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CHAMBERS

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Disease Newsletter

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Content

Ropewalk Chambers is delighted to publish our inaugural Industrial Disease Newsletter.

We will be publishing a Newsletter focusing specifically on developments in Industrial Disease litigation on a bi-annual basis with updates out to our readers in Q2 and Q4 of each calendar year.

We very much hope that they will be of benefit in informing readers of developments in both presently litigated matters, and in giving a steer as to the types of claims which may well emerge in the future, whilst of course, also giving an insight as to what members of Ropewalk have been working on in the course of their practices.

As ever, if anyone has any questions or queries regarding any industrial disease matter, please do not hesitate in contacting us, whether or not it is something covered in our newsletter.

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Introduction

1. Even in these strange times of 'lockdown', litigation continues in the context of industrial disease claims. There have been several recent developments which are of interest affecting a range of disease categories. Some of them are from the Courts, others from further research and industry reports by way of calls to action. In this newsletter, I will attempt to distil the core developments that practitioners in industrial disease ought to be mindful of going forward which have arisen in the last 12 months or so across the most common areas of disease litigation.

Asbestos Claims

(a) Asbestos Lists in the RCJ

2. The Masters Corridor of the RCJ has continued to be busy, virtually, despite the COVID-19 pandemic. It is a credit to the Masters that they have been able to evolve and adapt their lists to enable continued use of remote hearing technology to keep cases moving and not allow things to stagnate. Of course, the asbestos lists had always operated remotely to a large extent and at a greater pace than claims for other types of injury or industrial disease, but nonetheless, the lack of administrative staff at the RCJ due to COVID-19 has presented a further burden to overcome.

3. Notwithstanding that, at the time of writing, almost all of the Masters have produced guidance on how their respective lists will work during these uncertain times and feedback from members of the Personal Injury Bar Association is that hearings have remained effective with cases still being directed and adjudicate on initial case management issues and show cause hearings. Applications also remain being heard relatively swiftly following issue with cases prioritized where necessary. A hyperlink below is provided to the guidance initially issued by Senior Master Fontaine:

   https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878791/QB_Masters_Hearings_-_court_user_guidance.pdf

(b) Asbestos in Schools

4. Looking at things more widely, practitioners may recall the article which featured in the Guardian last summer regarding asbestos in schools[1]. In February 2012, the All-Party Parliamentary Group on

[1] https://www.theguardian.com/education/2019/jul/04/700-english-schools-reported-over-asbestos-safety-concerns

Occupational Health and Safety had previously reported upon the widespread presence of asbestos in school buildings[2] estimating that 75% of state schools likely contained asbestos. They also reported that between November 2010 and June 2011 they had surveyed the asbestos risk management plans of 164 schools, 28 of whom were unable to produce any such plans at all (i.e. 17%). The report found numerous common failings in schools containing asbestos, including; inadequate management plans, inadequate labelling and demarcation of asbestos, poor standards of training and promotion of asbestos awareness in school staff, and inadequate surveying of premises. Increased safety measures were therefore called for and a phased removal of asbestos from schools was also endorsed as ongoing policy. Six recommendations were published at the conclusion of the report to assist in safeguarding schools from asbestos risks and future claims.

5. In 2017 the Department for Education published a further report relating to schools with asbestos on their premises entitled 'Managing asbestos in your school'[3]. Thereafter, in 2018 the DfE conducted a survey (The Asbestos Management Assurance Process) inviting schools to detail the checks, inspections, surveys and on-site procedures they had to deal with and safeguard, asbestos on their sites. This commenced in March 2018 and concluded in July 2018 with an extension for replies given to February 2019 due to poor response levels. That prompted a BBC article which indicated that some 23% of schools had failed to respond to the enquiry altogether[4]; and the article in the Guardian in July 2019 cited at the outset.

6. Crucially, out of the DfE's survey, of those who did reply (some 2,952 schools), 2,570 confirmed that they believed that asbestos was present in at least one building on their premises. That is 87%, some 13% higher than that originally believed to be the case as per the 2012 All-Party report. A total of 676 schools failed to demonstrate any compliance or proper response and were reported to the HSE for investigation. A petition to put the matter before Parliament for consideration and to push for a phased removal programme of all asbestos from schools by 2028 is ongoing and has now raised in excess of 123,000 signatures[5].

7. On 10th March 2020, just prior to lockdown, the National Education Union announced that the Joint Union Asbestos Committee ('JUAC') issued a statement of intent to further lobby government to spotlight the issue. The JUAC is petitioning for[6]:

[2] https://publications.parliament.uk/pa/cm201213/cmselect/cmeduc/writev/1056/m4.htm
[3] https://www.gov.uk/government/publications/asbestos-management-in-schools--2
[4] https://www.bbc.co.uk/news/education-46961752
[5] https://you.38degrees.org.uk/petitions/protect-our-children-and-teachers-from-asbestos-exposure-in-schools
[6] https://neu.org.uk/press-releases/joint-union-asbestos-committee-asbestos-crisis-our-schools

- *The development of a planned, phased and costed programme of removal of all asbestos from schools*

- *Establishing a mandatory survey of all schools ensuring that it is known exactly where the asbestos is present and in what condition it is in*

- *Train all school staff on how asbestos should be managed in schools*

- *Increase resources to the Health & Safety Executive (HSE) and restore proactive inspections by them in schools*

- *Make the results of surveys available to all staff and parents of each school*

8. In short, despite the publicity and the now long-standing awareness of the issue of asbestos in schools, not a lot has been done to alleviate the situation. A lack of funding, and widespread under-estimation of the scale of the problem within the education sector seems to remain with no further comment yet from the HSE or the DfE following the referral of non-complying schools last year. It is plain that sustained pressure from those working within the sector was continuing right up to the COVID-19 pandemic taking control of the agenda and the suspension of schools. Further developments are expected and it will be interesting to see how matters unfold once 'normality' is resumed.

(c) Asbestos Claims and Section 33 Discretion

9. In the recent High Court decision of *Gregory -v- H J Haynes Limited* [2020] EWHC 911 (Ch)[7] Mr Justice Mann overturned a first instance decision of a District Judge who had found the Claimant statute-barred under the Limitation Act 1980 and had refused his application for section 33 discretion.

10. At trial, it was established that the Claimant had first instructed solicitors in 2009 to make his claim for damages arising from pleural thickening as a consequence of asbestos exposure. The Claimant had first acquired knowledge of his disease in 2008 following hospital investigation into symptoms. The Claimant did not issue his claim however, until 2017. The Defendant had been dissolved since 1992 and was resurrected for the purposes of another claim in 2015. Upon initial investigation by the Claimant's solicitor in 2009, no insurer for the Defendant could be traced. Checks continued to be made on ELTO but no

[7] https://www.bailii.org/ew/cases/EWHC/Ch/2020/911.html

insurer was revealed until 2014 when, co-incidentally, another claim was brought by a client of the Claimant's solicitors against the same Defendant in 2014. It seems that the insurer had been added to ELTO in 2013. Accordingly, in 2014, a letter of claim was sent to the Defendant.

11. At first instance, the Judge had held that the Claimant was culpable for the delay caused in that post-knowledge period between 2009 - 2014 and weighed this against him as 'culpable delay' when it came to adjudicating on whether section 33 discretion ought to be granted and, in particular, criticized the lack of steps taken by the Claimant's solicitors to locate the insurer by other means than sporadic checks of ELTO. The single permitted ground of appeal sought to attack that assessment.

12. Focusing on that issue, Mr Justice Mann held[8]:

"The district judge held that this was culpable delay on the basis that something could and should have been done in this period to further the claim. In my view this was an error. It is not possible to see what more the claimant could realistically and sensibly have done in this period. There was a dissolved and, even if restored, apparently penniless defendant. There was no point in seeking to restore it to the register unless and until it was apparent that there was some money available (or a "paymaster", as counsel before me put it). Searches of the insurer database had been done at least 4 times (by 2012, not by 2011, on the evidence). Reasonable searches had been done and no insurer had been found. There was no insurer on the database until 2013, so even if searches had been repeated daily (which is not a reasonable requirement) nothing useful would have emerged until then. It was not suggested that a search should have been done in early 2014 which would have revealed the insurer earlier than the search which did. Starting proceedings before restoration would not have been wise because they could not have been served and would have been a nullity pending validation by a restoration, which was not on the cards at the time. I do not consider that the claimant could be in any way to blame for the delay in this period, and that it was wrong to characterise the delay as culpable on the part of the claimant."

13. He went on[9]:

"The extracts I have set out make it clear that the judge placed significant weight on the delay between 2009 and 2014, and in particular on the claimant's culpability for that delay, as part of the balancing exercise which has to be done under section 33. Had he reached the right conclusion on culpability for that period his reasoning, and therefore perhaps his decision, would have been different. Because the finding of

[8] Paragraph 10
[9] Paragraph 15

culpability was unjustified, and because that obviously affected the weight given to that period of delay, it follows that the judge took into account an irrelevant consideration, and that it had a material effect on his ultimate decision."

14. Accordingly, the Appellate Court re-assessed the section 33 position, and once correcting the error made by the first instance Judge, held that it was equitable to exercise discretion and allow the Claimant's claim to proceed.

(d) Low Exposure Claims

15. In the recent case of *Valerie Bannister (Widow and Executrix of the Estate of Dennis Charles Bannister, Deceased) -v- Freemans PLC* [2020] EWHC 1256 (QB) the Claimant alleged that the Deceased (Mr. Bannister) had developed mesothelioma as a result of low level exposure to asbestos in 1983/4.

16. The Defendant was a mail order company which produced catalogues. Mr. Bannister was a manager in the Defendant's accounts department at premises in London. It was alleged that as a result of exposure to asbestos during one short incident in 1983/4, Mr. Bannister died of mesothelioma on 12th March 2019. It was alleged that following a weekend of asbestos removal works at the Defendant's premises, asbestos dust was left in Mr. Bannister's office which was visible when he came into the building on a Monday morning. It was alleged that the resulting asbestos dust was visible all over his desk and floor.

17. The claim failed in circumstances where the Claimant failed to prove that the dust which was found in Mr. Bannister's office was asbestos dust. In arriving at this conclusion, Geoffrey Tattershall QC (sitting as a Deputy Judge of the High Court) found that it was inherently unlikely that the Defendant, which had taken steps to identify the asbestos panels within the premises and had also taken steps to provide its employees with warnings about the forthcoming works (in the form of a memo), would have permitted the contractors to undertake the works without precautions.

18. The Judge also gave some general guidance on why the evidence of lay witnesses in historic claims should be viewed with care, citing principles from *Gestmin SPGS SA -v- Credit Suisse (UK) Limited* [2013] EWHC 3560, *Sloper -v- Lloyds Bank Plc* [2016] EWHC 483 and *Kimathi -v- Foreign and Commonwealth Office* [2018] EWHC 20.

19. The Judge also considered how the "Fairchild test" of materiality (i.e. whether the asbestos was of sufficient magnitude to create a "material increase in risk") should be determined.

20. The Judge approved the use of a "dose" estimate to guide the analysis of risk and considered the competing medical evidence as to how the dose estimate should be deployed in assessing risk. This involved the incorporation of epidemiological evidence and analysis from the 2000 study by *Hodgson & Darnton* on the risks associated with low levels of asbestos exposure.

21. The Judge accepted the Defendant's submission that the test of materiality could be formulated as follows: *"a dose of asbestos which was properly capable of being neglected could be defined as a dose which a medical practitioner who is aware of the medical risks would define as something that the average patient should not worry about"*.

22. In addition, the Judge accepted the Defendant's medical evidence that using a combination of the dose estimate and the *Hodgson & Darnton* paper would result in an estimated incidence of 0.2 deaths per 100,000 (lifetime risk) in those exposed- or a 1:50 million (annual risk) which the Defendant's expert did not regard as medically material. The Judge concluded that exposure at such a level could not be characterised as a "material increase in risk" and was therefore *de minimis*.

23. Accordingly, Judgment was given for the Defendant on the basis that the Claimant could not demonstrate that Mr. Bannister had in fact been exposed to asbestos and that even if the exposure had taken place, it should be treated as *de minimis*, so the claim would also have failed on that basis.

24. Practitioners should note that the Court adopted a specific framework for the consideration of what amounts to a "material increase in risk" and this involved a medical and epidemiological assessment of the risk. It demonstrates the importance of obtaining dose estimates and also medical evidence as to how that dose is to be interpreted in relation to the question of risk.

Silica Claims

25. In July 2019, the All-Party Parliamentary Group on Respiratory Health, in partnership with not-for-profit organization B&CE, commenced an enquiry into the issue of silicosis in the construction industry. The report was recently published in April 2020[10]. The fact that the report is entitled 'Silica - the next asbestos?' probably tells you something about the level of perceived risk which was found to be present within the industry due to respirable crystalline silica ('RCS') inhalation.

[10] https://2ihxox21inu92ajbbx2yez7v-wpengine.netdna-ssl.com/wp-content/uploads/2020/03/BCE-APPG-silica-next-asbestos-report.pdf

26. The report commented on academic research to suggest that up to 600,000 construction workers in the UK were exposed to silica dust on a daily basis and that silica posed the second highest health risk to construction workers behind asbestos. Knowledge within the industry of RCS, including its sources, risks and protective measures to alleviate those risks was found to be severely lacking and inadequate. The fact that since 2013 the development of silicosis has been non-reportable under RIDDOR nor a notifiable diseases under the Health Protection (Notification) Regulations 2010 has combined with this lack of industry knowledge to further compound the problems in surveying the extent to which exposure is occurring for workers within the sector. The present regulatory exposure limits were also deemed to be inadequate in the UK standing at 0.1mg/m^3 which is double the exposure limit in other countries and a limit which had been recommended in the UK since as long ago as 2003. Present exposure levels, however, were believed to be rarely adhered to in the UK and even rarer investigation or enforced by the HSE which is under-resourced to deal with the issues effectively.

"Respondents overwhelmingly told us that the true picture of silicosis in construction is unknown. It is not clear whether the number of cases is increasing over time, or whether it is better diagnosed. Several called for further clinical investigation into the true extent of the problem and a requirement to report newly diagnosed cases under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR) 2013, Surveillance of Work-related Diseases (SWORD) and The Health and Occupation Research network (THOR). iOH (formerly AOHNP) told us that there is a risk that many of the 2.2 million individuals working in construction in the UK could be exposed to the dangers of RCS. Some evidence suggests that their families could also be at risk but precise numbers affected by the silicosis problem are unclear. Contributors cite underreporting, the fragmented nature of the industry and poor diagnostic ability in the UK as factors which have limited the ability to pin down exactly how widespread the problem is."

27. The report confirms the previously established facts that RCS remains a particular issue in the stone mason industry, but is also relevant for those engaging in stone-work (including bricks and tiles) where exposure risk is also enhanced due to the increased use of power-tools within the industry:

"RCS is most toxic when it is freshly 'fractured' through processes such as stonecutting, drilling and polishing. When broken down in this way, it is a fine enough dust to reach deep inside the lungs when inhaled. Silica dust particles are invisible to the naked eye in normal light~~17~~, so high concentrations can be inhaled without the worker being aware of it."

28. Presently, regulation for the control of RSC remains governed by COSHH which also sets the exposure limits already cited. In order to comply with COSHH, employers need to:

- *Carry out a risk assessment*
- *Keep a record of the assessment (if they employ more than five people)*
- *Where practicable, consider substituting material with a lower RCS content*
- *Prevent or control exposure to RCS*
- *Explain the risks of RCS and how to avoid them*
- *Provide the worker with respiratory protective equipment*

Health surveillance is also required under the management of Health and Safety at Work Regulations 1999.

29. The recommendations from the collaboration can be summarised as follows[11]:

1. To make silicosis a reportable condition under the Reporting of Injuries, Diseases, and Dangerous Occurrences Regulations (2013) for those who are still at work and exposed, and make silicosis notifiable under the Health Protection (Notification) Regulations 2010 with the additional creation of a national silicosis register maintained by Public Health England.

2. Commence a targeted industry awareness campaign for those at risk from RSC exposure.

3. Allow for the share of occupational health records between workers and employers.

4. Introduce occupational health services into GP surgeries to allow for occupational histories to be taken where work-related ill health is suspected.

5. Introduce new health and safety regulations specifically relating to the control of respirable crystalline silica (RCS), to bring it into line with asbestos.

[11] Full outlines of each recommendation are set out in the report along with reasoning for each.

6. The NHS investigates the introduction of an appropriate screening programme for those exposed to RCS.

7. Increase access to occupational health services for those industries generating RCS exposure.

8. Reduce the workplace exposure limit (WEL) for RCS in the UK from 0.1mg/m3 to 0.05mg/m3, and statutory monitoring requirements are introduced to ensure workers are not exposed above that limit.

9. That the HSE introduces compulsory requirements for the effective use of masks, dust extraction and water suppression, along with annual reporting of inspection and compliance levels.

10. That HSE resources are increased to raise the volume of on-site inspections of building contractors of all sizes.

30. Plainly, some of the recommendations are ambitious. Others, however, are more nuanced intended to make use of existing regulatory instruments to expand protection and curb risks. The most interesting feature is undoubtedly the recommendation to table a new regulatory instrument specific to silica inhalation in a similar guise to the Asbestos Regulations and thereby take regulation for silicosis outside the COSHH regime within which it presently resides. With that, bespoke risk assessment, health surveillance and exposure limit guidance will undoubtedly emerge and plainly through the same, it is hoped that industry knowledge and extensive surveying will catch-up to form a better idea of the scale of the problem. Very much, 'watch this space'.

Dupuytren's Contracture

31. On 19th September 2019 the Social Security (Industrial Injuries) (Prescribed Disease) Amendment Regulations 2019 were tabled in Parliament. They came into force on 9th December 2019. With their passing, they brought into the spotlight a 'new' prescribed disease from the use of vibratory tools at work; Dupuytren's Contracture. On the back of this, there will, inevitably be new vibration-induced disease claims which will emerge in addition to the existing cohort of; HAVS, VWF, and vibration-induced CTS.

32. For those unfamiliar with the condition, Dupuytren's is a deformity of the hand (and more specifically, the ring and little fingers) which is caused by the developed of hardened fibrotic tissue in the palm of the hand which then causes the ring or little ringers (or sometimes both in extreme cases) to contract inwards and unable to be straightened. A typical example is in the image below[12]:

33. The link between vibration exposure and the development of the condition is not clear-cut. It has been debated for some time and was put into considerable focus by the Industrial Injuries Advisory Council ('IIAC') in 2006 when 'some' link was thought to be had. It is notable that, even today, the NHS website does not refer to the use of hand-held tools (be they vibratory or not) as being a possible cause of the condition. Likewise, rarediseases.org also do not list vibration or occupational factors as being a potential cause[13].

34. However, in 2014, IIAC commissioned a report[14] which ultimately concluded that the use of vibratory tools at work 'more than doubled' the risk of the development of the condition and therefore recommended that Dupuytren's Contracture become a prescribed disease for the purposes of Industrial Injuries Benefit:

"The Industrial Injuries Advisory Council's (IIAC's) inquiries in this area have included a detailed review of the research literature, consultation with experts in the field, and fresh analyses of three existing datasets held by other parties. When taken together, the evidence indicates that risks of the disease can be more

[12] https://www.nhs.uk/conditions/dupuytrens-contracture/
[13] https://rarediseases.org/rare-diseases/dupuytrens-contracture/
[14] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/308645/dupuytrens-contracture-report.pdf

than doubled (the threshold commonly employed in deciding on prescription under the IIDB Scheme), provided that exposures to vibration are sufficiently long."

35. In pinning down the exposure qualification criteria for those with demonstratable Dupuytren's Contracture, the report recommended, at paragraph 50:

"In considering a workable definition of the qualifying exposure(s), the Council feels that a duration of exposure at least ten years in aggregate (to the extent of two or more hours per day on three or more days per week) would be an appropriate cut-off point."

36. Following that report however, in 2017 the Government turned down the recommendation. Subsequently, it transpired that a meeting was requested by IIAC to discuss the issue further, in which IIAC persuaded the Government to endorse the original recommendation[15], including the recommendation as to exposure criteria. Regulation 2(3) of the Social Security (Industrial Injuries) (Prescribed Disease) Amendment Regulations 2019 now formally confirms that Dupuytren's Contracture is a prescribed disease and amended The Social Security (Industrial Injuries) (Prescribed Disease) Regulations 1985(c) to include the same as category reference A15[16].

Noise-Induced Hearing Loss Claims

37. A further recent Court of Appeal decision has emerged in the context of a NIHL claim which dealt with the issue of restoration of a company to the register. Admittedly, not an issue which is specific to NIHL claims only, it is nonetheless a useful decision to discuss given the legacy nature of many industrial disease claims.

38. In *Cowley -v- L.W. Carlisle & Company Limited* [2020] EWCA Civ 227 the Claimant sought to appeal the initial decision of a District Judge (which had been upheld on first appeal by a Circuit Judge) following their decision to strike out the Claimant's claim against the Defendant because they had issued, and purported to serve proceedings, against the Defendant prior to restoring the company to the register. At the time of issuing, and indeed the time of service, the Claimant's solicitors were aware of the dissolution of the Defendant and had intimated that they would restore them to the register in due course and

[15] See page 11 of the IIAC's latest Annual Report published in July 2019: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815349/iiac-annual-report-2018-2019.pdf
[16] http://www.legislation.gov.uk/uksi/2019/1241/pdfs/uksi_20191241_en.pdf

proposed a stay for that to take place. They also stated that they would rely on the decision in *Peaktone Ltd -v- Joddrell* [2012] EWCA Civ 1035 to retrospectively validate service once the Defendant was restored.

39. The 'Defendant', through its insurers, filed an Acknowledgement of Service contesting jurisdiction and made a further application to strike out the claim under CPRr3.4(2) as an abuse of process. The Claimant argued that notwithstanding the dissolution of the Defendant, the proceedings had been properly served on it at its last known place of business and that an order restoring the company to the register would validate that service retrospectively - again citing reliance on *Jodrell.* However, crucially, at the time of the application being made, and indeed the time of the hearing of that application before the District Judge, no such application to restore the Defendant had been lodged by the Claimant.

40. Lord Justice McCombe, giving the lead judgment in the Court of Appeal, held as follows[17]:

"Whatever may be the retrospective effect of the order restoring LWC to the register of companies may be, and whilst it may well be that (as in Peaktone) many, if not all, of the steps taken in the action would now be validated, we have to judge whether the orders below were properly made on the basis of the facts before the judges who made those orders. When they each reached their decisions LWC had been struck off and had been dissolved. The company no longer existed, and the judges had to work on that basis."

41. He went on[18]:

"In our judgment, therefore, he was entitled to consider whether the overriding objective was properly served by the continued presence in the action of the name of a non-existent company. He was entitled to consider whether he should exercise the power to strike out the claim purportedly brought against LWC and he did not err in principle in making the strike out order that he did for the short reasons that he gave. The good reasons for making that order were also properly articulated by Judge Rawlings in the passages of his judgment which we have quoted above."

42. A further issue then arose in respect of the way in which the insurer for the purported Defendant had then gone about its making of the application. A question arose as to whether or not an insurer (and therefore any solicitors who they appointed to act), had authority to make such an application given the dissolved status of the company they purported to act for. Whilst such authority may vest via the insurance policy they incur liability under, it was thought that that authority was removed by the dissolution. It seems in

[17] Paragraph 30
[18] Paragraph 33

obiter, the Court of Appeal suggested that were this situation to arise in the future, the insurer ought to notify the Court of the dissolved solution and invite them to case manage that issue accordingly and, where no application to restore is made, to strike out the claim[19]. Obviously, an issue arises though that the insurer could not be heard at any future hearing since their insured is not a party to proceedings unless and until, restored. Thinking about this issue in a little more detail, it is possible that CPRr3.1(2)(m) may provide the ambit to allow the Court to permit a non-party to attend and make submissions on a point in issue. At first blush, CPRr19.2(2)(b) would be impermissible since a dissolved company, even if named on a Claim Form, cannot be an 'existing party' when having regard to the wording and guidance to CPRr19.1 - under which a Defendant or party is described being a 'person' which in turn is "taken to mean a human being or entity which is recognised by the law as the subject of rights and duties"[20]. Plainly, the law does not 'recognise' a dissolved company due to its dissolved status and, in turn, it cannot hold or be subject to any rights or duties for the same reason. An interesting side-note to the judgment which will, no doubt, be re-visited!

Kam Jaspal
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June 2020

To view Kam Jaspal's profile, please click here.

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[19] See paragraph 36
[20] See commentary at 19.1.2 of the 2020 White Book

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