CA ON APPEAL FROM THE YORK COUNTY COURT (HIS HONOUR JUDGE RICHARD HUNT) : 22nd November 19999

1. **LORD JUSTICE WARD**: Mr Twohey died just over ten years ago aged 58. The cause of his death, which was not in dispute, was mesothelioma of the left pleural cavity due to exposure to asbestos. He had encountered all types of asbestos in the course of his working life as a plumber and heating engineer, much of his time having been spent moving the asbestos lagging round heating pipes and boilers, breaking it up and then, with fresh asbestos added, mixing this into a paste and reapplying it to pipes and boilers.

2. The period with which this appeal is concerned is the period from May 1954 until July 1968 when the deceased was employed as a plumber and heating engineer by a company called J Lindley & Co Ltd, which has long since ceased to exist and whose insurers are not known. That company had a contract with the Leeds County Council for the service and maintenance of their heating boilers at a number of premises owned by the council. The case brought by the executors of the late Mr Twohey was that he had spent about half of his time in that repair which produced large quantities of asbestos dust in surroundings without adequate ventilation. Breathing in that dust eventually led to his death.

3. The action was commenced in 1990 against seven defendants of which Lindley & Co was the second and the County Council the sixth. Eventually proceedings against all but the County Council were discontinued. The claim was dismissed by His Honour Judge Roger Hunt on 2 November 1998 and the executors appeal against that order.

4. In a nutshell the case is that the Council, as occupiers of the premises, owed the deceased the common duty of care under the Occupiers Liability Act 1957 and a duty in negligence to take adequate precautions against exposure to the asbestos dust; to warn his employers against the exposure to the dust; to ensure adequate ventilation of the boiler rooms and not permit the asbestos dust to become airborne.

5. At the trial a statement which had been made by the deceased before his death was admitted. In that statement the deceased spoke of his spending about 50 per cent of his time in the carrying out of the relagging procedures I have described. There was an agreed medical report which concluded with the opinion that: *"The work at the premises of Leeds City Council materially contributed to causation of his mesothelioma".*

6. The judge correctly identified that the principal issue was: *"The principle [sic] issue in the case was whether occupiers of property should have realised and taken precautions against asbestos dust in the 1950's as contended for by the Plaintiffs' expert Mr Beauchamp or by the 1970's as contended for by Mr O'Neill the Defendants' expert."*

7. His findings are set out in a judgment which is so short as perhaps to be perfunctory. He found at page 87: *"Both experts, as I understood it, agreed that knowledge of the dangers of asbestos came first to the manufacturers of asbestos, secondly to major users of it such as the Royal Navy then handlers of it such as plumbers and heating engineers and their employees, then occupiers of premises where asbestos had been used for insulation or fire prevention purposes and finally the general public. I am bound to say that at the end of the day I found the evidence of Mr O'Neill more persuasive than that of Mr Beauchamp and that the time when a reasonable occupier would be aware of the need for steps to be taken to reduce the inhalation of asbestos dust would be the 1970s."*

8. The judge referred to two authorities, **Ferguson v Welsh** [1987] 3 All ER 777 and **Bryce v Swan Hunter Group Plc [**1988] 1 All ER 659, which highlighted the differences between the liability of an occupier towards the employees of independent contractors working on their premises and the liability of employers to their employees. But, having pointed to the difference, he gave no indication as to how that distinction impacted upon his judgment. He then concluded: *"It follows, unhappily for the Plaintiffs, that I am not satisfied on a balance of possibilities that the Deceased was exposed to asbestos dust causing injury whilst working on the sixth Defendants' premises nor more importantly that if he was the Sixth Defendants were in breach of their duty as occupiers. Accordingly there must be judgment for the Defendants."*

9. That is essentially his judgment in four pages of double typescript, a good part of which was concerned with matters which were immaterial and which, perhaps upon reflection, the judge might have better left unsaid. It was a judgment handed down (we are told) shortly before the date of the order on 2 November, the trial of the action, which lasted two days, having concluded on 22 July.

10. The major attack upon that judgment is, therefore, unsurprising. It is that the judge gave no reasons for preferring the evidence of the defendants' expert, Mr O'Neill. Accordingly Mr Grenyer, for whose concise

submissions we are grateful, submits that if he cannot be entitled to his judgment at least this matter is one which has produced such an injustice that it ought to be remitted for re-hearing.

11. In my view it is axiomatic that the judge must sufficiently explain the reasons for this judgment so that that judgment can be understood by and intelligible to the parties before him. Here no reason, other than that the evidence of Mr O'Neill was more persuasive, is given by the judge. This was a case in which he heard those experts over several hours giving their evidence and giving reasons as to why each held the opinion which he did. It was intellectually possible, therefore, to explain what it was about the evidence of Mr O' Neill that rendered his opinion more persuasive than that of Mr Beauchamp.

12. It would have been perfectly possible for the judge to have set out in sufficient detail why it seemed more likely that knowledge would have come to occupiers in the 1970s rather than in the 1950's, and why he was not able to accept those passages elicited under cross-examination of Mr O'Neill which suggested that practical steps could have been taken, even in the 1950s to at least reduce the inhalation of the asbestos dust. The judge gave no intellectual reason for making the preferential decision which he did. He did not even say, as he could have said, that, having seen the witnesses cross-examined and closely observed their demeanour and the manner in which they gave their evidence, he was attracted to one rather than the other for that reason.

13. We are now left in the unsatisfactory position of having disputed evidence, which is not necessarily so compelling on one side or the other, that we can properly substitute our judgment for that of the judge. It would create an injustice if we were to usurp the advantage the trial judge has in the particular circumstances of a case like this. It follows that the only way which that injustice can be corrected is by remitting the case back to the county court for a further hearing.

14. That conclusion is one which I reach with a heavy heart. I do so because, as I indicated at the beginning of this judgment, it is now ten years since Mr Twohey died. The tenor of the judgment was in passages such as to have left his widow unhappy about the way in which the case was conducted before the trial judge. It would be an ordeal on her for the matter to be litigated again over a further period of two days.

15. Damages are substantially agreed. It seems to me therefore that this is preeminently the category of case in which, consistent with the overriding objective of the Civil Procedure Rules and the court's duty to manage cases as set out in rule 1.4(2)(e), that we should encourage the parties to use an alternative dispute resolution procedure to bring this unhappy matter to the conclusion which it now deserves sooner rather than later.

16. We have been told by Mr Grenyer that they sought to persuade the defendants to engage in such mediation. Mr Taylor, who appears on their behalf and for whose very realistic submissions I am particularly grateful, is not able to tell us whether that is correct or how his professional clients or their insurers reacted to that suggestion. If it be that the overture has been rejected, then we urge the defendants to think again.

17. In the light of the unfortunate history, I would also add the reminder that the court has powers to take a strong view about the rejection of the encouraging noises we are making, if necessary by imposing eventual orders for indemnity costs or indeed ordering that a higher rate of interest be paid on any damages which might at the end of the day be recoverable.

18. With that warning of dire consequences but essentially with a note of encouragement, I would allow this appeal and remit the matter back to the county court. It cannot be tried by His Honour Judge Roger Hunt because, sadly, we are told he passed away some time shortly after the delayed judgment which I have had occasion to criticise.

19. **LORD JUSTICE LAWS:** I agree that this appeal should be allowed for the reasons given by my Lord, Lord Justice Ward and that the order for a retrial proposed by him should be made. I would particularly associate myself with my Lord's remarks to alternative dispute resolution.

20. **LORD WOOLF, MR**: I agree and also associate my myself with the remarks made by Lord Justice Ward as to the desirability of trying to resolve this litigation without the necessity for a retrial.

Order: Appeal allowed with costs. Costs below to be costs in the retrial.