SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 19
PD2803/15

Lord Justice Clerk
Lord Malcolm
Lady Wise

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal

by

NICOLA STEVEN WATT OR MURRAY and OTHERS

Pursuers

against

LEND LEASE CONSTRUCTION LTD

Defenders

Pursuers: Brodie KC, Shields Sol Adv; Thomsons
Defenders: Ellis KC, MacGregor; Clyde and Co. (Scotland) LLP

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21 April 2023

Introduction

[1] The late James Watt was born on 18 January 1941 and died of mesothelioma on 14 January 2017. In this action his surviving relatives assert that his mesothelioma was caused by negligent exposure to asbestos by the defenders during his period of employment with them and by their breach of statutory duty. In this regard, although other regulations,

or statutory provisions, were referred to in the pleadings and in the expert report relied on for the pursuers, ultimately reliance was placed only on regulation 20 of the Construction (General Provisions) Regulations 1961. This provided that:

> "where in connection with any grinding, cleaning, spraying or manipulation of any material there is given off any dust or fume of such a character and to such an extent as to be likely to be injurious to the health of persons employed all reasonably practical measures shall be taken either by securing adequate ventilation or by the provision or use of suitable respirators or otherwise to prevent the inhalation of such dust or fume."

[2] The deceased was employed by the defenders, then known as Bovis Construction Limited, as a joiner between January and June 1963. He had previously been exposed to asbestos during his employment with James Watt & Son between 1957 and 1960. In his employment with the defenders he was exposed to asbestos during a three to four day period between January and June 1963, as noted below.

[3] It was a matter of agreement that the deceased developed pleural plaque disease as a result of occupational exposure to asbestos, and that he developed, and died of, mesothelioma. Quantum was also agreed. The central focus of the proof was on whether the pursuers had proved that it was or ought to have been reasonably foreseeable to the defenders at the time that the level of exposure gave rise to the risk of asbestos-related injury. Preferring the expert evidence led on behalf of the defenders, the Lord Ordinary held ([2022] CSOH 23) that in 1963 Mr Watt's employers could not be expected to have appreciated that the low level of exposure during those few days involved a risk of asbestos-related injury, thus the pursuers' action failed. They now reclaim (appeal) against that decision.

Factual background

[4] A statement from Mr Watt was provided to the court. In that he narrated that he had one job during his employment with the defenders where he came into contact with asbestos, when he was responsible for fitting asbestos ceiling tiles in a car park. This involved cutting 15-20 white sheets of asbestos into tiles. Each sheet required 3 cuts with a handsaw. Thereafter he had to plane the edges to create a bevel. Each of these activities was performed outside, and produced a lot of dust. Thereafter the tiles had to be drilled into position on the ceiling of the car park, producing more dust. This work was carried out over a three to four day period.

Decision of the Lord Ordinary

[5] The Lord Ordinary heard evidence from two expert witnesses, namely Mr Robin Howie, an occupational hygienist led for the pursuers and Professor Roger Willey, an occupational safety and health consultant specialising in asbestos who was led by the defenders. Both witnesses gave evidence of their assessment of the deceased's cumulative exposure to asbestos. In cross-examination, on the basis of Mr Watt's witness statement, Mr Howie had accepted that the exposure was not heavy and was of short duration. Professor Willey's description of the exposure as secondary, intermittent and low level was not challenged in cross-examination. The Lord Ordinary did not consider those statements to be inconsistent and accepted the categorisation given by Professor Willey, bearing in mind that the exposure was over a short period of only three or four days. He concluded:

> "On any view the level of exposure to asbestos to which Mr Watt was subjected as described by him in his statement was low level exposure over a very short period".

[6] In terms of the authorities relating to foreseeability, the Lord Ordinary considered that the key authorities relied upon by the pursuers (*Shell Tankers* v *Jeromson* [2001] EWCA Civ 101; *Maguire* v *Harland & Wolff plc* [2005] EWCA Civ 01; *Bussey* v *00654701 Ltd* [2018] EWCA Civ 243) all dealt with the question of foreseeability of injury and turned on their own facts. The foreseeable risk need not be that of mesothelioma. In *Abraham* v *G Ireson & Son (Properties) Ltd and another* [2009] EWHC 1958 (QB), where the level of exposure had been modest and infrequent, Swift J concluded, on the evidence before her as to the state of knowledge at the relevant time, that the defenders could not have been aware that exposure at the levels concerned gave rise to a risk of injury. Having reached that conclusion of fact, she determined that the employers failure to take precautions against such a risk could not be said to be negligent; and that, on the same basis of fact, they cannot have been aware that the dust was "likely to be injurious" to the claimant in terms of the regulations. The Lord Ordinary, noting that the exposure of the deceased was no more than that which had occurred in *Abraham*, considered that a similar consequence arose from his own conclusions of fact as to (a) the low level of exposure; and (b) the date of knowledge as to the risk of injury from such low level exposure.

Submissions for the pursuers

[7] The pursuers lodged numerous grounds of appeal which included arguments, advanced in the written Note of Argument, that the Lord Ordinary had erred (i) in his interpretation of the three Court of Appeal cases, *Jeromson*, *Maguire,* and *Bussey;* and (ii) in his assessment of the evidence of the expert witnesses. Both the grounds of appeal and the written submissions appeared to suggest that the Lord Ordinary should in effect have considered the factual findings in these cases as somehow applying to the circumstances of

this case. The court drew parties' attention to the case of YC v *Secretary of State for the Home Department* 2019 SC 285. In the result the oral submissions of senior counsel for the pursuer (who had not been responsible for the written documents) came to focus on an argument that the Lord Ordinary had erred in law in relation to his treatment of *Abraham*.

[8] It was submitted that the Lord Ordinary had simply adopted both the evidence and the reasoning in Abraham. The former offends against the observations made in para 15 of *YC.* Further, he erred in equating the deceased's exposure with that in *Abraham* having regard to the presence of visible dust in Mr Watt's working environment. In any event, the judge in *Abraham* fell into error as to a matter of fact in treating evidence regarding maximum permissible concentrations referred to in a 1960 Safety, Health and Welfare Booklet as supporting a conclusion that there was no risk. In adopting *Abraham* the Lord Ordinary had adopted the same error.

[9] These being errors of law, the matter was at large for this court. Submissions were advanced in support of the proposition that the court should assess the evidence in a way favourable to the pursuers. It was accepted that if the common law case fails, the same will follow for the statutory case in that it raises no separate issue.

Submissions for the defenders

[10] The Lord Ordinary had not adopted the findings in fact in *Abraham.* It was clear that he had made his own findings on the basis of the evidence led before him. Having made those findings he was correct to say that the reasoning which led Swift J to dismiss the claim in *Abraham* applied equally to the circumstances of the present case. The Lord Ordinary had applied the correct test as to foreseeability as expressed by Hale LJ (as she then was) at para 35 of *Jeromson*, and adopted in numerous cases since, namely:

> "whether the degree of exposure in this case was such that a reasonable employer should have identified a risk".

It is clear from *Jeromson* and subsequent cases that identifying the level of exposure and the known risk arising therefrom were component parts of the test. The Lord Ordinary was on the evidence entitled to reach the conclusions he did in respect of knowledge and exposure.

Analysis and decision

[11] It is mildly ironic that the grounds of appeal and note of argument for the pursuers having appeared to offend against the principles in relation to proof as referred to in *YC*, the eventual submission should suggest that the Lord Ordinary, in his approach to *Abraham* had erroneously relied for his own findings on findings in fact made in that case. It is the more so given that during the submissions of senior counsel for the pursuers at the proof, the Lord Ordinary interrupted counsel's detailed examination of the factual basis of other cases to suggest that little could be gained from such an examination since those cases were determined according to the evidence led therein, and that in the present case his task was to decide the case on the basis of the evidence led before him.

[12] We are satisfied that the Lord Ordinary did not fall into the errors attributed to him. At paras 8-14 of his opinion he summarised in some detail the evidence given by the expert witnesses. At para 15 he correctly notes that

> "In order to succeed the pursuers require to prove that it was or ought to have been reasonably foreseeable to the defenders at the material time that the exposure to asbestos to which Mr Watt was subjected gave rise to the risk of asbestos-related injury."

He then proceeds to make his factual determination as to the level of exposure to which the deceased had been subjected, namely that it was secondary, intermittent and low level. It is clear that he based this on the unchallenged evidence led before him from Prof Willey and

not to any extent on consideration of the evidence led in *Abraham*. He did not in any way adopt the factual determinations in *Abraham*, and referred to them only to set out the factual basis which led Swift J to her conclusions on negligence and breach of statutory duty. He was right to endorse an approach that required him to assess the evidence relating to the degree of exposure and the knowledge of any risks arising therefrom at the time of the exposure. It was accepted that the Lord Ordinary had been entitled to make the finding that he did in relation to the nature of the deceased's exposure. It is difficult to square that concession with the argument that he erred in equiparating the exposure with that which obtained in *Abraham*, but in any event he did no such thing. He clearly made the assessment on the basis of the evidence led.

[13] The same applies to the Lord Ordinary's ultimate conclusion on knowledge, expressed in para 21, which is prefaced by the words "Having considered the evidence of Mr Howie and Professor Willey...". The Lord Ordinary concluded that "it was not until after the publication of the Newhouse and Thomson paper in 1965 at the earliest that employers could have been aware that asbestos exposure at the level to which Mr Watt was subjected gave rise to the risk of injury". He plainly decided the case according to the evidence before him, and in particular by reference to his preference for that of Professor Willey on the key issues. We see no proper basis to fault his decision in this regard. Whether Swift J made any error of fact in *Abraham* is beside the point: the Lord Ordinary not having fallen into the trap of adopting the factual basis of that case cannot be said to have adopted any error in this case.

[14] For these reasons the argument that the Lord Ordinary erred in law, and that the case is at large for this court, must fail. The reclaiming motion will be refused.