Case No: B3/2013/1743

Neutral Citation Number: [2013] EWCA Civ 1346
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BRISTOL DISTRICT REGISTRY QBD
His Honour Judge Denyer QC (sitting as a High Court Judge)
2BS91162

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 6th November 2013

Before :

LORD DYSON, MASTER OF THE ROLLS
LORD JUSTICE McCOMBE
and
LADY JUSTICE GLOSTER

- -

Between :

PERCY LEONARD McDONALD	**Claimant /Appellant**
- and -	
(1) DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT **(2) NATIONAL GRID ELECTRICITY TRANSMISSION PLC**	**Defendants/ Respondents**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
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165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

David Allan QC and Simon Kilvington (instructed by **Irwin Mitchell LLP**) for the **Claimant/Appellant**
Matthew White (instructed by the **Treasury Solicitor**) for the **First Defendant/Respondent**
Dominic Nolan QC (instructed by **Plexus Law**) for the **Second Defendant/Respondent**

- -

Judgment

Lord Justice McCombe:

(A) Introduction

1. This is an appeal by Mr Percy McDonald from the order dated 24 June 2013 of His Honour Judge Denyer QC, sitting as a Judge of the High Court. By that order the learned judge dismissed Mr McDonald's claim against the Defendants/Respondents for damages for personal injuries, alleged to have been sustained by him in the course of his employment by the First Respondent's predecessor and while visiting premises controlled by the Second Respondent's predecessor owing to their respective negligence and/or breach of statutory duty. It is Mr McDonald's case that the condition of mesothelioma, from which, on 12 July 2012, he was diagnosed as suffering, was caused by exposure to asbestos at the Second Respondent's premises, as a result of these breaches of duty. Claims in negligence are levelled against both Respondents. In addition, Mr McDonald alleges that the Second Respondent was in breach of its statutory duties under the Asbestos Industry Regulations 1931 and the Factories Act 1937. Permission to appeal to this court was refused by the Judge and by Goldring LJ on the papers; it was granted upon an oral application by Beatson LJ.

(B) Background Facts

2. Certain of the grounds of appeal relate to the Judge's factual findings and to these points I will return. However, some non-contentious background facts can be stated at the outset.

3. Mr McDonald was born on 30 October 1930 and between 1954 and 1959 he worked at the Building Research Station at Watford, initially as a lorry driver and subsequently (from January 1957) as a fitter. The First Respondent is the successor body to Mr McDonald's employer at that time. The Second Respondent is the successor body to the occupier of the relevant premises at the times in question, the Battersea Power Station in London. During the course of his employment in the relevant period Mr McDonald attended the Second Respondent's premises for the purposes of collecting in his lorry pulverised fuel ash ("PFA"). It was during these visits, he alleges, that he suffered the exposure to asbestos dust from which his condition developed some 55 years or so later.

(C) The parties' cases on the facts

4. Mr McDonald's evidence was received by way of his three witness statements. It had been envisaged throughout the proceedings, until a very late stage before trial, that he would attend the trial and would give his evidence orally. Unfortunately, by the time of the trial (and only shortly before it), it became apparent that his health would not permit him to do this. He was not, therefore, cross-examined on the statements, either before the Judge or before an examiner of the court prior to trial. However, his statements were admitted at trial before the Judge as his evidence in the case.

5. Mr McDonald said in the statements that he was employed by the Building Research Station from 1954 until March 1959. Between 1954 and 1957, his attendance at the power station was as a driver about twice a month. In January 1957 he became a

maintenance fitter and was asked to go to the premises rather less often, about twice every three months on average, when others could not do the trip or if there was not much to do at his work base. The nature of Mr McDonald's evidence as to what occurred on his visits to Battersea can be derived from some short passages from his three statements.

6. In paragraphs 13 to 16 of his first statement he said this:

> "13. I drove a lorry (tipper) to Battersea Power Station and it would be filled up beneath a shoot (sic). PF ash was a fine dust. It took me about an hour to drive to Battersea Power Station and I would normally be there for between 1-2 hours and it would normally take me about an hour and a half to drive back. Nearly all of the occasions I visited Battersea Power Station, there would be a queue of vehicles waiting for various deliveries. I would simply park up my lorry and then go into the power station. I estimate that, on average, I spent about an hour or so in the power station. I had to deal with paperwork and talk to the Manager about my delivery. I got to know the workers in the power station very well and they would show me around and I would also have lunch in the power station. I would always be talking to the power station workers about what they were doing and about football etc. I generally waited in the power station until my lorry was ready.
>
> 14. Most of the time I went to the power station there was some type of lagging and de-lagging work taking place. Boilers, pipe work and equipment was being lagged with asbestos insulation and asbestos insulation was also being removed in some places. For the new asbestos insulation I saw the laggers mixing up asbestos powder in oil drums to make up a paste and apply to the pipe work, equipment or boilers. There was dried paste on the floor and I remember walking on it. There were visible clouds of asbestos in the air and on the surfaces and it was generally a very dusty place to be. I just got used to seeing that amount of asbestos dust in the air. The laggers were also cutting pre-formed sections to fit to pipe work and the boilers/equipment. The laggers also removed some of the old asbestos as I remember seeing them ripping it off the pipe work. I do not know why they were removing the old asbestos. Usually I was only 10-15 feet away from the work of the laggers and fitters.
>
> 15. Back at the British (sic) Research Station, the foreman was Harold Jordan. I would tell Harold that I had been in the power station talking to the workers in there. Harold was aware that nearly all of the delivery drivers would go into the power station whilst waiting for their lorry to be filled up with the PF ash.

> 16. I was not given any training about the dangers of asbestos. I was given no breathing protection to wear."

In paragraphs 4 to 6 of the second statement, Mr McDonald added:

> "4. When I arrived at the Power Station it took me 5 minutes inside the Power Station to walk to the managers' office. On nearly every occasion there were other people waiting to speak to the manager and there were usually about half a dozen people waiting. Once I got all my paperwork completed I would usually speak to the workers who were dealing with my delivery and ask them about how long it would take and if there were any delays as I was on a schedule. If there were any delays I would try and see if they could be avoided and speak to the workers and managers. The workers/managers would take me to where the PF ash processes were being dealt with and show me what they were doing when there were delays. I found that when I spoke to the workers/managers and watched over what they were doing, the quicker I would get my delivery and be able to leave. The more noise I made, the quicker I was able to leave.
>
> 5. I would use the Battersea Power Station toilet that was within the Power Station also. The only reason I was taken around the Power Station was to deal with any issue regarding my delivery.
>
> 6. As I have said in my statement of 31 August 2012, laggers and fitters were in close proximity to the areas where I visited in the Power Station. Sometimes they were above me and I could see asbestos dust falling down, and regularly they would be within just a few feet of where I was speaking to managers and workers."

Finally, in paragraph 3 he said this about his discussions with his foreman, Mr Jordan:

> "When I spoke to Harold Jordan I did tell him a few times that the work of the laggers was very skilled and artistic in how they applied the asbestos lagging material to pipework and boilers. Harold replied that after such a long time the laggers had got used to their job and that's what they were being paid to do."

7. The First Respondent observed that in Mr McDonald's case, he visited the premises something like 68 times over a four year period, about once a month averaged over the four years. It was to be doubted, said the First Respondent, that he was exposed to asbestos on each occasion or even on a majority of them. It was pointed out that Mr McDonald's activities in seeing the station manager, having lunch, using the lavatories and talking with other workers were hardly likely to be in the presence of significant asbestos dust; the relevant parts of the premises no doubt being relatively dust free. It was submitted that the bulk of Mr McDonald's activity would have to

have been carried out in areas related to the loading of PFA, which were at some distance from the asbestos lagging areas.

8. The Second Respondent advanced similar points. The PFA plant was in a different area from where asbestos activity was carried out. The need for Mr McDonald to go to the boiler house of the power station or the turbine house, where asbestos lagging activities took place, would have been limited. There was no need for any lagging work in the PFA plant. In such circumstances, the claim that Mr McDonald would regularly be within 10 to 15 feet of lagging work and regularly exposed to "clouds of dust", as his case was put at various stages of the trial, should be treated sceptically. Further, the argument continued, Mr McDonald would have been naturally anxious to chase the loading of his lorry, which would not have been in the relevant area of the power station premises, in order to be able to leave the premises as quickly as possible.

9. The Judge's conclusion on these rival factual cases was:

> "6. I am conscious that it has not been possible to put these points to the Claimant and I must of course bear that in mind. Nevertheless there is considerable force in some of these observations [of the Respondents]. The inevitable conclusion has to be that any exposure was at a modest level on a limited number of occasions over a relatively short period of time. The intensity of any such exposure is a matter to be dealt with hereafter."

Later in his judgment, after consideration of the expert evidence, the Judge added this:

> "11. I accept the Defendant's [sic] analysis of the real extent and duration of the Claimant's visit to the power station. I reject the notion that he was constantly standing in clouds of asbestos dust when he was there - this is an unreal scenario."

10. It is submitted for Mr McDonald that in the absence of cross-examination his evidence should have been taken by the judge as uncontroversial and that the Judge should not, therefore, have reached a conclusion as to the nature of Mr McDonald's exposure to asbestos as other than that alleged in his witness statements. Mr Allan QC and Mr Kilvington for Mr McDonald refer to the following passages from Phipson on Evidence 17th Edn. paragraph 12-12

> "17.....*In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point*.....
>
> 18…...*This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected.*"

11. Mr Nolan QC for the Second Respondent submits that the Respondents had not waived their right to contest the underlying facts of the case, simply because cross-examination of Mr McDonald proved to be impracticable. This, he argues, was a trial brought to an expedited hearing, because of Mr McDonald's health, and until two days before trial it was thought that he would be attending to give live evidence. The potential window for examination of Mr McDonald pre-trial was set for an early stage and before full exchange of expert evidence, which was to be important in this case.

12. Mr Nolan argues that the witness statements were admitted in evidence under the Civil Evidence Act 1995 which provides that the weight of such evidence is to be assessed with regard to any circumstances to be drawn as to its reliability or otherwise: see section 4 of the Act. He points to section 4(2) which provides:

> "(2) Regard may be had, in particular, to the following
>
> (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
>
> (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
>
> (c) whether the evidence involves multiple hearsay;
>
> (d) whether any person involved had any motive to conceal or misrepresent matters;
>
> (e) whether the original statement was an edited account, or was made in collaboration with another of for a particular purpose;
>
> (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

Mr Nolan submits that, of these factors, (b), (d) and (e) are of relevance in this case.

13. The Respondents argued before the Judge (and argue in this court) that these matters, and the various criticisms of the evidence advanced by Mr McDonald, were factors which the Judge was entitled to take into account in assessing the facts overall and that the judge was entitled to conclude, as he did, that the exposure to asbestos was "at a modest level on a limited number of occasions over a relatively short period of time". It is to be seen further from the judgment that the Judge weighed up these various factors affecting the value to be placed upon Mr McDonald's evidence and properly put each factor in the balance.

14. In my judgment, the Respondents' approach to the assessment of the factual background is correct. The Judge was not bound to take Mr McDonald's witness statements as "word for word" accurate. The Judge was entitled to have regard to the full procedural circumstances (with which he was well familiar) in which the evidence had been admitted and to assess its weight, in accordance with section 4 of the 1995

Act and having regard to the inherent probabilities in the case in the light of the submissions made to him. I do not, therefore, accept the criticism of the Judge's factual findings advanced on behalf of Mr McDonald.

15. In the circumstances, I consider that the Judge's findings of primary fact as to the level of the relevant exposure should not be disturbed and must form the basis of our consideration of the other points arising on this appeal.

(D) The Expert Evidence

16. The Judge set out in his judgment the salient features of the expert evidence, given by Mr John Raper, a forensic scientist (called on behalf Mr McDonald) and by Mr Graham Glenn, a consulting engineer (instructed on behalf of the First Respondent). They each gave evidence as to the general state of knowledge of the potential for harm from asbestos exposure at various dates. By the end of the pre-trial stages there was substantial common understanding as to the state of knowledge of the dangers posed by asbestos, reflected by the following extracts from the experts' joint report:

> "5. Mr Raper will say that from the early 1930s there was knowledge that exposure to the substantial quantities of asbestos dust was associated with a risk of developing asbestosis.
>
> 6. Mr Glenn will say that it was thought that prolonged exposure to a high concentration of asbestos dust was necessary to create a risk of asbestosis.
>
> 7. We agree that from the mid-1950s it was shown that the type of exposure to asbestos dust associated with a risk of asbestosis was associated with the development of lung cancer.
>
> 8. We agree that from the mid-1960s there was knowledge that exposure to small quantities of asbestos dust, in particular crocidolite, was associated with a risk of developing mesothelioma.
>
> 9. The date that the Defendants either did or should have become aware of the risks associated with asbestos dust is a matter for the Court to consider. However, we agree that the Claimant's attendance at the Second Defendant's premises during his employment with the First Defendant would have pre-dated knowledge of mesothelioma and knowledge that exposure to relatively small quantities of asbestos dust was harmful.
>
> 10. Mr Raper will say that at the time of the Claimant's attendance at the Second Defendant's power station there would have been sufficient authoritative literature in the public domain for the Second Defendant, as operators of Battersea power station, to have realised that exposure to a high

> concentration of asbestos dust was associated with a serious health hazard.
>
> ……
>
> 13……Mr Glenn would not condone ignorance of a significant risk to health in the course of such work, but the Claimant's work was to drive to the power station to collect ash. He was not employed or expected to spend time wandering around the power station. The duty of the First Defendant with regard to any possible risk outside the work required as part of the employment is a matter for expert legal comment."

17. Based upon the earlier factual findings, to which I have already referred, the Judge found this:

> "I accept that his [Mr McDonald's] likely exposure when exposed was not greater than those levels thought of in the 50s and 60s as being unlikely to pose any real risk to health."

(E) The Judge's Conclusions

18. On this state of the evidence, and on the basis of his findings to which I have referred, the Judge proceeded to consider the respective liability of the two respondents.

19. So far as the First Respondent is concerned he considered the decision in this court in *Williams v University of Birmingham* [2011] CWCA Civ 1242, and found that there could be no duty upon it, as an employer, to warn against dangers not known to be dangers at the time and his conclusion was this:

> "I have already dealt with the likely actual level of exposure to which the Claimant in this case was subject. I have explained that in the 1950s no employer such as the first Defendant could have been expected to know about the risk posed by a modest degree of exposure to asbestos fibre. It would not have been reasonably foreseeable to the first Defendant that the Claimant was likely to be exposed to asbestos related injury. There were no steps that the first Defendant ought to have taken given that they were perfectly reasonably unaware of any exposure or any danger of exposure in the circumstances in which their employee, the Claimant was attending the premises at the power station. There were no necessary reasonable steps that the first Defendant could have taken. As I have already indicated it cannot be the case that they can be expected to have given advice about a danger of which they were, perfectly reasonably, unaware. As it seems to me the claim against the employers the first Defendant must fail."

20. The Judge proceeded to consider the position of the Second Respondent as controller of the subject premises. (The Amended Particulars of Claim relied upon alleged breaches of sections 1(1), 4, 26 and 47 of the Factories Act 1937 and upon alleged

breaches of Regulations 1 and 2 of the Asbestos Industry Regulations 1931 (made under section 9 of the Factory and Workshop Act 1901)). It appears that, before the Judge at trial, however, only the claims under s.47 of the 1937 Act and under Regulation 2 of the 1931 Regulations were pursued.

21. As mentioned above, it seems that claims in negligence were also levelled against this respondent, although the wording of paragraph 7 of the Amended Particulars of Claim is not of the clearest, referring in different places to "Defendan***t***" and "Defendant***s***" and particularising breaches of duty mostly more apt to a case against an employer only. The skeleton argument at trial, however, made it clear that negligence at common law was being alleged against the Second Respondent, in addition to breach of statutory duty.

22. The Judge dealt with the case against the Second Respondent only in respect of breach of statutory duty. Mr Nolan submits that, after hearing the evidence of the experts, there was really no surviving case in common law negligence capable of being pursued against his client.

23. The Judge began with consideration of Section 47(1) of the Factories Act 1937 which was in these terms:

> "….In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such an extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against the inhalation of the dust or fume or other impurity and to prevent it accumulating in any work room, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained as near as possible to the point of origin of the dust or fume or other impurity, so as to prevent it entering the air of any work room."

24. The Judge's conclusion in respect of the alleged liability under that subsection, after consideration of *Baker v Quantum Clothing* [2011] UKSC 17, [2011]1 WLR 1003 (a case concerning noise and liability under s.29 of the Factories Ac 1961), was this:

> "By reference to all the matters set out in this judgment in my view it is abundantly clear that in the 1950s by reference to the knowledge available to persons such as the second Defendants it would not reasonably have been foreseen that the quantities and intensity of any asbestos dust given off to which this Claimant was exposed would be likely to be injurious or offensive to his health. In other words as a matter of fact the statutory duty in Section 47 would not have extended at that time to protecting this Claimant from the inhalation of such modest quantities as he may have inhaled."

25. The Judge had begun his consideration of section 47(1) by focussing on the part of the section dealing with "any substantial quantity of dust", but ended with a conclusion

based upon the part dealing with "dust…of such a character and to such an extent as to be likely to be injurious or offensive to the persons employed…".

26. The preamble to the Regulations, significantly defining their scope in a manner unfamiliar in modern legislative drafting, provided as follows:

> "In pursuance of Section 79 of the Factory and Workshop Act, 1901, I hereby make the following Regulations and direct that they shall apply to all factories and workshops or parts thereof in which the following processes or any of them are carried on:-
>
> (i) breaking, crushing, disintegrating, opening and grinding of *asbestos*, and the mixing or sieving of *asbestos*, and all processes involving manipulation of *asbestos*, incidental thereto;
>
> (ii) all processes in the manufacture of *asbestos textiles*, including preparatory and finishing processes;
>
> (iii) the making of insulation slabs or sections, composed wholly or partly of *asbestos*, and processes incidental thereto;
>
> (iv) the making or repairing of insulating mattresses, composed wholly or partly of *asbestos*, and processes incidental thereto;
>
> (v) sawing, grinding, turning, abrading and polishing, in the dry state, of articles composed wholly or partly of *asbestos* in the manufacture of such articles;
>
> (vi) the cleaning of any chambers, fixtures and appliances for the collection of *asbestos* dust produced in any of the foregoing processes.
>
> Provided that nothing in these Regulations shall apply to any factory or workshop or part thereof in which the process of mixing of *asbestos* or repair of insulating mattresses or any process specified in (v) or any cleaning of machinery or other plant used in connection with any such process, is carried on, so long as (a) such process or work is carried on occasionally only and no person is employed therein for more than eight hours in any week, and (b) no other process specified in the foregoing paragraphs is carried on."

It continued:

> "It shall be the duty of the occupier to observe Part I of these Regulations".

Then one finds, in Part I, Regulation 2 in these terms:

> "2. (a) Mixing or blending by hand of *asbestos* shall not be carried on except with an exhaust draught effected by mechanical means so designed and maintained as to ensure as far as practicable the suppression of dust during the processes.
>
> (b) In premises that are constructed or re-constructed after the date of these Regulations the mixing or blending by hand of *asbestos* shall not be done except in a special room or place in which no other work is ordinarily carried on."

27. The Judge held that he was bound by the decision in this Court in *Cherry Tree Machine Co. Ltd. & anor. v Dawson* [2001] EWCA Civ 101, [2001] PIQR P19 to hold that the Regulations applied not only to premises where the manufacture or use of asbestos was central to the processes being carried out, but also to other types of premises where relevant processes were carried out, and he found that, of the six processes identified in the preamble as relevant, only one was material in the present case, namely that identified in paragraph (v) quoted above:

> "(v) sawing, grinding, turning abrading and polishing in the dry state, of articles composed wholly or partly of asbestos in the manufacture of such articles".

(He did not refer to "mixing…of asbestos" as appears in paragraph (i). It seems to follow, therefore, that he also considered that Regulation 2(a) did not apply – "mixing or blending by hand").

28. The Judge considered that "sawing or grinding" might have been relevant to lagging work in respect of the pipes and that it might have been done as incidental to the work of power generation. He then referred to the exception to the regulatory duties, appearing in the preamble, for any process within paragraph (v),

> "…so long as (a) such process or work is carried on occasionally and no person is employed therein for more than eight hours in any week…"

29. The Judge noted that no evidence was available from anyone actually working at Battersea in the 1950s and concluded:

> "Given the lack of evidence and given that on any view the lagging of pipes was, at best, an incidental to the main work of the power station, I cannot possibly be satisfied that individuals working for the second defendants at that time did such work other than occasionally and were so employed for more than eight hours per week. In other words, even if the Regulations applied to Battersea and even if visitors and not just employees are potentially within the ambit of the protection, I am not satisfied on the balance of probability that the exemption did not apply. The claim pursuant to the Regulations therefore fails."

(F) The Appeal

30. On the present appeal Mr Allan QC (who did not appear below) and Mr Kilvington for Mr McDonald submit that the learned Judge failed properly to consider the argument that the First Respondent owed a "non-delegable duty" at common law to provide a safe system of work and, in this respect wrongly held that it was reasonably unaware of the potential danger to its employees, including Mr McDonald, from exposure to asbestos. With regard to the Second Respondent, it is argued that the Judge came to erroneous conclusions in respect of the claims under section 47 of the 1937 Act and under the 1931 Regulations.

31. In respect of the common law duty, Counsel for Mr McDonald rely upon the following passage (slightly misquoted in the skeleton argument) from the judgment of Kennedy LJ in *Nelhams v Sandells Maintenance Ltd & anor.* [1996] PIQR 52, 55, referring to the judgment of Beldram LJ in *Morris v Breaveglen* [1993] PIQR 294 as follows:

> "Giving the leading judgment in this court, Beldram L.J. analysed all of the well known authorities relating to this branch of law, and pointed out that there is an important distinction to be drawn between cases where damage has been caused by an employee in the general employment of one employer who is working under the directions of a second employer and cases where it is the employee himself who sustains the damage. In the first category of case the general employer may be able to escape vicarious liability. In the second category of case vicarious liability is not in issue, and the general employer remains subject to his duty to exercise due care and skill for the safety of his employees by providing them with suitable plant and equipment and a safe system of work. As it happens, the employee has been instructed, in the course of his employment, to go to a site which his employer does not control, and to work there under the directions of a supervisor or supervisors employed by others who thus become the agents through whom the general employer seeks to discharge his obligations to his employee, but the employer remains liable if the agents themselves do not use due care and skill in carrying out the employer's duty (*Wilsons and Clyde Coal Co v English* [1938] A.C. 57). As Lord Hailsham said in *McDermid v Nash Dredging Reclamation Co.* [1987] AC 906 at 910, "the employer cannot escape liability if the duty has been delegated and then not properly performed."
>
> Beldram L.J. pointed out in *Morris* that if there is negligence on the part of the supervisor to whom the plaintiff has been entrusted, the employers of that supervisor may be vicariously liable for his negligence, so it is entirely possible that more than one defendant will be found liable."

32. With regard to the dismissal of the claim under section 47, it is submitted as follows:

i) that the Judge wrongly found that the duty only arose in respect of persons employed in the factory in issue;

ii) that he erred in finding that the duty to take all practicable measures to protect against "any substantial quantity of dust of any kind" required "foreseeability" that the quantities and intensity of dust being given off would be likely to be injurious or offensive to health. It is submitted that this conflates the two parts of the section, namely (a) "dust…of such a character and to such an extent as to be likely to be injurious or offensive to the persons employed…" and (b) "any substantial quantity of dust of any kind". In the case of the latter, it is argued there is no requirement of foresight of harm;

iii) That he wrongly failed to consider whether dust given off by mixing asbestos paste or stripping asbestos lagging was "substantial" when given off and that he failed to address an argument that the statutory duty extended to protect against inhalation even if the dust was not "substantial" at the point of inhalation;

iv) That the judge accordingly failed to consider whether the Second Respondent had established that they had taken all practicable steps to protect against inhalation of dust, and thus failed to consider whether the dust inhaled had caused a material increase in the risk of contracting mesothelioma.

33. With regard to the case under the 1931 Regulations, Counsel for Mr McDonald argue that the Judge misconstrued and/or misapplied the Regulations in a number of respects. In summary, it is submitted that the Judge failed to consider the process of "mixing asbestos" and wrongly failed to consider whether that process was carried on outside the exception to the duties provided in the preamble. It is said the Judge erred in requiring Mr McDonald to prove that the Second Respondent was *not* within the exception, rather than placing the burden upon that respondent to prove that the exception *did* apply. Next, it is contended that the Judge wrongly required Mr McDonald to prove that the process was carried out more than occasionally *and* for more than 8 hours per week. It is submitted that there were two other subsidiary flaws in the Judge's construction of the Regulations which it is not necessary to set out.

34. In summary, the First Respondent's riposte to the appeal is, first, that the judge made findings of fact open to him, including a finding that harm to Mr McDonald was not foreseeable to it, given the extent of the exposure found. Secondly, it is argued that there is no attempt to avoid a non-delegable duty. The First Respondent can only be liable in negligence; it did not owe any of the strict statutory duties alleged against the Second Respondent and, absent negligence on the First Respondent's part, it is not liable merely because the employee was injured in the course of his duties owing to another person being in breach of separate duties owed to its employee. There is no rule that, if an employee is injured at work in any circumstance, the employer is liable in addition to whoever committed the real breach of duty causing the injury, here (potentially) the Second Respondent.

35. The Second Respondent contends that it cannot be liable at common law for injury to Mr McDonald absent foreseeability of injury. In this respect, it relies on the same findings of fact by the Judge as are relied upon by the First Respondent. It is submitted further that the Judge was correct to hold that the duty under section 47 of the 1937 Act was indeed owed only to persons employed in the relevant asbestos processes, which Mr McDonald was not: see *Banks v Woodhall Duckham & ors.* (1995) 30 November (CA) (Unreported) (of which we have been helpfully provided

with a print of the transcript of the judgments). In so far as the section applies more widely than to persons so employed, it is submitted that the Judge's findings of fact lead inexorably to the conclusion that Mr McDonald was not exposed to a "substantial quantity" of dust and thus the section does not apply. Reliance is also placed upon the construction put upon the phrase "substantial quantity" by Irwin J in *Anderson v RWE n Power plc* (2010) 22 March (unreported), paragraph [43] (of which again we have a transcript) as "almost certainly mean[ing] "so substantial as to be likely to be injurious".

36. As for the points arising under the 1931 Regulations, the Second Respondent's primary submission is that the claim was correctly dismissed because the Judge found as a fact that Mr McDonald had not been present to a sufficient extent to be exposed to asbestos dust. Further, it is submitted that it would not have been "practicable" (within the meaning of Regulation 2) for a factory occupier to take steps to meet a risk which no reasonable occupier at the relevant time would foresee. Further, Mr Nolan QC for the Second Respondent submits that, in any event, the Regulations do not apply to the asbestos operations at the power station as the language, in short, shows that the Regulations apply to the "asbestos industry" and not to a power station - a construction which was accepted by this court in *Banks's* case (supra) and by Lord Gill in the Outer House of the Court of Session in Scotland in *Watt v Fairfield Shipbuilding & Engineering Co. Ltd.* (1999) SLT 1984 (but not, it must be noted, in this Court in the *Cherry Tree* case). Mr Nolan robustly submits that the *Cherry Tree* case was wrongly decided on this point.

(G) My Assessment

(a) The Common Law claims

37. In my judgment, the appeal against the Judge's dismissal of the claim against the successor to Mr McDonald's employer, the First Respondent, can be dealt with very shortly. Having rejected, as I have, the criticisms of the Judge's approach to Mr McDonald's evidence, as made by counsel on his behalf, it seems to me that this aspect of the appeal must fail. The Judge found that Mr McDonald's exposure to asbestos was modest and that an employer, in the state of knowledge of the problem at the time, could not reasonably have foreseen that it would be likely to cause him to suffer harm. This was entirely within the primary facts as found and within the ambit of the agreed position of the experts, as reflected by their joint report, to which I have already referred. It is also clearly in accord with the various analyses, in the reported cases, of the contemporary literature concerning what was known of the dangers of exposure to asbestos dust in the period with which we are concerned.

38. I accept Mr White's submission for the First Respondent that it could only be liable to Mr McDonald for breach of its common law duty in negligence. It is acknowledged that that is a non-delegable duty. However, on the state of knowledge at the time and on the evidence before the judge no one could have foreseen this harm from the exposure experienced by Mr McDonald. No one was in breach of any common law duty of care in the respect alleged. Breach of statutory duty on the part of the Second Respondent (if such there was) does not import a breach of a non-delegable duty in negligence by the First Respondent, absent some material knowledge by the employer of the danger to which its employee was potentially exposed.

39. This was not a case like *Smith v Austin Lifts* [1959] 1 WLR 100 where an employer knows of a danger on premises to which the employee is sent. It suffices to refer to the passage in the judgment of Lord Denning MR in that case (at pp. 117-8) as follows:

> "….Notwithstanding what was said in *Taylor v. Sims & Sims* it has since been held, I think rightly, that employers who send their workmen to work on the premises of others cannot renounce all responsibility for their safety. The employers still have an overriding duty to take reasonable care not to expose their men to unnecessary risk. They must, for instance, take reasonable care to devise a safe system of work, see *General Cleaning Contractors Ltd. V. Christmas* **and if they know or ought to know** of a danger on the premises to which they send their men, they ought to take reasonable care to safeguard them from it. What is reasonable care depends, of course, on the circumstances, see *Wilson v. Tyneside Window Cleaning Co.*
>
> Applying this principle, I think the judge was entitled in this case to find the employers liable. If the workmen had not reported any difficulty or defect on the premises, the employers would not have been responsible. They would have been entitled to assume that the means of access provided by the occupiers was reasonably safe."

40. Mr White, for the First Respondent, referred also to *Cooke v Square D* [1992] ICR 262, 268H in the judgment of Farquharson LJ referring to the need in deciding issues such as the present to concentrate on all the circumstances of the case including the place to which the employee is being sent, the nature of the building, the experience of the employee, the nature of the work required to be carried out, the degree of control that the employer can reasonably exercise in the circumstances and the employer's knowledge of the defective state of the premises.

41. Mr White submitted that this employer was concerned with visits by Mr McDonald to the premises of a reputable organisation over which the employer could exercise little control. He also pointed to the evidence relating to the areas at the power station to which Mr McDonald would have recourse in performance of his duties which should not have involved any exposure to asbestos.

42. In my view, the Judge was correct to reject Mr McDonald's case against the First Respondent. The appeal against that part of the Judge's order dismissing the claim against the First Respondent should, in my view, be dismissed.

43. The case at common law against the Second Respondent is, in my judgment, little different. The relevant premises were, of course, controlled by the Second Respondent's predecessor. However, in the end, the case against the Second Respondent also turned upon the general state of knowledge of the dangers of exposures to asbestos at the relevant time. Mr Nolan relied upon the common ground between the experts on this subject, which I have already recorded above, and the effective acceptance by Mr Raper, Mr McDonald's witness, that nobody would have identified Mr McDonald's exposure as potentially injurious. He also referred us to the

guidance literature on the subject from March 1960 and at the time of issue of the 1969 Regulations, both of which still indicated that some exposure to asbestos dust could be accepted as tolerable, or in the latter case in respect of which enforcement action by the Factories Inspectorate would not be taken. In the former case, the booklet still gave indications of "permissible concentrations of certain substances" including asbestos.

44. Mr Allan for Mr McDonald was constrained to accept that on the Judge's findings as to the level of exposure it was difficult for him to contend that a foreseeable risk of injury at the time was established. In my judgment, that must have been a correct concession. Mr Allan concentrated his attack upon the findings of primary fact, a subject already considered. In the light of my view of the Judge's findings of fact, it seems to me that Mr McDonald's case against the Second Respondent in negligence was, with respect, a hopeless one. It may be that the Judge did not deal with the matter expressly because, in reality that case had passed into the background by the end of the hearing and/or was effectively determined by the finding in favour of the First Respondent on the same facts.

Breach of Statutory Duty

45. I turn to the statutory claims which only arise in respect of the Second Respondent. I will deal first with section 47(1) of the 1937 Act and secondly with the 1931 Regulations. I have set out the relevant provisions of both above.

Section 47 of the Factories Act 1937

46. Under the 1937 Act, two principal points arise: first, did section 47(1) apply at all; secondly, if it did, was the Judge correct to find that there was no breach.

47. On the first point, the Judge made no finding. This is not surprising, since we are told that, while one aspect of the point was advanced in written argument, it was not pursued at all at trial. The matter has been raised in the Second Respondent's skeleton argument of 22 July 2013, but not (even now) in the Respondent's Notice of 17 July, raising a similar issue in respect of the Regulations. Mr Allan objects to the point being taken on the appeal and we have to decide whether we should allow the point to be raised, although he did not object to us hearing argument on the issue and we did so.

48. The failure to take this argument earlier is indeed surprising as Mr Nolan himself had successfully raised it on behalf of the defendant in *Banks's* case upon which he now relies for the contention that the section does not apply in Mr McDonald's case.

49. In my view, we should allow Mr Nolan to raise this matter. It is a pure point of law. Mr Allan was unable to suggest any material issue of fact that was not raised at trial in the belief that the issue was no longer alive. Further, Mr Allan is one of the leading practitioners in this field and, as his argument proved, he was well able to deal with this point in oral argument. His only objection was that we did not have before us a transcript of the first instance decision of Buxton J (as he then was) which is referred to in *Banks* and which does not appear to have been before the court in that case either. However, Mr Allan had clear notice of the possible argument on receipt of Mr Nolan's written submissions and I cannot see that he was truly prejudiced by this

omission from our materials. For my part, I would allow Mr Nolan to pursue this issue.

50. Logically, this point on the applicability of Section 47(1) is the precursor of all else on this aspect of the case and I will deal with it first.

51. Mr Nolan argues that the subsection did not apply to Mr McDonald because he was not one of "the persons employed" within the meaning of the section. He was neither employed at the premises, nor was he employed in any process to which the section applied. He relies upon the decision in *Banks's* case.

52. That case concerned a man who at the relevant time was employed by the first defendant as a pipe fitter at two steel works occupied and operated by predecessors of the second defendant. His evidence was that his work was for two years at each of the sites and involved erecting pipes, breaking into old pipes and knocking off old lagging between an inch and three inches in thickness; his overalls would be smothered in powdered lagging and that it would be in the air for quite some time. He said it would take an hour to two hours to knock such lagging off. He would then fit new pipes and laggers would then attend to fit the new lagging, mixing asbestos in 40 gallon drums, making a lot of mess when opening the bags and mixing the materials. Claims were made against each defendant (along with other employers of the claimant) at common law and for breaches of section 47(1) and of the 1931 Regulations.

53. In giving the leading judgment of the court (with which Swinton Thomas and Butler-Sloss LJJ agreed) Stuart-Smith LJ accepted Mr Nolan's submission in that case that section 47(1) did not apply to the claimant.

54. The learned Lord Justice referred first to *Brophy v Bradfield & Co. Ltd.* [1955] 1 WLR 1148, 1153 where Singleton LJ (with whom Jenkins and Parker LJJ agreed) said with regard to section 47,

> "That section again deals with work rooms and with processes carried on in the factory. For the reason I have given with regard to section 4(1) I do not think that section 47(1) applies to the facts of this case."[1]

55. He referred also to a decision of Streatfield J in *Waley v Briggs Motor Bodies Ltd.* (unreported), apparently a case under section 49 of the Act and the Protection of Eyes Regulations in which it had been held that the regulations did not apply because the process being carried on by the contractor was not the process being carried on in the factory.[2]

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[1] Section 4(1) of the 1937 Act provided as follows:

> "Effective and suitable provision shall be made for securing and maintaining by the circulation of fresh air in each workroom the adequate ventilation of the room, and for rendering harmless, so far as practicable, all fumes, dust and other impurities that may be injurious to health generated in the course of any process or work carried on in the factory."

[2] Section 49 was in these terms:

56. Stuart-Smith LJ then turned to section 47(1) directly. He said that he found force in Mr Nolan's submission that the business of lagging pipes was not a process being carried on in the factory (inferentially indicating that the section might not apply for that reason), but he then continued as follows:

> "The next point is whether or not the plaintiff was a person employed within the meaning of s 47? In my judgment, the words "person employed" in s 47 relate back to the words found earlier in the section, namely "in connection with any process". That seems to me to be the natural reading of the words, and they do not apply to persons who may happen to be in the factory in general. That was the view which Rose J took in Morrison and The Central Electricity Board v Babcock & Wilcox (Unreported, 15 March 1986). He said:
>
> "The first question that arises in the present case, and it is one that is apparently free from direct authority, is whether the persons employed to whom the section twice refers include within the ambit of the protection provided by the section someone who like this plaintiff was not himself engaged in the dust making process. Mr Mclaren urges that this is a statute imposing a criminal penalty and it should therefore be strictly construed. That submission in my judgment is largely answered by the speech of Lord Porter in Harrison v The National Coal Board [1951] AC 639 at p 650. It has, however, to be remembered that this Act is also a remedial measure, passed for the protection of the workmen and must therefore be read so as to effect its object so far as the wording fairly and reasonably permits, but, in my judgment, the words "the persons employed" means "persons employed in the process". If it had been intended to extend the protection to persons employed in the factory generally, the section could have been so worded, as, for example, section 14(1) of the Act is worded in relation to secure fencing, section 63 specifically refers to a process whereas it could have been referred to the factory generally. Furthermore, the specific reference to "any work room" reinforced the suggestion that it is those who are in a limited area of the factory rather than those in the factory at large for whose protection the section is designed."
>
> That was a case under s 63 of the Factories Act 1961 which is similar in terms to s 47 of the 1937 Act.

> "In the case of any such process as may be specified by regulations of the Secretary of State, being a process which involves a special risk of injury to the eyes from particles or fragments thrown off in the course of the process, suitable goggles or effective screens shall, in accordance with any directions given by the regulations, be provided to protect the eyes of the persons employed in the process."

> It is right to say that Buxton J, in a case which we do not have, took a different view. He apparently based himself on the language of s 49, as it then was of the 1937 Act, which is the section dealing with the protection of eyes,…..
>
> ……
>
> That was the relevant consideration which Streatfield J dealt with in the case of Waley, to which I have referred. It is true that in that case, because of the grammar and language of the section, the "persons employed in the process" is to be found expressly stated, but in my judgment, although there is a large part of the section in between the words "process" and "persons employed", the natural reading of the section is as I have indicated. I therefore would agree with Rose J and respectfully disagree with Buxton J on the construction of that section.[3]"

57. The learned Lord Justice then turned to the claim under the 1931 Regulations and accepted Mr Nolan's submission that those Regulations did not apply to the claimant in that case either – a matter to which I must return below.

58. It was decided in the *Cherry Tree* case (supra), at paragraph [25], that the "observations" of the court in *Banks* (admittedly on the question whether the 1931 Regulations applied) were not essential to the determination of the case. It seems to me that it is not necessary to embark upon a consideration of whether this Court's decision in *Banks* was "obiter dictum" or not. I think it was not. Stuart-Smith LJ dealt serially with each of the claims and found expressly that the claim under this section failed because the claimant was not within its ambit. Whether technically obiter or not, it seems to me that this was a decision of this Court expressly on point and that we should follow it. If Mr Banks was not within the protection of section 47(1) then neither was Mr McDonald and his claim under the subsection and it ought to have been dismissed on this basis.

59. Having considered this point independently of the authority of the *Banks* case, it seems to me difficult in any case to see how Mr McDonald was a "person employed" either in the sense of being employed at the factory or in the process of handling asbestos. It seems to me that he was neither. He was employed by another employer and his duties involved occasional visits to the premises. That does not seem to me to make him a "person employed" for the purposes of section 47.

60. However, if I am wrong on the proper application of the section and Mr McDonald was within its protection, as we have had full argument on the point, I ought to consider whether or not the learned Judge was correct in holding that his claim under the section failed.

61. It was common ground before us that Mr McDonald could not show that his claim in respect of the dust fell within the description of "dust of such a character and to such an extent as [was] likely to be injurious or offensive" to him (if he was a "person

[3] In *Anderson v RWE nPower* (supra), Irwin J followed *Owen v IMI Copper Tube* (unreported) 15 June 1995, the decision of Buxton J (as he then was), referred to in *Banks*, rather than the decision of Rose J (as he then was) in *Morrison v CEGB*, but Irwin J does not appear to have been referred to *Banks's* case itself.

employed"). The question, therefore, was whether there was given off any "substantial quantity of dust of any kind" against which the Second Respondent had failed to take "all practicable measures" to protect Mr McDonald.

62. It seems to me that the Judge made no finding on this point. Although he began to address the question at the beginning of paragraph 13 of the judgment, by the end of the paragraph he had strayed off into the question of whether or not Mr McDonald had been exposed to dust "likely to be injurious or offensive" and held that he was not.

63. Mr Allan's submission in this area is that the evidence showed that there were substantial quantities of asbestos dust discharged in the activities at the power station and that it matters not that such dust may not have been substantial at the point of inhalation. He submitted that it was common ground between the experts that the processes at the power station would have produced a substantial quantity of dust. He referred to the reports of Mr Raper for Mr McDonald and Mr Glenn for the First Respondent to be found at pp. 201 and 225 of our Appeal Bundle 1 respectively. The first of those references includes a table of Mr Raper's compilation referring to the concentrations of asbestos dust to which Mr McDonald was likely to have been exposed. Each is based upon Mr McDonald's "proximity" to the location of various operations. The table is introduced by the following:

> "4.31 On the basis of the Claimant's account and in view of the foregoing [in which Mr Raper had stated his own understanding of "substantial quantities of dust"], I would estimate the concentrations of asbestos dust to which the Claimant is likely to have been exposed as shown in the following table… "

The second passage, from the report of Mr Glenn, was in these terms:

> "If there was work with asbestos insulation in the power station then there was the potential for anyone close to that work to be exposed to a high concentration of asbestos dust, but the dust would disperse as it moved away from the work area and those in neighbouring areas would have been subjected to a lower concentration of dust than those directly involved in the work."

64. In my judgment, these passages are slender evidence of the giving off of a substantial quantity of dust. The first is based upon Mr McDonald's account which, as the Judge found, had its deficiencies. The second only alludes to a "potential" for exposure to high quantities of dust based upon proximity of the person in question to the operation in question. I consider that that material is not adequate to demonstrate that there was the giving off of any "substantial quantity of dust" relevant to the injury said to have been caused to Mr McDonald at these premises. There simply was not the necessary evidence to establish in this case what quantities of dust were discharged by work at this power station and in what circumstances so as to constitute a "substantial quantity" for the purposes of the section.

65. In the circumstances, it is not necessary to decide what practicable measures were required to be taken to provide protection.

66. In my view, therefore, the Judge was correct to dismiss the claim so far as it was based upon section 47, but for rather different reasons from those which he gave.

Asbestos Industry Regulations 1931

67. Again, I have set out the relevant provisions of these regulations at paragraph 26 above.

68. It is contended for Mr McDonald that the operations at the power station included "mixing" asbestos within the meaning of paragraph (i) of the preamble and that, therefore, the Second Respondent was in breach of the duty requiring that such mixing should not be carried on "except with an exhaust draught effected by mechanical means so designed and maintained as to ensure so far as practicable the suppression of dust during the process" (Regulation 2 (a)).

69. Mr Nolan for the Second Respondent took five points in his support for the Judge's dismissal of the claim under this head. First, he argued that the regulations did not apply to Mr McDonald at all. Secondly, it was said that Mr McDonald did not claim to see "mixing" being carried out. Thirdly, even if the regulations did apply, the onus was on Mr McDonald to establish that regulation 2(a) applied and he failed to do so to the Judge's satisfaction. Fourthly, it is submitted that the Judge found no breach as there was insufficient exposure to engage the regulation. Fifthly, Mr Nolan argued that what was "practicable" to suppress dust must be what was practicable to meet known dangers.

70. As an overall approach to our consideration of the Regulations, Mr Nolan argued that it would be strange indeed for liability under them to be made out in a case where there was (a) no foreseeable risk, (b) no breach of duty at common law, (c) no liability under section 47 (1) of the 1937 Act for dust of such a character as was "likely to be injurious" and (d) no infringement of the "substantial quantity of dust" provisions of section 47 (1) of the 1937 Act.

71. Mr Nolan's first submission was based again on *Banks's* case. In that case, this court held that the regulations did not apply to the lagging of pipes in a steel works. Mr Nolan argues here (although again only under a Respondent's Notice), having reserved his position on the point at trial in view of this court's rejection of that argument in the *Cherry Tree* case, that the regulations do not apply to lagging of pipes in a power station. Mr Nolan submits that the decision in the *Cherry Tree* case was wrong and that we should not follow it, as having been decided "per incuriam".

72. In *Banks* Stuart-Smith LJ accepted Mr Nolan's argument on this point in the following passage:

> "It was said that the Asbestos Industry Regulations apply to the second defendant. Mr Nolan advanced five reasons why in his submission the regulations did not apply to the work which was being done in those factories at the time. First, the language of the title of the regulations themselves, the Asbestos Industry Regulations, is not apt, he submits, to refer to the steel making industry. Second, he submits that if one looks at the processes which are referred to in the preamble to the regulations, all

except the first one are processes in the manufacture of asbestos products of one sort or another in a factory which is making those products. The exception is para 1, which is the one which is relied upon here, namely:

"……the breaking, crushing, disintegrating, opening and grinding of asbestos, and the mixing of sieving of asbestos, and all processes involving manipulation of asbestos incidental thereto."

Mr Nolan submits that that is simply the preparatory stage in a factory or premises involved in the production of asbestos products and it does not enlarge the scope of the regulations. He, further, in support of that submission, relies upon the definition of asbestos as meaning any fibrous, silicone mineral and any mixture containing such mineral, whether crude, crushed or open, and he submits that para 1, which I have just read, is clearly the preliminary and preparatory stages to what goes on in the factory itself He submits that the work that the regulations themselves address is work in the industry; that is to be seen from the nature and substance of the regulations themselves, and the sort of machines that they are dealing with. Nowhere is it relevant to lagging of pipe work. He further drew our attention to the way in which the regulations appear to have been understood by the factory inspectorate over many years, and in particular to excerpts from the Factory Inspector's report of 1967, which plainly shows that it was not thought that the regulations applied to the steel industry or lagging of pipes. That may not be a point of great substance, because, as we indicated to Mr May at the outset, the factory inspectors are not necessarily the right person to construe the regulations, but it certainly shows how the regulations were understood generally throughout the industry.

Finally, Mr Nolan submits that if one compares the ambit of the 1969 regulations, which relate in effect to all work or processes being carried out by any contractor, with the narrowness of the 1931 regulations, it is clear that they were never intended to apply to work of lagging pipes in a steel works. I find Mr Nolan's submissions on that point persuasive, and I accept them."

73. A decision to like effect was reached by Lord Gill in the Outer House of the Court of Session in *Watt's* case (supra), with reference to *Banks*.

74. In *Cherry Tree*, in a leading judgment (with which Mantell LJ and Cresswell J agreed) Hale LJ (as she then was) declined to follow *Banks* on this point and held that the construction given to the regulations by Stuart-Smith LJ was wrong. As already noted, the learned Lady Justice held that the observations of the court on this point in *Banks* were not essential to the determination of the case because the trial judge in that case had been unable to make findings as to the extent to which any of the

defendants, including the occupiers of the steel works, had exposed the claimant to asbestos.

75. On the substance of the argument, Hale LJ said this (in paragraphs [20] to [23]):

> "20. It is clear that neither at first instance nor on appeal was the court in *Banks* given the same assistance both with argument and with documentary material as has been given both to the judge and to this court in this case. There is no account in the judgment of any reply to Mr Nolan's submissions. The most powerful of those is the first, the title to the Regulations. There are however two even more powerful arguments in reply. First, the Regulations are expressly applied to *any* factory or workshop where the defined processes take place. Nowhere is it said that the Regulations apply only to factories and workshops whose only or main business is the processing of raw asbestos or the manufacture of products made out of raw asbestos. Lord Gill in *Watt* placed some weight upon the heading to Part IV of the 1901 Act 'Dangerous and Unhealthy Industries' but the wording of section 79 is wider than that, as is the wording of the Secretary of State's certificate under that section (see para 4 above).
>
> 21.Second, the exemption clearly contemplates that the Regulations would otherwise apply to places where those processes were carried on only occasionally or for comparatively short periods by any one person. Lord Gill in *Watt* considered that the 'provisos' could be given a satisfactory meaning which was consistent with his view. It is however very difficult to imagine a factory or workshop whose main business was producing asbestos or asbestos products to which the exemption could possibly apply, given that only certain processes, infrequently carried on, are exempted and only then if none of the other defined processes is carried on in the same factory. Mr Owen was quite unable to give us any examples.
>
> 22.The second and third reasons can only have been advanced as indications of the sort of place and process the Regulations had in mind rather than as an exercise in statutory construction. As is apparent from the judge's reasoning, process (i) and regulation 2 are readily capable of applying to the mixing of asbestos flock in this case. It does not appear that the court in *Banks* was referred to Merewether and Price: there is no reference to it in the Court of Appeal judgment and the claimant had called no expert evidence in which such documents would normally be produced. The examples given in Merewether and Price clearly contemplate the mixing of asbestos in the manufacture of a wide variety of products, not just 'asbestos products'.

> 23.As to the fourth reason, as the court pointed out, the factory inspectors are not necessarily the right people to construe the Regulations. Nevertheless it is interesting that in a memorandum dated 6 September 1949 from the Chief Safety Officer to Regional Safety Officers, in relation to the lagging of steam pipes in generating stations, the opinion is expressed that the 1931 Regulations *did* apply to the mixing of asbestos and to the making of preformed insulation slabs or sections, but that they did *not* apply the removal of old lagging or to the actual application of the insulation to steam pipes etc. This clearly indicates an opinion that the Regulations were capable of applying to premises outside the asbestos industry itself: further the distinction made is easy to fit into the processes listed in the preamble. Knocking off old lagging does not fit within any of them as readily as does mixing asbestos to form new lagging. Even then, in the Annual Report of the Chief Inspector of Factories for the year 1956 (1958, Cmnd 329), on p 142, it is said that 'One very hazardous process, to which the regulations do not always apply, is the removal of old heat insulation lagging.' The reason given is that 'Much of this work is done in premises not subject to the Factories Acts, and in any case the operation does not take long.' The problem for laggers was that they might not work regularly in any one place even if it was subject to the Factories Acts, although they were as individuals constantly exposed to risk. This type of problem, along with the recent discovery that minimal exposure might result in mesothelioma, is ample explanation for the wider scope of the 1969 Regulations."

76. As noted, Hale LJ found that the observations of Stuart-Smith LJ on the present point were "obiter dicta". Whatever my own view on that point, I consider that we are bound to follow the *Cherry Tree* decision, subject only to Mr Nolan's "per incuriam" submission.

77. Mr Nolan's submission was based not solely upon an argument that the reasoning in *Banks* should be applied in preference to that of the court in the *Cherry Tree* case, but on the basis that Hale LJ had misconstrued the term "mixing" that is to be found both in Regulation 2(a) and in the preamble. He argued that the misconstruction arose from an erroneous understanding of the report which led to the 1931 Regulations, namely *Report on the Effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry* by Merewether & Price (1930) ("M&P"). Hale LJ said this (at [10] and [11]) in *Cherry Tree*:

> "10. There is no definition of 'mixing' in the Regulations. Merewether and Price describe the process of mixing asbestos material in asbestos textile factories by spreading it on the floor; but they also give a number of examples where "fiberized material or dry mixtures containing it are manipulated in preliminary manufacturing processes" in non textile factories:

> "The wet mixtures for millboard, paper, and asbestos-cement products are prepared in a beater, as used in paper mills. Dry fiberized asbestos is emptied into the beater trough, the sacks being shaken to some extent. Evolution of dust occurs before the material becomes mixed with the circulating water.' (p 26)
>
> Fiberized asbestos or "magnesia" is a component of many insulating compositions which may also contain clay, kieselguhr, fossil meal, flax, hemp or jute waste and other materials. The proportion of asbestos in the final product varies widely. In many small works the materials are mixed "dry", by hand, in an open manner, involving sack emptying and filling, shovelling and weighing. . . (p 27)
>
> Preparatory processes in paste making [for covering electrodes] include . . . (ii) handmixing of the ground materials at a bench, involving emptying out of dry material into pans.' (p 30)
>
> Other processes of comparatively minor importance, e.g. asbestos putty mixing, in which there is handing and feeding of dry material in preparatory processes, will call for precautions as previously described for similar work. (p 30)" "

> 11. This is what Mr Dawson was doing, albeit on a small scale, in order to produce the paste to seal the dry cleaning presses. The judge rejected an argument that the Regulations contemplated only a mixing of asbestos with asbestos rather than with water. He held that the 'plain meaning' (by which he may have meant the natural and ordinary meaning) of the word 'mixing' could not be so restricted. Hence the Regulations did apply to the process. In my view, in the absence of a definition of 'mixing' in the Regulations or of clear evidence of a restricted technical meaning to which the Regulations were intended to apply, the judge was right to reach that conclusion."

78. Mr Nolan argued that when the Regulations referred to "mixing" in paragraph (i) of the preamble and in regulation 2, they referred to mixing in a specialised sense of the asbestos textile industry covered on page 21 of M&P. The passage reads as follows:

> "Material for yarn is not usually treated in disintegrators, but in most factories these machines are used for fiberizing waste asbestos yarn, etc. Crushing flattens out and breaks up the mineral without damaging the fibres. It is accomplished either in a large edge runner, or in a small pan mill of the mortar mixing type. The material is emptied upon the floor close to the machine, the contents of several sacks sometimes being spread on the floor to obtain a rough "mixing". The crushed material is either taken from the machine by hand, or discharged through a

> bottom delivery slide, usually filled into sacks or skips and, if necessary, weighed on a portable weighing machine. A few edge runners discharge upon short inclined lattices and the material falls automatically into the sack or skip."

He submitted that to read the term more generally (as, with respect, he urged Hale LJ did) is a misconstruction of the Regulations because in turn it misreads the M&P report on which she relied. In particular, it was a misreading in applying it to the quite different operation being conducted by Mr Dawson in the *Cherry Tree* case.

79. There is in my view, force in that observation, since it is clear to me that M&P's report was dealing only with the asbestos industry, as their title indicated. Further, the report deals with the problem facing the industry and the processes and preventative measures in two parts in Part II, namely "Textiles" pp.20-26 and "Non-Textiles" pp. 26-30, but both are "Asbestos Products" and both are dealing with Asbestos Industry processes: see pp. 18-19 of M&P where one finds this:

> "The asbestos industry has developed greatly in recent years and continues to expand rapidly, mainly because of demands of the motor, electrical, engineering and building industries, and of the increasing attention now paid to the insulation of steam plant to promote fuel economy.
>
> Asbestos products may, for convenience, be divided into seven main groups:-
>
> *Textiles.*
>
> (a) Yarn and cloth
>
> *Non-Textiles.*
>
> (b) Millboard, paper, asbestos-cement sheets, tiles, and other building materials, sheet material of rubber or bituminous mixtures containing asbestos.
>
> (c) Insulation materials and articles.
>
> (d) Brake and Clutch linings
>
> (e) Packing and jointings.
>
> (f) Asbestos-covered electric conductors-electrodes, cables and wiring, coils for electric machinery.
>
> (g) Miscellaneous, including moulded electrical and other goods, etc.
>
> Some factories make both textile and non-textile goods. So-called "fiberized" asbestos, i.e., opened or broken-up material in a fine flock-like condition, is manipulated, unmixed with other materials, in large quantities in the factories included in

> groups (a), (b), and (c), and to a much smaller extent in some of the other factories and workshops."

All the processes described in M&P and quoted in paragraph 10 of the *Cherry Tree* judgment are processes with asbestos textiles and asbestos non-textiles in that industry. The Summary of Recommendations begins thus:

> "Asbestos factories and workshops cover a great variety of processes. The premises differ widely in structural features and are congested in many cases with machinery or material. Processes are largely carried on in close association.
>
> Dust is produced at many kinds of machines, in hand process work, and in simple incidental operations, particularly in emptying settling chambers, and in all handling of "fiberized" asbestos.
>
> In textile factories, pure asbestos dust is continuously produced, in differing amounts, at all the principal machines. Card stripping, a very dusty operation, is usually effected by hand strickles. Hand mixing of different grades and varieties, incidental to opening processes, is also dusty.
>
> In non-textile factories, pure asbestos dust is produced at opening machines, in feeding machines, in making insulating mattresses (a dusty hand process), and in incidental hand work. Dust, though rarely pure asbestos, is produced in finishing operations, e.g. sawing, grinding and other abrading of asbestos products."

The Summary goes on to say,

> "The asbestos manufacturers are clearly confronted with the necessity of attaining conditions in their industry which will ensure much less dust in the atmosphere than can safely be tolerated in comparable trades not using asbestos."

80. It seems to me, therefore, that the report and recommendations were probably directed to the asbestos industry alone. As the writers said at the beginning of section 3 of Part I of the Report ("Scope of the Investigation"), they limited themselves to the manufacturing processes in the asbestos industry:

> "Asbestos is very largely used in industry, being an important constituent of may different products. The diversity of industries concerned made it essential that some restriction of the field of investigation should be decided upon.
>
> The manufacturing processes affected fall more or less sharply into two groups (1) those in which there is exposure to pure asbestos or asbestos mixed with a very small percentage of

> cotton or other vegetable fibre, and (2) those in which there is exposure to a mixture of dusts, of which asbestos is but one.
>
> The former group comprises in the main the textile branch of the industry…
>
> The latter group includes a number of processes in which the proportion of asbestos in the dust evolved ranges from a negligible quantity upwards…"

81. The question, however, is, even if we were to be convinced that Hale LJ's application of M&P in her judgment in the *Cherry Tree* case was erroneous, does that bring the case within the ambit of the per incuriam principle. In my judgment, it does not.

82. While the length of time set aside for the hearing in this appeal was too short and, for that reason, we heard little argument on this point in the context of this case, we were directed by Mr Nolan (for later reading) to a number of the authorities and in particular to the succinct and helpful review of them by Lloyd LJ in *Desnousse v Newham LBC* [2006] EWCA Civ 547, [2006] QB 831, paragraphs [70] to [77]. The only category of case there examined by Lloyd LJ into which the present case might possibly fall would be what was characterised as "an exceptional residual category of cases which are not strictly per incuriam, but where the court has refused to follow a previous decision."

83. The closest of those cases to our circumstances is *Rickards v Rickards* [1990] Fam 194 where the court refused to follow a previous decision of the court because, although the relevant House of Lords decision had been cited, the later court held that the earlier court had misread or misunderstood the House of Lords case. Of significance was the fact that, for particular reasons, there was no possibility of appeal to the House of Lords if the previous decision were to be followed. Otherwise the better course, rather than not to follow the earlier decision, would have been to follow the earlier decision but to grant permission to appeal higher: see *Desnousse's* case at [76].

84. In my judgment, even that closest of the cases in the per incuriam line does not permit us here to decline to follow the decision in *Cherry Tree* on this point, even if we were to be of opinion that that decision was wrong. The misunderstanding of M&P in the *Cherry Tree* case (if such it was) was hardly a misunderstanding of a House of Lords authority. Further, it was only one of the grounds upon which the court declined to follow what it considered to be the *obiter dicta* in *Banks* Accordingly, I consider that we are constrained by the *Cherry Tree* case to hold that the Regulations do potentially apply in this case and to reject Mr Nolan's first submission accordingly.

85. Working on that basis, the operation said to have been responsible for Mr McDonald's condition was the mixing of asbestos with water in drums, as described in his first statement. The breach of the regulations alleged is a breach of Regulation 2(a), namely the mixing without "an exhaust draught effected by mechanical means so designed and maintained as to ensure so far as practicable the suppression of dust during the process". Further that regulation will not apply (and there will therefore be no breach) so long as "the factory or workshop or part thereof in which the process of

mixing…is carried on… occasionally only and no person is employed therein for more than eight hours in any week…".

86. It is perhaps convenient to deal with the exception first, because if it applied in this case, as the Judge found, Mr McDonald's claim had to fail. The Judge held that the onus was on Mr McDonald to prove that the exception did not apply and that he had failed to do so. The question also arises, under Regulation 2(a) as to where the burden of proving whether or not a relevant "exhaust draught" to "ensure…..suppression of dust" was "practicable " lies.

87. On these issues we were referred to only one authority, *Nimmo v Alexander Cowan & sons Ltd.* [1968] AC 107, a case under section 29 of the Factories Act 1961. The section provides that,

> "There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work, and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there."

The question for the court was who had the onus of proving whether steps were reasonably practicable or not. As Lord Wilberforce put it in his dissenting speech in that case,

> "The alternatives are (1) that the practicability of reasonable steps (which were not taken) forms an integral part of the statutory offence (and consequently of the breach of statutory duty on which the pursuer founds), and (2) that the absence of reasonably practicable steps is a defence." (p.128B-C)"

Lord Wilberforce went on to say that,

> "…..the precise question which we have to decide [is]… whether the words "so far as is reasonably practicable" are an integral part of the description of the offence, or are equivalent to a defence taking the case out of the subsection." (p.129G)

88. The majority of their Lordships favoured the view that under that section the onus of pleading and proving that it was not reasonably practicable to keep the place safe lay upon the employers.

89. That case was, of course, dealing with an entirely different statutory provision from that with which we are concerned. However, it seems to me that the principle to be applied is the same. Are either of these elements of "practicability" or the "non-occasional" nature of the work, as a matter of constructions of the Regulations, parts of the description of the statutory duty or are they the equivalents of defences?

90. The answer to that question does not permit of significant elaboration and must be very much a matter of impression from the language used. It does seem to me to be clear, however, that Regulation 2 (and the Regulations as a whole) will apply to relevant processes unless the occupier of the premises establishes that the proviso

applies. In my opinion, the Judge was wrong to hold otherwise. It would be very much within the province and knowledge of the occupier of premises to present the case on the frequency of the operations and the number of hours worked by any individual workman. Similarly, but with added reliance upon the decision on a very similar question in *Nimmo's* case, it seems to me that the onus of showing that there was an "exhaust draught effected by mechanical means so designed and maintained to work as far as practicable in the suppression of dust", within the meaning of Regulation 2(a), falls upon the Second Respondent.

91. I have taken the view that the Judge wrongly reversed the burden of proof as to the applicability of the proviso in the preamble to the Regulations. He found that it was impossible for anyone to call positive evidence as to the working practices at the power station in the 1950s. His conclusion was this,

> "Given the lack of evidence and given that on any view the lagging of pipes was, at best, an incidental to the main work of the power station, I cannot possibly be satisfied that individuals working for the second defendants at that time did such work other than occasionally and were so employed for more than eight hours per work….I am not satisfied on the balance of probability that the exemption did not apply."

It is apparent that the Judge did have evidence as to the nature of the main business of the power station and from it formed an impression of the incidental nature of the lagging activity. I have asked myself, therefore, whether he would inevitably have reached the same conclusion on the evidence if he had recognised that the burden was on the Second Respondent to prove the matters set out in the proviso. I do not think it is possible to reach that conclusion. Accordingly, it seems to me that the Second Respondent failed to show on the evidence that the case fell outside the Regulations because of the application of the proviso.

92. The Second Respondent's answer to the "practicability" point is that it could not have been practicable for someone in its predecessor's position to provide an exhaust draught to meet an unforeseeable risk: see paragraph 50 of Mr Nolan's skeleton argument.

93. In support of this argument Nr Nolan relied upon the decision of the Supreme Court in *Baker v Quantum Group & ors*. In that case a majority of the court held that the requirement to provide a "safe" place of work under section 29 of the Factories Act 1961 was not an unchanging concept and had to be judged by general knowledge and standards of the time. Lord Mance and Lord Dyson said (obiter) that the qualification "so far as is reasonably practicable" was wide enough to allow current knowledge and standards to be taken into account. Mr Nolan submits that this approach should be adopted in relation to Regulation 2(a).

94. Mr Allan countered Mr Nolan's submission by saying that the 1961 Act and these Regulations are different. There was dust at the power station when Mr McDonald was present and what was required by Regulation 2(a) was its suppression, if that was at all practicable, whether or not a danger from it was foreseeable. Mr Allan also pointed to a sentence in the expert report prepared by Mr Glenn for the First Respondent where he said,

> "…there were precautions that would have protected anyone in the power station from a foreseeable risk and it is a matter of evidence whether the Second Defendant, responsible for operations within the power station took such precautions…"

95. It seems to me that Regulation 2(a) was not requiring the achievement of an abstract standard, such as "safety" nor was the test what was "reasonably practicable". This regulation required "to ensure so far as practicable the suppression of dust."

96. In *Baker's* case, Lord Mance referred to the rejection of the argument that "reasonably practicable" meant no more than "practicable" in *Marshall v Gotham Ltd* [1954] AC 360, at 364 (for the argument) and 370 and 372 (for its rejection): *Baker's* case at paragraph [83]. In the earlier case, Counsel for the ultimately unsuccessful plaintiff (Paget QC and Hunter) argued that,

> " "Reasonably practicable" means just "practicable" and does not qualify the duty, so it is enough to show that it was physically practicable to take certain precautions, and it is irrelevant to consider whether in the circumstances it would have been reasonable." (Loc. Cit.p.364)."

97. Lord Reid's answer to that submission was:

> "I turn to consider what it meant by precautions being "reasonably practicable". It was maintained for the appellant that this means no more than "practicable" and that it is enough to show that it was physically practicable to use the precautions and irrelevant to consider whether in the circumstances it would have been reasonable to do so. This argument was said to be supported by the decision in this House in *Black v Fife Coal Co. Ltd*[4].I do not so read that case. It may be that "practicable" and "reasonably practicable" were sometimes used in that case interchangeably. But the circumstances were such that it made no difference which expression was used… But, in my judgment, there may well be precautions which it is practicable, but not reasonably practicable to take, and I think that follows from the decision of the Court of Appeal in *Edwards v National Coal Board*[5]…"

Lord Reid continued, however, with the words relied upon by counsel for the unsuccessful defendant in the *Cherry Tree* case (Mr Owen QC, as he then was),

> "I think it is enough to say that if a precaution is practicable it must be taken unless in the whole circumstances that would be unreasonable."

98. In considering that statement, I also bear in mind what Lord Reid went on to say a few lines further on:

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[4] [1912] AC 149
[5] [1949] KB 704

> "Different phraseology has been adopted in different cases, and while the general effect may be the same, I do not think it is helpful in borderline cases to argue from one statutory provision to another which is differently expressed."

However, the passage quoted does seem to me to give clear authority for the proposition that "practicable" is not always the same as "reasonably practicable".

99. In my judgment, therefore it is difficult to avoid the same conclusion here as that reached by Hale LJ at paragraph 28 in the *Cherry Tree* case:

> "The regulation in this case is quite clear: the obligation to provide an exhaust is absolute unless it is not practicable to do so. There is no question of reasonable practicability. In any event, the known danger was dust and the required precaution was both known and practicable…".

In the circumstances, Hale LJ found that it was unnecessary to enter into the question of how far foreseeability of risk enters into an issue of "reasonable practicability" – the phrase distinctly not used in these regulations. In my view, therefore, the decision on the meaning of the word "practicable" in this Regulation, as construed by Hale LJ, is not affected by the subsequent decision in *Baker v Quantum Clothing*.

100. The same seems to me to be true in this case. The known danger was dust, even if the full extent of the danger was not known at the time. It was recognised that, whatever the extent of danger, it was necessary to protect against it and that was what the regulation provided. There was evidence here that such protection was possible: see the passage from Mr Glenn's report relied upon by Mr Allan and quoted above.

101. Assuming the breach of statutory duty under Regulation 2(a) which I consider that the Judge ought to have found, the only question that remains is whether Mr McDonald, on the evidence, sufficiently established that the modest exposure was enough to found the casual requirements of liability.

102. Since preparing this judgment in draft, I have had the benefit of seeing a draft of the judgment to be delivered by the Master of the Rolls, with which I entirely agree. He deals with the causation point in paragraph 119 of that judgment and I need say no more that that I agree with him on this point also.

(H) Conclusion.

103. Accordingly, I would allow the appeal on the basis that the Judge ought to have held the Second Respondent liable to Mr McDonald for breach of its statutory duty under the 1931 Regulations. I would dismiss the appeal against the Judge's dismissal of the claim against the First Respondent.

Lady Justice Gloster.

104. I agree with both judgments.

Lord Dyson, Master of the Rolls.

105. I agree that this appeal should be dismissed against the first respondent and allowed against the second respondent. In view of the complexity of the issues, I wish to add a few words of my own to explain in outline why I have reached this conclusion.

Common law

106. I would dismiss the claims in negligence against both respondents for the reasons give by McCombe LJ at paras 37 to 44 of his judgment. The judge was entitled to find (as he did at para 13 of his judgment) that it was not reasonably foreseeable in the 1950s that "the quantities and intensity of any asbestos dust given off to which this claimant was exposed would be likely to be injurious or offensive to his health." That finding is fatal to the negligence claims.

Section 47(1) of the Factories Act 1937

107. I agree with McCombe LJ that the appellant was not a "person employed" within the meaning of section 47(1) of the Factories Act 1937 (paras 58 and 59 above). This was the conclusion reached by this court in *Banks v Woodhall Duckham* (30 November 1995, unreported). I am inclined to agree with McCombe LJ (for the reasons that he gives at para 58) that this conclusion was part of the ratio of the decision of the court. In any event, however, I find the reasoning of Stuart-Smith LJ (quoted at para 56 above) compelling and agree with it. The words "the persons employed" mean "the persons employed in the process" ie the process which releases the dust or fumes into the air. The appellant was not such a person: he was not involved in the processes at the second respondent's factory which released asbestos dust into the air. Furthermore, section 47(1) was not aimed at protecting visitors to a factory against the inhalation of dust or fumes, but at protecting "the persons employed" there against such inhalation. He was not an employee of the second respondent. Nor was he employed by the second respondent as or by an independent contractor to do work for the second respondent at the factory: see *Massey-Harris-Ferguson (Manufacturing) Ltd v Piper* [1956] 2 All ER 722.

108. The claim for breach of section 47(1) must, therefore, be dismissed because the appellant did not come within its scope.

109. In any event, I agree with McCombe LJ that for the reasons he gives at paras 61 to 64 above, the appellant has not shown that there was given off any "substantial quantity of dust of any kind". It is unfortunate that the judge did not make any finding on this issue of fact and it is difficult for this court to make good this omission. But the table of concentrations of asbestos dust to which Mr Raper says the claimant is likely to have been exposed contains vague generalised estimates and is an insufficiently secure basis on which to conclude that a substantial quantity of dust was given off.

The Asbestos Industry Regulations 1931

110. I agree that, for the reasons given by McCombe LJ at paras 68 to 85, the Regulations were capable of applying to the appellant notwithstanding that the main business of the factory was not the processing of asbestos or the manufacture of asbestos products. I accept that there are arguments both ways on this point. These are rehearsed by Stuart-Smith LJ in *Banks* and Hale LJ in *Dawson v Cherry Tree Machine Co Ltd* [2001] PIQR P19. But whether or not Hale LJ was right to say that

the "observations" on this issue in *Banks* were obiter dicta, I am in no doubt that this court should follow and apply her careful reasoning. Even if Hale LJ misunderstood the Merewether and Price report, that is insufficient to bring her decision within the *per incuriam* principle. A decision is not *per incuriam* simply because it is subsequently shown to have been wrongly decided.

111. The next question is whether the proviso to the preamble to the Regulations was satisfied. So far as material, the proviso states: "Provided that nothing in these Regulations shall apply to any factory…or part thereof in which the process of mixing of *asbestos* …..is carried on, so long as (a) such process…is carried on occasionally only and no person is employed therein for more than eight hours in any week, and (b) no other process specified in the foregoing paragraphs is carried on."

112. In my view, the case law on practicability and reasonable practicability to which McCombe LJ refers at paras 88 to 100 is of limited assistance here. I would hold that the onus of proving that the conditions of the proviso are satisfied rests on the occupier of the factory on the simple basis that he who asserts must prove. There is nothing in the structure or language of the Regulations which indicates that the person alleging a breach of the duty imposed by them must prove that the proviso does *not* apply. It would have been surprising if the position had been otherwise, since the question whether any person is employed in the factory (or part thereof) for more than eight hours in any week and whether any other specified process is carried on is one which is peculiarly within the knowledge of the occupier. It would be unjust to place the onus of proof on the person who has less knowledge of the relevant facts. There is no warrant for believing that this is what Parliament intended.

113. I therefore agree with McCombe LJ that the judge wrongly imposed the burden of proof on the appellant and that the second Respondent failed to show that the proviso applies on the facts of this case.

114. The next question in relation to the Regulations is whether there was a breach of regulation 2(a) which provided that the mixing by hand of asbestos "shall not be carried on except with an exhaust draught effected by mechanical means so designed and maintained to ensure as far as practicable the suppression of dust during the process". The focus of this part of the argument was on whether the onus was (i) on the appellant to prove that the second respondent had not taken steps so as to ensure as far as practicable the suppression of dust during the processes or (ii) on the second respondent to prove that it had taken such steps.

115. In my view, the onus was on the second respondent to prove that an exhaust draught had been effected by mechanical means so designed and maintained as to ensure as far as practicable the suppression of dust. In reaching this conclusion, I have been assisted by the reasoning of the majority in *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107, although I recognise that the statutory provision under consideration in that case was expressed in different language from regulation 2(a). That provision stated "There shall, so far as is reasonably practicable, be provided and maintained safe access to every place…" The majority adopted a purposive interpretation of the section. Thus Lord Guest (p 122B-D) said that the question depended on "which construction will best achieve the result to be attained, namely, to make and keep the working place safe". He attached some importance to the consideration that the means of achieving the end were more likely to be within the knowledge of the

defenders than the pursuer. It would be unreasonable to expect a widow to have to specify what steps which the defender should have taken to make the working place safe were reasonably practicable.

116. Lord Upjohn adopted a similar approach at p 124E-127E. He said that he could not believe that Parliament intended to impose on the injured workman or, if dead, the widow the obligation to aver with the necessary particularity the manner in which the employer should have employed reasonably practicable means to make and keep the place safe for him.

117. Lord Pearson took the same view. He too was impressed with the means of knowledge point (p 132 et seq). He recognised that this was not necessarily a sufficient justification for shifting the onus of proof which normally lies on the plaintiff; but it was an important factor to be taken into account together with the form and content of the relevant statutory provisions (p 133B).

118. But ultimately, I do not consider that the question of whether there was a breach of regulation 2(a) turns on the onus of proof issue. For the reasons given by McCombe LJ at paras 100 and 101 above, I am satisfied that second respondent breached regulation 2(a). If the burden of proving the breach was on the appellant, it has been discharged.

119. The final question is whether causation has been established by the appellant. This issue was not considered by the judge because he found that there was no liability. In these circumstances, it is difficult for this court to deal with the question of causation. As I understand it, the only evidence of the appellant's exposure to asbestos dust is of exposure from the activities at the second respondent's factory. There is no suggestion that he was exposed to asbestos dust in the course of any other employment during his working life. It follows that, unless he was exposed to asbestos dust in the general atmosphere, the mesothelioma must have been caused by the dust to which he was exposed at the second respondent's factory. If he was not exposed to asbestos dust in the general atmosphere, causation will have been established in the conventional way. If he was exposed to asbestos dust in the atmosphere, then he will succeed on the basis that the second respondent materially increased the risk of the appellant contracting mesothelioma: see *Sienkiewicz v Grieif (UK) Ltd* [2011] UKSC 10, [2011] 2 AC 229.