



IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

No. HQ16A02945

Royal Courts of Justice
Strand, London WC2A 2LL

Tuesday 4th October 2016

Before:

MASTER DAVISON

(In Private)

BETWEEN :

WINIFRED GOLDSTONE

Claimant

- and -

- (1) LORNA PAMELA WITTON
- (2) JOHN STEPHEN GETHIN
- (3) DIGNITY FUNERALS LIMITED

Defendants

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MR. R. WEIR QC (instructed by Leigh Day) appeared on behalf of the Claimant.

MR. R. HIORNS (instructed by Hayes & Storr) appeared on behalf of the First and Second Defendants.

MR. A. DAVIS (instructed by Keoghs) appeared on behalf of the Third Defendant.

J U D G M E N T

(As approved by the Judge)

MASTER DAVISON:

- 1 I am going to give a short judgment.
- 2 This is a first CMC in a mesothelioma case. The Claimant was employed by an undertaking which carried on two lines of business. One line of business was a funeral business and the other was a carpentry business. The Claimant was exposed to asbestos in the course of her work. There were two sources of that: first, the fabric of the building; second, the activities of the carpentry business, (which does seem to have been by far the major source of the exposure). The exposure seems to have been in clear breach of the hygiene standards of the day and in breach also of the Asbestos Regulations 1969 and the Control of Asbestos at Work Regulations 1987. Very sadly the Claimant has now been diagnosed with mesothelioma.
- 3 On the evidence before me there was no bright line between the activities of the two sides of the business as far as the Claimant's employment was concerned. The workshop where the carpentry aspect was carried out was part of a building from which both sides of the business operated. Both sides of the business shared administration, chiefly in the form of the Claimant, who was an administrator, and also in the form of common facilities. One of those common facilities was the ladies' lavatory to which the Claimant had access only by going through the carpentry workshop.
- 4 In 1989 there was a TUPE transfer of the funeral's business to the Third Defendant and the carpentry business was at that point closed down. The TUPE regulations 1981 applied to that transfer. Regulation 3(1) of TUPE is in these terms:

“Subject to the provisions of these Regulations, these Regulations apply to a transfer from one person to another of an undertaking situated immediately before the transfer in the United Kingdom or a part of one which is so situated.”
- 5 Because of the wording of Regulation 3, which includes a transfer of part of an undertaking, there is no doubt that the Claimant's employment transferred at that point to the Third Defendant.
- 6 As to the effect of that we need to look at the Acquired Rights Directive under which the Regulations were made and at Regulation 5 of the Regulations themselves. Article 3(1) of the Acquired Rights Directive is in these terms:

“The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of

a transfer within at the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.”

7 Then Regulation 5(1) and (2)(a) of the Regulations themselves were in these terms:

“ (1) A relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph 1 above, on the completion of a relevant transfer – (a) all the transferor’s rights, powers, duties and liabilities under or in connection with any such contract, shall be transferred by virtue of this Regulation to the transferee.”

8 The liabilities transferred include liability for an injury caused by negligence or breach of statutory duty. That was established by the well-known case of *Bernadone v Pall Mall Services Group Limited & Others* [2001] ICR 197.

9 The Third Defendant’s response is that liability for the Claimant’s mesothelioma remains with the carpentry business because that part of the business was not transferred. The question for me this morning is whether that point is sufficiently meritorious, or potentially meritorious, to justify me putting off this case - where the Claimant is very sadly dying of mesothelioma - to a full show cause hearing which could not happen for a number of weeks. I have come to the conclusion that there is no merit in the point and that I should enter judgment against the Third Defendant in favour of the Claimant at this stage. I can give my reasons for that very shortly:-

(1) The first is that it seems to me that this is a liability which was incurred “in connection with” the Claimant’s employment with the transferor, because up to the date of the transfer the transferor operated two businesses with common facilities – namely common management and common premises. The phrase “in connection with any such contract of employment” is to be given a broad interpretation, having regard to the wording of the underlying directive. The businesses were inextricably linked and it follows that the liability was connected with the part of the undertaking transferred.

(2) The second is that the Claimant’s duties in connection with the funeral business exposed her to the activities of the carpentry business. Even if the businesses had been separate, to the extent that employment with one

exposed her to risks from the other, such exposure was, it seems to me, an incident of her employment activities in relation to the funeral business. And, of course, on any view, the funeral business was transferred to the Third Defendant in 1989.

- 10 For these reasons it seems to me that liability for the exposure of the Claimant to asbestos and her consequent mesothelioma plainly has transferred to the Third Defendant. The Third Defendant has no defence to the claim and therefore it would be appropriate to enter judgment at this stage.

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- 11 I am going to order that the Third Defendant pay the Claimant's costs of bringing the claim against the First and Second Defendants. That is because the Third Defendant did not admit liability. It maintained that liability did not rest with the Third Defendant – and maintained that position until today. Therefore, I agree with Mr Weir QC that the Claimant really had no choice other than to join the First and the Second Defendant. Therefore, it seems to me that it is proper for the Third Defendant to pay those costs.
- 12 I will say 8th December 2016 for the assessment at the Royal Courts. The overriding thing is to get the assessment on as soon as we can.
