Stepping back from the detail of the case, and I acknowledge that many more arguments have been articulated on both sides than I have dealt with in this *ex tempore* judgment, I am satisfied that although the matter is certainly not one in which I could say with confidence that appellant would win, that is not the test. The test is whether or not it was discharged the evidential burden simply of identifying a real prospect of success and that is not the highest of thresholds. I appreciate there are also arguments as to what arguments were actually articulated in front of the Master, and to which documents he was specifically directed, and

it is somewhat difficult at the appellate stage to identify with any helpful certainty what may or may not have been argued precisely before the Master.

20 Nevertheless, I am satisfied that the Master's evident mistake in relation to Caposite, which he thought was incontrovertibly an exposure which occurred during the time that the claimant was employed by the second defendant, is sufficient to justify this court in looking again at the exercise of his judgment. This is not a discretion case. It is judgment case and bearing in mind the points that I have considered to be most relevant to the exercise of that judgment, I have come by way of review, not by way of re-hearing, to the conclusion that Master was, indeed, wrong to elevate the status of the claimant's case such as to effectively deprive the appellant of any real prospect. Accordingly, and for those reasons, this appeal is allowed.

CERTIFICATE

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