Asbestos Claims Update

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Author: Kam Jaspal

In this article, Kam Jaspal provides an update on asbestos litigation in the time of the COVID-19 pandemic and summarises recent developments in the area, from asbestos in schools to low exposure claims and limitation.

Asbestos Lists in the RCJ

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.

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 Injuries 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 are still heard relatively swiftly following issue, with cases prioritised where necessary. Please click here to view the guidance initially issued by Senior Master Fontaine.

Asbestos in Schools

Looking at things more widely, practitioners may recall an article which featured in the *Guardian* last summer regarding asbestos in schools. In February 2012, the All-Party Parliamentary Group on Occupational Health and Safety had previously reported upon the widespread presence of asbestos in school buildings, 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.

In 2017, the Department for Education ("DfE") published a further report relating to schools with asbestos on their premises entitled "*Managing asbestos in your school*". 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, and the article in the Guardian in July 2019 cited above.

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.

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

1. the development of a planned, phased and costed programme of removal of all asbestos from schools;

2. the establishment of a mandatory survey of all schools ensuring that it is known exactly where the asbestos is present and in what condition it is in;

3. training for all school staff on how asbestos should be managed in schools;

4. an increase in resources to the Health & Safety Executive ("HSE") and restoration of proactive inspections by them in schools; and

5. the availability of the results of surveys to all staff and parents of each school.

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' resumes.

Asbestos Claims and Section 33 Discretion

In the recent High Court decision of *Gregory v H J Haynes Ltd* [2020] EWHC 911 (Ch), Mann J overturned a first instance decision of a District Judge who had found the claim statute-barred under the Limitation Act 1980 and had refused to exercise his section 33 discretion.

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 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.

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

Focusing on that issue, Mann J held as follows at [10]:

"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."

His Lordship went on at [15]:

"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 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."

Accordingly, the Appellate Court re-assessed the section 33 position and, 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.

Low Exposure Claims

In the recent case of *Bannister 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 1983/84.

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 Mr Bannister died of mesothelioma on 12 March 2019 as a result of exposure to asbestos during one short incident in 1983/84 when, following a weekend of asbestos removal works at the Defendant's premises, asbestos dust was left in Mr Bannister's office which was visible all over his desk and floor when he came into the building on the Monday morning.

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.

The Judge also made some general observations as to the reasons why the evidence of lay witnesses in historic claims should be viewed with care, citing principles from *Gestmin SPGS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), *Sloper v Lloyds Bank plc* [2016] EWHC 483 (QB) and *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 20 (QB).

The Judge 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 and approved the use of a "*dose*" estimate to guide the analysis of risk. He 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.

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*".

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*.

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.

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. This 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.