Percy Leonard McDonald v (1) Department for Communities and Local Government; and (2) National Grid Electricity Transmission PLC [2013] EWCA Civ 1346

Matthew White of St John's Chambers has recently succeeded in the Court of Appeal in a battle over exposure to a modest amount of asbestos in the 1950s.

The Claimant (C) was employed by the predecessor in title of the First Defendant (D1) (the Department of Communities and Local Government, represented by Matthew White) between 1954 and 1959. In the course of that employment he was required to drive into Battersea Power station (occupied by the predecessor of the Second Defendant (D2)). Whilst there, he was exposed to asbestos. He visited about once per month for 4 years. Whilst he described exposure to "clouds" of asbestos dust, the trial judge (HHJ Denyer QC, sitting as a judge of the High Court) was not prepared to accept that C was exposed to sufficient asbestos to have posed a foreseeable risk of harm judged by the standards of the day.

On appeal C contended that:-

(1) The judge ought to have accepted that he was exposed to lots of asbestos, particularly because he had not been well enough to attend trial to be cross-examined and the defendants had had (but not taken) the opportunity to take evidence from his bedside.

(2) D2 (the occupier) was in breach of duty to him under Factories Act 1937 s.47.

(3) D2 (the occupier) owed him effectively strict liability under the Asbestos Industry Regulations 1931.

(4) D1 (the employer) owed a non-delegable duty of care and was liable for the breaches of duty of D2.

The Court of Appeal found no fault in the approach of the judge to the question of exposure. The judge was entitled to consider C's evidence critically even though he had not been cross-examined.

As for the Factories Act s.47 claim (a requirement to take all practicable measures to protect persons employed from substantial quantities of dust), the Court of Appeal held that C was not a "person employed" within the meaning of the section. Nor could C show on the evidence that he was exposed to substantial quantities of dust.

In a decision that will quite possibly be appealed to the Supreme Court, the Court of Appeal held themselves bound by Cherry Tree Machine Co & Another v. Dawson [2001] PIQR P19 to find that the Asbestos Industry Regulations 1931

applied even though the purpose of D2's premises was not connected with the asbestos industry (although some of the comments in the decision suggest that they had doubts as to that). The Court of Appeal also agreed with the decision in Cherry Tree that the duty (which was not to mix asbestos except with an exhaust draft "to ensure as far as practicable the suppression of dust during the processes") was an absolute one.

This remains an interesting point. C drew analogy with Baker v. Quantum Group & Others [2011] UKSC 17 in which it was held that the requirement to provide a "safe" place of work under s.29 of the Factories Act 1961 was not an unchanging concept and that "safety" had to be judged by the standards of the time. Consider too Richards v. Highways Ironfounders [1955]1 WLR 1049 (quoting the headnote):- "*the question of whether the defendants had taken all "practicable measures" to protect persons employed against inhalation of dust must be judged in the light of the state of the relevant knowledge at the date of the alleged breach...*"

D2 contended that what was "practicable" (within the Asbestos Industry Regulations duty) had to be judged by standards of the time as in Baker and Richards. The Court rejected that, agreeing with the conclusion in Cherry Tree:- "*The regulation in this case is quite clear: the obligation to provide an exhaust is absolute unless it is not practicable to do so. There is no question of reasonable practicability. In any event, the known danger was dust and the required precaution was both known and practicable...*"

The result is that a 1931 statute that was surely not intended to impose strict liability for exposure to quantities of asbestos that were thought (wrongly) at the time to be harmless in fact produces that result.

The preamble to the Regulations says that they do not apply where asbestos processes are carried on "*occasionally only and no person is employed therein for more than 8 hours in any week*". The trial judge found against C on the basis that C could not prove that that exemption from the application of the Regulations did not apply. An unsurprising part of the Court of Appeal's decision is determination that the burden of proving that the exemption applies rests upon the defendant; the judge had fallen into error in that respect.

As for C's claim that D1 was liable pursuant to a non-delegable duty as employer, the Court of Appeal accepted that D1 could only be liable in respect of a duty that it owed (and could not delegate) itself. Since D1 did not owe the duty under the Asbestos Industry Regulations, D1 could not be liable for D2's breach of that duty.

On the basis of those findings the employer (represented by Matthew White) successfully resisted the claim and appeal. The Claimant (represented by David Allan QC & Simon Kilvington) was successful in its appeal against the occupier (represented by Dominic Nolan QC).

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