Neutral Citation Number: [2021] EWHC 751 (QB)

Case No: QB-2019-003841

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2021

Before :

DAVID PITTAWAY QC
(Sitting as a Deputy Judge of the High Court)

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Between :

EDWARD GEORGE BALLS	**Claimant**
- and -	
SUSAN MARGARET REEVE & BRYAN JAMES THURLOW (As Personal Representatives of the Estate of Sydney Theodore Thurlow Deceased)	**Defendants**

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- -

Max Archer (instructed by **Irwin Mitchell**) for the **Claimant**
Kam Jaspal (instructed by **BLM**) for the **Defendants**

Hearing dates: 9, 10 March 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

DAVID PITTAWAY QC

Covid-19 Protocol: This judgment has been handed down remotely by circulation to the parties' representatives by way of e-mail, release to Bailii and publication on the Courts and Tribunals website. The date will be deemed to be Friday, 26 March 2021.

David Pittaway QC:

Introduction

1. Mr Edward Balls brings a claim for damages against the personal representatives of Mr Sidney Thurlow deceased arising out his employment in Mr Thurlow's construction business ("ST Thurlow") between 1954 and 1983. Mr Balls was employed as a carpenter. During the course of his employment, it is alleged that he worked regularly with asbestos, particularly during the construction of houses, bungalows and farm buildings in Suffolk. Mr Balls, who was born on 11 February 1939, and is now aged 81 years, contracted asbestosis as a result of which he has suffered significant disability. Mr Thurlow died on 23 November 2015. By an order of 25 June 2020, his son and daughter were substituted as his personal representatives and the Defendants in the action. The claim relates specifically to the period between 1979 and 1984 for which insurance cover for ST Thurlow has been identified. There is also a claim for provisional damages.

2. The claim was issued on 28 October 2019. The Defendants maintain that it was issued outside the limitation period and is statute barred. If I find that the claim is statute-barred, I am asked Mr Balls to exercise my discretion under section 33 of the Limitation Act 1980 to allow the claim to proceed. The Defendants submit that Mr Balls was aware that he was suffering from a respiratory condition as far back as the 1990s and in any event by the 2000s. They rely on Mr Balls' own oral evidence, particularly his recollection that he had spoken to Mr Thurlow at the wake after his eldest son's funeral in 2004 when he may well have said that he was suffering from breathing problems, and the evidence of Mr Thurlow's son, daughter and son-in-law, who all recollect Mr Thurlow saying to them at an unidentified time that Mr Balls was suffering from asbestos or asbestosis.

3. The main focus of the trial was the issue of limitation, although both breach of duty and causation remained in issue. I have set out the pleaded position below from which it can be seen that the Defendants alleged that the claim is statute-barred, and no admissions were made as to the other aspects of the claim. Subject to the limitation issue, Mr Jaspal conceded in his closing submissions that, if I was to find that Mr Balls had been exposed to asbestos in the course of his employment with ST Thurlow between 1979 and 1984, then breach of duty would follow, however, causation remained in issue. Mr Archer and Mr Jaspal have also agreed that, if I find for Mr Balls on limitation, breach of duty and causation, the issues of apportionment and damages are capable of being agreed between the parties. In those circumstances, I would not be required to make any findings on those issues.

Pleadings

4. Paragraph 2 of the Particulars of Claim states:

> "The Claimant was employed as a carpenter carrying out building and renovation work all over Bury St Edmunds and the surrounding area. The Claimant carried out many jobs where he was exposed extensively to asbestos. The Claimant pulled down old barns on the Euston Estate which had corrugated asbestos roofs by using a hammer to smash up the asbestos sheets. He

> then picked up the pieces of broken asbestos with his hands to dispose of them. When the Claimant repaired barns on the estate, the Claimant removed the broken pieces of asbestos with his hammer and replaced them with new sheets of corrugated asbestos. The new sheets had to be cut to size with a hand saw which generated asbestos dust and then drilled into place with a hand drill, which created further asbestos dust. The Claimant built many homes and garages around Bury St Edmunds, for which he was required to repeatedly cut, drill and handle asbestos. The Claimant used large 8 x 4ft sheets of hard flat asbestos to make soffits for the buildings. This required him to cut through the sheets with a hand saw so that they fitted together. He then used a hand drill to secure them into place. The Claimant cut the hard, flat asbestos sheets to use for the internal walls of the garages and for boxing in pipework. Repeatedly cutting and drilling the asbestos throughout these constructions generated large amounts of asbestos dust which was impossible for the Claimant to avoid. The Claimant also worked on a commercial job, fixing asbestos corrugated sheets on the roof of Glasswell's factory. This job took him 2 weeks to complete. He also constructed a large cow shed which took him 3 months to complete. Both of these jobs involved cutting and drilling corrugated asbestos every day, tasks which generated large amounts of asbestos dust that was impossible to avoid. At the end of every day of work, the Claimant cleaned up the area. This involved brushing away the asbestos dust that had accumulated on the floor. This agitated the dust and caused it to become airborne. The Claimant was not warned of the dangers of asbestos and was not provided with any masks or protection."

5. Paragraphs and 4 and 5 of the Particulars of Claim alleges that:

> "The Defendants during the period set out in paragraphs above knew or ought to have known that: a) inhalation of dust or fibre including asbestos might be dangerous; and b) the Claimant could and should have been protected against inhalation of dust or fibre including asbestos; and c) not to protect the Claimant against or to prevent the Claimant from inhalation of dust or fibre including asbestos gave rise to a foreseeable risk of causing asbestos induced illness. However, the Defendants did not (a) warn the Claimant of the dangers of asbestos; (b) instruct him as to means designed to reduce his inhalation of asbestos dust; or (c) provide breathing apparatus or any other form of respiratory protection."

6. Paragraphs 6, 7 and 8 of the Particulars of Claim set out the Particulars of Negligence and Breach of Statutory Duty under section 1, 4, 29 and 63 of the Factories Act 1961 and Regulation 7 (1), 8 (1), 9. 10 and 15 of the Asbestos Regulations 1969. In summary, it is alleged that no safety measures were undertaken by Mr Balls' employers to protect him from exposure to asbestos dust during the period between 1979 and 1984. For the

purposes of this judgment, I am not required to consider the individual allegations as Mr Jaspal has conceded that if Mr Balls was exposed to asbestos as alleged during the course of his employment in the period between 1979 to 1984 then breach of duty will have been established.

7. Paragraph 8 of the Particulars of Claim alleges:

> "The Claimant had a persistent cough from Christmas 2016 and was subsequently diagnosed with a series of chest infections. The Claimant attended his GP again in February 2017 in relation to his persistent cough and breathing difficulties. It was following this visit to the GP that he was referred for an x-ray in March 2017 and following that x-ray was referred for a CT scan in April 2017. Following the CT scan in April 2017, the Claimant was advised in May 2017 that he has an asbestos related condition, asbestosis. This was the first time this had been mentioned to the Claimant. It was during this consultation, that the treating physician advised that he may be entitled to seek compensation and the Claimant looked into this accordingly. The Claimant's medical records show that he had an x-ray in 2013. The Claimant cannot recall this and cannot recall ever being told the results of this x ray."

8. Paragraph 2 of the Defence alleges that the claim is statute barred by virtue of section 11 of the Limitation Act 1980. Paragraph 3 alleges that:

> "The Defendants relies on the history recorded in the Claimant's medical records and his own medical evidence (which is not admitted) and avers – a. In his medical report dated 26 September 2017, Dr A. J. Edey, Consultant Thoracic Radiologist, reports on a chest radiograph of the Claimant dated 2 August 2013 which shows "*mild reticulation in both lung bases suggesting interstitial pulmonary fibrosis*." He also reports that "*there have been signs on x-rays and CT scans dating back to August 2013 of interstitial pulmonary fibrosis. The pattern of fibrosis is consistent with asbestosis*". b. The Claimant's medical records indicate that he had a CT scan of the abdomen and pelvis on 16 September 2013, in light of which "*bilateral pleural calcification is seen over the diaphragm in keeping with previous asbestos exposure*". c. The Claimant's medical expert, Professor Maskell (Consultant Physician) at paragraph 10.1 in his report dated 13 February 2018 opines that the Claimant has a respiratory disability which he estimates at 20% (which is not admitted by reason of the Defendants' want of knowledge) and that "*this has been present for at least the past 24 months"* i.e. since not later than February 2016. According to the Claimant's IIDB application, he was assessed by the DWP in September 2017 and recorded as having a date of onset for his alleged respiratory condition of 14 October 2015."

9. Paragraph 4 of the Defence alleges that:

> "The Claimant knew or ought to have known of symptoms which were "significant" within the meaning and for the purposes of the Limitation Act 1980 from a date more than three years prior to the issue of these proceedings."

10. Paragraph 5 of the Defence alleges that:

> "It would be inequitable for the Claimant to be granted discretion to allow this claim to proceed under section 33 of the 1980 Act in all the circumstances, including, inter alia, the death of the Defendants and/or the Claimant's inability to produce the records relating to the instigation of the aforesaid medical investigations during 2013 and what the Claimant was told as regards the results of these investigations."

11. The Defence to the substantive claim consists of no admissions being made as to Mr Balls' exposure to asbestos and the application of the regulations and legislation during the course of his employment with the Defendants. It is also pleaded that asbestosis is a divisible disease, and insofar as Mr Balls proves any injury, loss or damage, then any damages awarded to him are required to be reduced or apportioned to reflect any exposure to asbestos in the course of his employment other than with the Defendants or from non-occupational exposures to asbestos.

Expert Evidence

12. Mr Archer relies upon a report dated 26 September 2017 from Dr Edey, consultant radiologist, in which he reviews Mr Balls' radiology, and considers that: "there is clear evidence of previous asbestos exposure resulting in the formation of pleural plaques. In addition there have been signs on x-rays and CTS dating back to August 2013 of interstitial pulmonary fibrosis. The pattern of fibrosis is compatible with asbestos exposure."

13. The report from Professor Maskell, consultant chest physician, dated 13 February 2018, sets out Mr. Balls' occupational history whilst he was employed by ST Thurlow, specifying the nature of the work that he was asked to carry out. He concludes that Mr Balls was extensively exposed to asbestos between 1961/2 and 1983/4. He states that: "this heavy exposure to asbestos is likely to meet the Helsinki Criteria for putting him at risk of developing asbestosis and asbestos related lung disease but would obviously be for an occupational hygienist to confirm." He sets out the history of Mr Balls' respiratory illness from the medical records. It is noteworthy that Mr Balls 'respiratory condition clearly began to deteriorate in early 2017 to a sufficient extent that he attended his GP who referred him to hospital, where the diagnosis of asbestosis was made." At that time he was suffering from breathlessness, a productive cough, and had given up gardening, having previously described himself as an active man who walked five miles daily. The report also records that he was given advice that he was able to make an asbestos-related compensation claim. Professor Maskell goes onto consider what medical conditions that Mr Balls may develop, which would then be the subject of a claim for provisional damages. In his supplementary report of 24 May 2018, he provides an update on Mr Balls' medical condition.

14. Professor Maskell gave oral evidence as to Mr Ball's medical condition. From the medical records he had charted the clinical progression of Mr Ball's asbestosis leading to the diagnosis in 2017. In cross-examination he accepted that he had produced two desktop reports without an examination of Mr Balls. He also accepted that he had not prepared a detailed dose calculation, following a full investigation of Mr Balls' occupational history, which he said was outside his expertise. He maintained that the pattern of exposure to asbestosis described by Mr Balls was of sufficient intensity to have caused asbestosis. He described it as a minimum of five to ten years moderate exposure.

Factual Evidence

15. In three witness statements, Mr Balls sets out in detail the work that he undertook for ST Thurlow which is summarised in paragraph 2 of the Particulars of Claim above. Mr Balls gave oral evidence and was cross-examined. The employment of Mr Balls by Mr Thurlow's construction business was over a long period, from 1954 until 1984 except for a short period of National Service. He describes ST Thurlow as a small building firm which specialised in house building and renovation work all over Bury St Edmonds and the local area. Mr Balls joined the business from school and was trained as a carpenter under the supervision of Mr Thurlow. Except for a short break for National Service, he remained in that role until he left the business. In the witness statements he sets out the nature of his work, which included sawing asbestos and asbestolux, primarily used for soffits in the roofs of the bungalows that Mr Thurlow was building. He worked for Mr Thurlow on buildings including farm buildings on the Duke of Grafton's estate at Euston Hall. As I understand his evidence, the pattern of work continued throughout the time of his employment in the business.

16. In more detail in his witness statements, Mr Balls described his pattern of work whilst he was employed by ST Thurlow. He stated that he used asbestos extensively throughout his employment with ST Thurlow. He recalls working on the Euston Estate, where he 'pulled down old barns which had corrugated asbestos roofs' he used a hammer to smash old asbestos sheets and handled the pieces to dispose of them, a process which 'created large amounts of asbestos dust that was impossible to avoid'. He also installed new asbestos sheets whilst working on the Euston Estate. He cut these sheets to size with a hand saw and used a drill to secure the new sheets into position, again generating large amounts of asbestos dust. He picked up the debris and put it into farm tracks. More generally he states that much of his work involved asbestos materials. He states that he was 'repeatedly cutting, drilling and handling asbestos throughout these constructions.' He gave examples of using 8x4 asbestos sheets for soffits, asbestos sheets for internal partition walls, corrugated asbestos sheets and asbestos boards for pipework all of which he cut by hand and drilled. He stated that he was in contact with asbestos 'every day'. During the course of his oral evidence, he qualified whether he did work with asbestos every day to regularly. Depending on where a particular building project had reached, for example, the roofs, he would be working with asbestos. At the end of a day of working with these materials he swept up and cleared away the debris, agitating the dust further. His evidence is that in the last few years of work for ST Thurlow he used asbestolux, which he cut and drilled for soffits and boxing. He was not provided with any protective equipment. He wore a boiler suit which he recalls being covered with asbestos dust at the end of a working day. He was not exposed to asbestos by any of his other employers.

17. Mr Balls was cross-examined about the pattern of his work, in particular the absence of detail about his exposure to asbestos, particularly in the period between 1979 and 1984. He was also cross-examined about when he first developed respiratory problems, which he admitted that he had for some years. He was asked how Mr Thurlow's children would have known that he had been exposed to asbestos or had asbestosis. He said that he may have mentioned breathing problems when he spoke to Mr Thurlow at the wake after his eldest son's funeral in 2004. He denied that he knew that they were caused by exposure to asbestos or asbestosis. He admitted that he had been sent a copy of the hospital letter in 2013 which referred to his exposure to asbestos but denied that he knew it was related to his condition. He said that it had not been referred to when he had subsequently been to see his GP, Dr Atkins.

18. Mr and Mrs Reeves and Mr Brian Thurlow gave short oral evidence that Mr Thurlow had mentioned to them that Mr Balls was suffering, respectively, from asbestos, Mr and Mrs Reeves, or asbestosis, Mr Brian Thurlow. In my view, it is probable that these conversations were after the death of Mr Thurlow's son in 2004. If that is the case, it would be consistent with Mr Balls' evidence that he may have mentioned breathing problems to Mr Thurlow at his eldest son's wake.

19. There is no other evidence now available of the work undertaken by Mr Ball or Mr Thurlow's business either documentary or witness evidence available. Mr Davies, the Defendants' solicitor, has filed made a witness statement setting out the steps he undertook to obtain such evidence. He attempted to trace witnesses and find documentation relating to Mr Balls' exposure to asbestos. In summary, he was not able to find any witnesses or any documents that shed light on Mr Balls' exposure to asbestos during his employment with ST Thurlow.

Section 14 of the Limitation Act 1980

20. Section 11 of the Limitation Act 1980 provides that an action for personal injury must be brought within three years of either the date that the cause of action accrued or the 'date of knowledge' of the person injured, if later.

21. Section 14(1) of the Limitation Act 1980 provides that, in Section 11 of the Act: *(a) that the injury in question was significant; and (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty … "… references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts - and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant."*

22. Section 14(2) provides a definition of "significant injury" and states that "*For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a Defendants who did not dispute liability and was able to satisfy a judgment."*

23. Section 14(3) provides - *(c) from facts observable or ascertainable by him; or (d) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek; "… a person's knowledge includes knowledge which he might reasonably have expected to acquire - But a person shall not be fixed*

under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

Defendants' Submissions

24. Mr Jaspal has referred me to a number of authorities in support of his submission that Mr Balls' claim is statute barred. He submits that it is for Mr Balls to prove that his claim was brought within time, Crocker -v- British Coal [1995] BMLR 159 and AB -v- Ministry of Defence [2012] 2WLR 643, and that if Mr Balls is unable to do so, he must overcome the limitation defence by proving that discretion under section 33 of the Act should be exercised in his favour. He submits that I should ask, in the first instance, when Mr Balls was first aware that he had suffered injury and (if attribution is in issue) what he thought of its possible causes, Dobbie -v- Medway Health Authority [1994] 1WLR 1234 at 1241H. If I find Mr Balls lacked actual knowledge, a further enquiry has to be made as to what he ought reasonably to have known by reference to Section 14(3). He submits that the knowledge required is of a broad nature, sufficient to enable a claimant to begin to investigate whether he might have a claim against a defendant, Nash v Eli Lilly [1993] 1 WLR 782 and Spargo -v- North Essex District Health Authority [1997] PIQR P235. In particular, the level of knowledge required is not equivalent to knowledge of causation, which is a matter to be investigated and ascertained at a later date.

25. As to actual knowledge, the question arising for me, Mr Jaspal submits, is when Mr Balls suffered symptoms, what he thought of them and whether he had the low level of knowledge sufficient to enable him to begin to investigate whether he had a viable claim. As far as significant injury is concerned, the question is one of quantum alone, and does not invite consideration of the cause, nature or usualness of the injury, Dobbie supra at page 1242. He referred in his skeleton argument to the pleural plaques test case, Rothwell -v- Chemical and Insulating Company [2006] ICR 158, where the Court of Appeal considered the test to be comparable to the principle "de minimis non curat lex". That is, if the injury is more than "de minimis" it will satisfy the test within Section 14(2). In terms of what constitutes de minimis assistance, he says, can be drawn from the recent case of Dryden v Johnson Matthey [2018] UKSC 18, where Lady Black reviewed the previous decisions and discerned two principles from Rothwell, the second of which was "…to be actionable, the damage must be more than negligible".

26. He also relied on the test in A -v- Hoare [2008] 1 AC 844, particularly in the speech of Lord Hoffmann at paragraph 34 of the Judgment.

> "The material to which that test (Section 14(2)) applies is generally "subjective" in the sense that it is applied to what the Claimant knows of his injuries rather than the injury as it actually was. Even then, his knowledge may have to be supplemented with imputed "objective" knowledge under Section 14(3). But the test itself is an entirely impersonal standard: not whether the Claimant himself would have considered the injury sufficiently serious to justify proceedings but whether he would "reasonably" have done so. You ask what the Claimant knew about the injury he had suffered, you add any knowledge about

> the injury which may be imputed to him under section 14(3) and you then ask whether a reasonable person with that knowledge would have considered the injury sufficiently serious to justify his instituting proceedings for damages against a Defendants who did not dispute liability and was able to satisfy a judgment … Section 14(2) is, after all, simply a standard of the seriousness of the injury and nothing more. Standards are in their nature impersonal and do not vary with the person to whom they are applied."

27. In answering the questions that he poses, Mr Jaspal relies primarily on the oral evidence given by Mr Balls and his admission that he knew had respiratory problems over many years, and that he must have known that they were both significant and attributable to his asbestos exposure whilst working for ST Thurlow. He also relies on the evidence of Mr and Mrs Reeves and Mr Bryan Thurlow that he must have been aware of his injury prior to the death of Mr Thurlow on 23 November 2015. He submits that if Mr. Thurlow was aware during his lifetime that Mr Balls was complaining of an asbestos related injury, then Mr Balls must also have had such knowledge. He places reliance upon the information contained in Dr Edey's report that a chest radiograph of August 2013 demonstrated "mild reticulation in both lung bases suggesting interstitial pulmonary fibrosis…" He also relies on Mr Balls' industrial benefits application in 2017 and the estimate of 25% disability backdated to October 2015 as evidence that he was aware he had respiratory disability more than 3 years prior to commencement of the claim.

28. Mr Jaspal also submits that if Mr Balls did not have actual knowledge, then, he had constructive knowledge of all the relevant matters set out above. Mr Jaspal submits that a reasonable person, knowing what Mr Balls knew and ought to have known, armed with such combined knowledge, would have considered the injury significant and attributable to his exposure to asbestos in the course of his employment with ST Thurlow. He says that when Mr Balls first became aware of symptoms or the presence of fibrosis, certainly by 2013, he should have attended his GP to investigate the causes of the symptoms. Had the appropriate enquiries been made, it is inconceivable that the medical practitioner would not have asked Mr Balls about his employment history and any exposure to asbestos, George Collins v Secretary of State for Business Innovation [2014] EWCA Civ 717, Johnson -v- Ministry of Defence [2013] PIQR P7 and Platt v BRB Residuary [2014] EWCA Civ 1401.

29. Mr Jaspal submits that in Platt, the Court of Appeal held that it was reasonable to expect a person who was suffering from hearing loss to ask his specialist whether the history of noise exposure which they had discussed had caused or contributed to his symptoms. Mr. Platt's personal injury claim was statute-barred by Act section 11(4) and section 14 where he had failed to do so. He maintains that the same should apply in a case of asbestos related injury. If asbestos exposure was discussed, then Mr Balls should have asked his GP whether such exposure was a possible cause for his respiratory symptoms and/or fibrosis.

Claimant's Submissions

30. As to actual knowledge, Mr Archer's primary submission is that there was no diagnosis of asbestosis on the evidence before May 2017. He also relies upon Brooke LJ's

judgment in Spargo v North Essex District Health Authority [1997] PIRW P235, where he held:

> "i. The knowledge required to satisfy s.14(1)(b) is a broad knowledge of the essence of the causally relevant act or omission to which the injury is attributable;"
>
> ii. 'Attributable' In this context means 'capable of being attributed to', in the sense of being a real possibility;
>
> iii. A plaintiff has the requisite knowledge when she knows enough to make it reasonable for her to begin to investigate whether or not she has a case against the Defendants. Another way of putting this is to say that she will have such knowledge if she so firmly believes that her condition is capable of being attributed to an act or a mission which she can identify (in broad terms) that she goes to a solicitor to seek advice about making claim for compensation;
>
> iv. On the other hand, she will not have the requisite knowledge if she thinks she knows the act or a mission she should investigate but in fact is barking up the wrong tree or if her knowledge of what the Defendants did or did not do is so vague or general that she cannot fairly be expected to know that she should investigate or if her state of mind is such that she thinks her condition is capable of being attributed to the at remission alleged to constitute negligence, but she is not sure about this, and we need to check with an expert before she could properly be said to know what it was."

31. He submits that the effect of the judgment in Spargo is clear, time does not run until a claimant has obtained an expert medical diagnosis and is particularly so given that the onset of asbestosis is gradual and insidious. This, he says, was affirmed in Sir Robert Lloyd & Co Ltd v Hoey [2011] EWCA Civ 1060, in which a claimant who suffered from chest pains over a period of many years was not fixed with knowledge until he received a firm diagnosis of an actionable condition by a medical expert.

32. Mr Archer submits that Dr Edey's retrospective interpretation of the radiology is that in 2013 there was reticulation suggestive of interstitial pulmonary fibrosis and unactionable asbestos related pleural plaques. There is no evidence that either (i) the scan was anything more than 'suggestive' of fibrosis and (ii) that any treating doctor made any reference to asbestosis. He submits the evidence of Mr and Mrs Reeves and Mr Bryan Thurlow takes them no further as it is hearsay and vague. None of these witnesses were party to any conversation between Mr Balls and Mr Thurlow. He also draws a distinction between the use of the words "asbestos" and "asbestosis" in the conversations and the diagnosis of asbestosis in August 2017 referred to in the medical records.

33. As to constructive knowledge, Mr Archer submits that this depends on the objective question of what reasonable steps a claimant is expected to take to acquire the relevant knowledge to bring a claim. He says that it should be noted that section 14 of the Act

expressly states that '*a person shall not be fixed under this sub-section with knowledge of a fact ascertainable only with the help of expert evidence so long as he has taken all reasonable steps to obtain (and where appropriate, to act on) that advice*'.

34. Mr Archer submits that it is hard to see how Mr Balls could have done more. He took steps to investigate his chest pains in early 2017 and was told he had an actionable condition shortly afterwards. In 2013 he underwent investigations for the symptoms he was experiencing and did not receive a diagnosis. Indeed, he says, it is not even clear that he had an actionable condition prior to 2017, the evidence is retrospective and only 'suggestive' of fibrosis (but not asbestosis) at this point. As set out in section 14 itself, if the knowledge required to issue proceedings required expert evidence then a claimant will not be fixed with constructive knowledge. Mr Archer also submits that there is no evidence that the scans in 2013 could be interpreted by an expert as being asbestosis.

35. Mr Archer submits that Mr Ball was not suffering from a significant injury before 2017. He relies upon the decision in Lloyd to support his case that Mr Ball was not required to investigate the cause of his respiratory problems before he was given the diagnosis of asbestosis in May 2017. Further, he submits that the evidence of the Mr Thurlow's family has to be treated with caution as it is hearsay.

Section 33 of the Limitation Act 1980

36. Section 33 of the Act provides for a discretionary exclusion of time limit for actions in respect of personal injuries or death**:**

> "(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which— (a) the provisions of section 11 or 12 of this Act prejudice the plaintiff or any person whom he represents; and (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents; the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.
>
> …..
>
> "(3) In acting under this section the court shall have regard to all the circumstances of case and in particular to—
>
> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 or (as the case may be) by section 12;
>
> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests

> reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

Defendants' Submissions

37. The burden of proving that discretion should be exercised in a claimant's favour pursuant to Section 33 (1) of the Act rests on the claimant, Sayers -v- Chelwood [2013] 1 WLR 1695 and Chief Constable of Greater Manchester Police v Carroll [2017] EWCA Civ 1992.

38. Mr Jaspal submitted that the question for the Court under Section 33 is whether it would be "equitable to allow the action to proceed", notwithstanding the expiry of the primary limitation period. As stated by McCombe LJ in Re v Ge [2015] EWCA Civ 287:

> "that question can only be answered by reference (as the section says expressly) to 'all the circumstances', including the particular factors picked out in the Act. No factor, as it seems to me, can be given a priori importance; all are potentially important. However, the importance of each of those statutory factors and the importance of other factors (specific to the case) outside the ones spelled out in section 33(3) will vary in intensity from case to case. One of the factors will usually be the one identified by the Judge in paragraph 29, by reference to the judgment of Bingham MR in Dobbie v Medway [1994] 1WLR 1234, 1238 D-E, namely that statutory limitation rules are '…no doubt designed in part to encourage potential Claimants to prosecute their claims with reasonable expedition…but they are also based on the belief that a time comes when, for better or worse, a Defendants should be effectively relieved from the risk of having to resist stale claims."

39. Mr Jaspal submits it should not be forgotten that one relevant factor is the existence of the limitation period, which parliament has decided is usually appropriate. He also raises the issue of proportionality where the value of the claim is small, Robinson v St Helens MBC [2003] PIQR P128 and Chief Constable of Greater Manchester Police v Carroll [2017] EWCA Civ 1992).

40. Mr Jaspal submits the policy underpinning the Act is the protection of a defendant from the injustice of having to face a stale claim, Donovan -v- Gwentoys Limited [1990] 1WLR 472 at 479B. The same case is authority for the principle that the Court, in the exercise of its discretion, can consider all prejudice accruing from the date of the accrual of the cause of action and not just that which occurs after the expiry of the limitation period, Lord Oliver at page 479 to 480, George Collins v Secretary of State for Business Innovation [2014] EWCA Civ 717, albeit the prejudice from the date of knowledge carries most weight. Further, he submits in an appropriate case, it is not essential that there be direct evidence as to the aspects of prejudice such as the particular respects in which witnesses' recollections are impaired, Price -v- United Engineering Steels [1998] PIQR P407 at page 414. He says that I am permitted to draw appropriate inferences in relation to prejudice arising from the likely loss of material records, the difficulty in identifying witnesses, the shortcomings of memory and the difficulties with apportionment which will have developed due to the passage of time. The prejudice in this case is obvious given that the relevant period of alleged exposure goes back some 36 to 42 years. He relies upon Mr Davies's witness statement that enquiries have been made to obtain evidence without success. Further he submits that Mr Balls' witness statement fails to properly address the factors set out at section 33 of the Act, David Carr v Panel Products Ltd [2018] EWCA Civ 190.

41. Turning to the criteria in section 33 of the Act, Mr Jaspal submits that the relevant delay after expiry of the limitation period is measured in years for which there is no adequate explanation. It is plain and obvious that where the evidence required goes back four decades the defence of the claim will be prejudiced and the evidence made less cogent by the passage of time. Despite reasonable and proportionate enquiries, there is very limited documentation available, none of which is relevant to the key issues in this case. Mr Balls' own evidence will also be less reliable as a result of the passage of time, particularly where he is not relying on witnesses in support of his claim. Mr. Thurlow's evidence is no longer available as he died in 2015. He points to there being no adverse conduct on the part of the Defendants, and to there being no real explanation for Mr Balls' conduct after the he first became aware of his symptoms. Further, after he instructed his solicitors, which was no later than 4 July 2017, there was a further delay of over two years before the claim was issued.

Claimant's Submissions

42. As to section 33 of the Act, Mr Archer submits that the prejudice to Mr Balls is obvious, in that he will be precluded from bringing his claim for damages. He submits that Mr Balls has a good arguable claim as a result of his exposure to asbestos and his actionable injury. He also submitted that, where a claimant loses a claim with no recourse against his own solicitors, the prejudice against him will be great, Grenville v Waltham Forest Health Authority [1992] 11 WLUK. As to the prejudice to the Defendants, he submits that the forensic prejudice is limited. The Defendants' solicitor has produced a statement setting out his attempts to find documents and trace witnesses. He acknowledges that these attempts have come to nothing but he submits that it is unlikely that the position would be any different if the claim had been intimated in 2013 or 2015, HMG3 Ltd v Dunn [2019] EWHC 882. As to the length and reasons for any delay, he submits that it flows from the fact of his diagnosis in 2017 and the symptomology that he suffered from at this time. Once the diagnosis of asbestosis had been made, he submits that Mr

Balls acted reasonably and promptly. His solicitors instructed Dr Edey in 2017 and Professor Maskell in 2018 before issuing proceedings in 2019.

Discussion on Limitation

43. The view that I have come to is that Mr Ball did not have actual knowledge of a significant injury attributable to his exposure to asbestos during the course of his employment with ST Thurlow, in the period between 1979 and 1984, until asbestosis was diagnosed in August 2017. Mr Ball was a feisty witness who was determined in what he said and how he said it. I formed the view that he was entirely truthful and gave the best account that he could as to his symptoms. His evidence, volunteered by him, that he may have discussed breathing problems at Mr Thurlow's eldest son's funeral in 2004 was characteristic of the man. Even though he accepted that he had suffered from respiratory problems for some years, he clearly considered they were not sufficiently serious to bring them to the attention to his GP or doctors at hospital appointments until early 2017. He conceded that he had been sent a copy of the hospital's letter sent to his GP in 2013 but he said that he had not regarded the reference there to exposure to asbestos as being asbestosis. I accept Mr Archer's submission that Mr Balls' asbestosis was an insidious progressive disease which did not manifest itself until late 2016, after which time it was promptly diagnosed.

44. Nevertheless, the issue of constructive knowledge is more difficult. Whilst I accept Mr Jaspal's submission that the questions I should ask are what Mr Balls knew of his injury, what he ought to have known and then ask whether a reasonable person, armed with such combined knowledge, would have considered the injury significant, on balance I am not satisfied that Mr Balls should be fixed with constructive knowledge. The main reason I have come to that view is that I accept Mr Archer's submission, which I repeat, that asbestosis was not diagnosed until August 2017. I also accept the distinction that he draws a between the x-ray being interpreted as showing signs of asbestos exposure and asbestosis. The two are very different, the former capable of being harmless, the latter being the development an asbestos-related disease. As late as 2013 the imaging did not show that Mr Balls had developed asbestosis. Set against that is Mr Balls own admission that he had suffered breathing problems "for years" and the reported conversations he had with Mr Thurlow. It is noteworthy that Mr Balls had been referred to hospital in 2013 because of weight loss, and although there was reference to exposure to asbestos on in the copy letter he received, neither the hospital nor the GP decided to take it further. I have already cautioned against placing weight on the evidence of Mr Thurlow's relatives as to what Mr Thurlow had said to them, probably in 2004 or 2005. In my view, the description of "asbestos" or "asbestosis" may well have been the description placed by Mr Thurlow upon what Mr Balls told Mr Thurlow rather than what he did tell him. Whether that is or is not a correct interpretation of the conversation is speculative. The circumstances in which Mr Balls Industrial Injuries Disablement Benefit, which he was awarded in September 2017, was backdated to 2015 remain obscure. They were not explained in Mr Balls' witness statement or explored in cross-examination. In any event, the benefit was applied for after the diagnosis of asbestosis was made.

45. If I am wrong on the date of knowledge, then I would have exercised my discretion under section 33 of the Act 1980 to permit the claim to proceed. I have considered the criteria set out in the section, and all the circumstances of the case, and concluded that

to deprive Mr Balls of the opportunity to pursue a remedy would be unjust. I do not find that there is any serious prejudice to the Defendants as a result of any delay in bringing these proceedings. The events took place a very long time ago and even if I had concluded that Mr Thurlow had the requisite knowledge by 2004, which I do not, I very much doubt that the evidence available would have been very different from today. In my view, the evidence of the general nature of the building works undertaken by ST Thurlow and the pattern of work of Mr Balls, as a carpenter would have been broadly the same. Certainly by 2015, Mr Thurlow was dead, and if the action had been commenced within three years of the x-ray result being reported to Mr Balls in 2013, the probability is that Mr Thurlow would not have been alive to give evidence, indeed the claim may not have been notified to the Defendants' insurers, in order for a witness statement to have been obtained from him. I find nothing in the other criteria or case law that would displace me from the conclusion which I have reached.

Asbestos Exposure

46. In his skeleton argument, Mr Jaspal relied upon the absence of evidence, expert and lay, as to Mr Balls' exposure to asbestos in the period between 1979 to 1984. He referred in his skeleton argument to the Asbestos Regulations ("the Regulations") 1969, supported by an Approved Code of Practice and by hygiene standards, specifying the levels of asbestos dust which were regarded as being acceptable, measured in terms of both level of exposure and duration of exposure. He refers to the original standard being set at 2 fibres per cc for chrysotile and amosite and 0.2 fibres per cc for crocidolite, albeit that revisions took place in subsequent years. Mr Jaspal describes the evidence that Mr Balls was exposed to asbestos in the relevant period as thin both in his oral witness statement and oral evidence, particularly during the relevant period. In his closing submissions, however, he conceded that if I am satisfied that Mr Balls was exposed to asbestos during the course of his employment with ST Thurlow in the period between 1979 to 1984 then breach of duty is made out. In that case, I would not have to go on to consider the detailed submissions in both counsels' skeleton arguments as to the application of the Factories Act 1961 and the Regulations.

47. Instead, Mr Jaspal mounts his attack on causation relying primarily on the absence of any expert evidence from an occupational hygienist that Mr Balls' asbestosis was caused by his exposure to asbestos during the course of his employment by ST Thurlow in the relevant period between 1979 and 1984. He submits that Mr Balls has failed to show that the Helsinki Criteria have been met. He submits that it would be unsafe for me to attempt to undertake some form of dose calculation or to simply presume that there has been 25 fibre ml/yrs. exposure in the circumstances of this particular case. The calculation would depend upon a number of variables, hence expert input was required. He does, however, accept that evidence is not required from an occupational hygienist in every case but states that the evidence available is insufficient in this case. He pointedly relies upon Professor Maskell's report stating that he deferred to an occupational hygienist.

48. Mr Archer approaches this issue as three simple questions: (1) whether Mr Balls was exposed to asbestos by ST Thurlow, (2) whether that exposure was in breach of duty in the relevant period, and (3) whether Mr Balls' asbestosis was caused by ST Thurlow's breach of duty. He relies upon Mr Balls' evidence, both written and oral, that he was exposed to significant quantities of asbestos on a regular basis whilst in the employment

of ST Thurlow. He submits that Mr Balls' description of exposure is clear and compelling. The cutting and drilling of asbestos boards, asbestos soffits and asbestos corrugated sheets releasing visible asbestos dust is exposure that would have been appreciated as being dangerous, in the relevant period, if not previously. He submits that the work that Mr Balls carried out did not involve low levels of exposure. Further he submits that there is no witness or documentary evidence capable of undermining the account of Mr Balls' exposure to asbestos.

49. On causation, Mr Archer relies primarily on Mr Balls' diagnosis of asbestosis in May 2017 and the medical evidence of Professor Maskell. In the section of Professor Maskell's report entitled 'summary and opinion, diagnoses and causation', he states that 'Mr Balls has pleural plaques and asbestosis as a result of asbestos exposure'. In his report he sets out the history of asbestos exposure as given by Mr Balls and states that 'This heavy exposure is likely to meet the Helsinki Criteria for putting him as risk of developing asbestosis and asbestos-related lung disease, but obviously would be for an occupational hygienist to confirm.' Mr Archer submits that no other diagnosis for Mr Balls' respiratory disease has been put forward other than asbestosis. The opinion Professor Maskell has reached, he submits, is based upon the progression of the illness and the scans and eventual diagnosis all being consistent with asbestosis. I was reminded that asbestosis is a 'cumulative' condition, so described because there is a positive relationship between the dose of asbestos received and the risk of development of the disease for which ST Thurlow was responsible, per Holtby Brigham & Cowan (Hull) Ltd [2000] ICR 1086 CA. Mr Archer submits that if Mr Balls (i) suffers from asbestosis and (ii) was negligently exposed to asbestos whilst working for the company, it will follow that ST Thurlow is liable to the extent of its contribution. In this case ST Thurlow is the only exposer and would be liable for the entirety of the Mr Balls' disease if it were not for the fact that insurance had only been traced for 16%, namely that part of Mr Balls' period of employment between 1979 and 1984.

50. Further Mr Archer submits that in considering the application of the Helsinki Criteria in this case, the criteria are made out without the evidence of an occupational hygienist. The Helsinki Criteria were set out in a consensus paper 'Asbestos, asbestosis and cancer: the Helsinki Criteria for diagnosis and attribution' produced after the International Expert Meeting on Asbestos, Asbestosis and Cancer at Helsinki in January 1997. The criteria will be met if a claimant can demonstrate a 'cumulative exposure of 25 fibre/ml years or if a claimant can demonstrate either one year of heavy exposure or five to ten years of moderate exposure'. Here, he submits, there is a 30-year history of moderate to heavy exposure, which is referred to by Professor Maskell in his report.

51. Mr Archer submits that no attempt has been made to go behind the diagnosis of asbestosis made by the medical experts or, indeed, the treating doctors. Given that asbestosis is a condition that arises solely from exposure to asbestos and the only exposer is ST Thurlow, he submits that it must follow that causation is made out in this case. He submits that the Defendants' position that the case on causation cannot be determined in Mr Balls' favour without the evidence of an expert hygienist is misconceived. It is a medical question in a case where there is no issue as to whether Mr Balls suffers from asbestosis or idiopathic pulmonary fibrosis (IPF) both of which are forms of interstitial pulmonary fibrosis. He submits that it has never been suggested that Mr Balls' condition is IPF. Finally, it is neither necessary nor proportionate for a

claimant with a history of exposure as significant as the claimant with supportive medical evidence to obtain a report from an occupational hygienist.

Discussion

52. In my view, Mr Balls has established a breach of duty on the part of Mr Thurlow's business during the period 1979 to 1984. I am satisfied that he was regularly required to work with asbestos during that period, above a minimal exposure, and that no precautions were taken to protect him from its effect. One piece of oral evidence that was particularly telling was Mr Ball's evidence that after cutting asbestos with a handsaw he used to blow the dust away to see his pencil markings as to where to cut next. I find as a fact that the pattern of exposure continued through the latter part of his employment in a similar way to earlier periods. I have already said I was impressed with Mr Balls as a truthful witness who did his best to assist the court.

53. I am also satisfied that causation has been proved. I accept Professor Maskell's evidence and find that this case falls into a category where it was not necessary to obtain expert evidence from an occupational hygienist. The Defence put Mr Balls to proof that he has developed a compensable asbestos related disease. Mr Balls did not work for any other employer where he came into contact with asbestos. I accept Mr Archer's submission that this is a question of medical causation. The diagnosis of asbestosis has not been challenged. In my view, Professor Maskell's evidence taken with Mr Balls' evidence is sufficient to prove, on the balance of probabilities, that he had moderate to severe exposure to asbestos for a period of up to 30 years, including the period between 1979 and 1984, consistent with the Helsinki Criteria.

54. As I said at the outset, I am informed by both counsel that, depending on my findings, it is not necessary for to make any further findings on apportionment and quantum. In these circumstances, I direct that judgment shall be entered for Mr Balls.