

Decision of Mr David Allan, KC

1. X contracted mesothelioma. She made an application for compensation to the T&N Asbestos Trust. Sadly X died as a result of the disease. The application was continued on behalf of the estate by the executors. The Trustees considered the evidence in the case and concluded that the alleged exposure to asbestos did not satisfy the exposure criteria set out in Schedule 1(i)(3) of the Trust Distribution Procedures (TDP). That decision has been appealed by the executors of X's estate. I am asked, as the appointed expert under the TDP, to determine the appeal.
  
2. The relevant provision of the TDP, namely Schedule 1(i)(3), requires:

"Credible evidence of material Asbestos Exposure caused by the activities of T&N or any relevant company and such Asbestos Exposure commencing at least 10 years before first diagnosis."

The T&N company was Turners Asbestos Cement Company Ltd. which operated a factory in Erith, Kent, during the relevant period.
  
3. Two statements were taken from X during her illness. The alleged T&N exposure is said to have occurred between 1966 and 1970. X states that her first husband's mother lived about one mile from an asbestos factory. She would visit her mother-in-law two or three times a week. She says it would sometimes be dusty and she would help clean up dust using a dustpan and brush. She suggests the dust came across from the asbestos factory. In a short second statement X states that having considered Google maps, the distance from the house to the asbestos factory was less than she initially thought and was actually 650 metres.
  
4. In her first statement X sets out details of other possible exposure to asbestos dust.

5. \_\_\_\_\_

6. \_\_\_\_\_

7. \_\_\_\_\_

8. A medical report, dated 26<sup>th</sup> October 2022, has been obtained from Dr. R.M. Rudd, a consultant physician. Dr. Rudd has vast experience of reporting on asbestos disease cases. Following a comprehensive review of the medical records, Dr. Rudd concludes that X contracted pleural mesothelioma of the sarcomatoid type. He explains that most cases of mesothelioma are caused by asbestos exposure. Even where there is no obvious history of exposure, a substantial proportion of these cases will be caused by undocumented or unsuspected occupational or environmental exposure. When there is a history of past significant asbestos exposure, the balance of probabilities strongly favours that exposure being the cause of the mesothelioma.

9. Having set out the detail of X's possible occupational and non-occupational exposure to asbestos, Dr. Rudd addresses the potential causative effect of the various exposures recalled by X. In relation to the visits to power stations, Dr. Rudd states that if X sustained any significant exposure to asbestos on such visits, such exposure would have increased her risk of mesothelioma but only to a very small extent in view of the brevity of the exposure. In relation to the employment with XX, Dr. Rudd stated there is no definite evidence there was asbestos exposure. It would be for a Court to determine, with the assistance of expert evidence from a consultant engineer or

occupational hygienist, the extent of any exposure to asbestos dust. In relation to exposure to dust brought into her parents' home on the overalls of her father, Dr. Rudd states that from the nature of her father's work it is possible that the dust included asbestos dust and, if so, would have contributed to the risk of mesothelioma. Dr. Rudd doubts that the work of X's son at XXX in the 1990s would have exposed her to asbestos.

10. As to the visits by X to the home of her first husband's mother between 1966 and 1970, Dr. Rudd states:

"If, as she believes, the dust included asbestos dust, exposure from this source would have contributed to the risk that she would develop mesothelioma."

This poses the question of whether the dust contained asbestos but of course does not answer it.

11. In the written submissions in support of the appeal, reference is made to the judgments in three cases involving non-occupational exposure to asbestos dust including **MARGERESON v. J.W. ROBERTS 1996 PIQR 154** in which I represented the widow of Mr. Margereson at first instance and in the Court of Appeal. The case involved an asbestos factory in Armley, Leeds and the exposure of Mr. Margereson as a child to asbestos dust which escaped from the factory. He lived close to the factory and went to a school where the playground was regularly contaminated by dust from the factory. He also played on loading bays attached to the factory. A substantial body of evidence was adduced over several weeks as to the extent of dust escaping from the factory and the impact on the surrounding area and the local community. In the Court of Appeal's judgment, **1996 EWCA Civ. 154**, the evidence is summarised as follows:

"The evidence was overwhelming to the effect that beyond the perimeters of the factory on all sides asbestos dust was deposited in enormous quantities. That dust had emanated from within the factory walls. It had escaped either through open doors and windows in the factory buildings or from open areas of the factory such as yards or loading bays of which there were eight. The dust was also extracted to an extent from within the factory itself through extraction equipment venting into the atmosphere."

12. In **MAGUIRE v. HARLAND & WOLF PLC 2005 EWCA Civ. 1**, where I again represented the claimant, the claim was brought by the husband of the deceased. Mr. Maguire was heavily exposed to asbestos dust when working at a shipyard in Liverpool. He went home in workclothes contaminated with asbestos dust. Mrs. Maguire was exposed to asbestos dust which her husband brought into the home and when she cleaned his workclothes. Exposure to asbestos dust in these circumstances was established. The case succeeded at first instance on foreseeability, but the majority in the Court of Appeal held that foreseeability was not established.
13. **PINDER v. CAPE PLC 2006 EWHC 3630(QB)** was a decision of Ramsey J. The claimant had been exposed to asbestos in the 1950s when playing on a rubbish tip where asbestos waste from Cape's Acre Mill had been dumped. The judge accepted the evidence of Dr. Rudd that asbestos dust inhaled when playing on the tip probably caused or materially contributed to the claimant's mesothelioma. However, the judge held it was not foreseeable that in the 1950s the levels of exposure from playing on the tip would cause injury.
14. A landmark in the developing knowledge that mesothelioma could be caused by relatively low levels of asbestos dust exposure was the paper published by Newhouse and Thompson in 1965 entitled Mesothelioma of Pleura and Peritoneum Following

Exposure to Asbestos in the London Area. This study looked at a group of 83 patients at a London hospital where the diagnosis of mesothelioma was confirmed. For 76 of the patients full occupational and residential histories were obtained. Over half had a history either of occupational exposure to asbestos, or they lived in a household with a relative who had occupational exposure and brought asbestos dust into the home on their clothes. There were also 36 cases where there was no history of work or domestic exposure. However, of these cases 11 lived within half a mile of an asbestos factory. The authors stated there was evidence that neighbourhood exposure may be important.

15. Unfortunately in the present case, there is a paucity of evidence regarding escape of asbestos dust from the factory in Erith. There is a newspaper report of August 2007 which refers to residents digging up asbestos waste from ground near to the factory. The report refers to a number of discoveries of asbestos waste at sites near the TAC asbestos factory in Manor Road, Erith. There is reference in the report to a number of occasions in the 1990s when asbestos waste was uncovered during the building of housing. There is no reference in the report of any instances of escape of asbestos dust from the TAC factory. I am instructed that a search of the T&N records has provided little information regarding the Erith factory, which was sold in 1986. The TAC minute books for the relevant period have been scrutinised for any reference to dust escaping from the Erith factory or concerning complaints from residents. No such references were found.
16. The only evidence of possible exposure to asbestos dust from the Erith factory is one paragraph in X's first statement. In contrast to other cases, X did not live close to an

asbestos factory and during the period 1966 to 1970 she did not live with someone who worked at the Erith factory. One does not doubt that on occasion when she visited the house it was dusty. However, there must be considerable doubt that a significant proportion of this dust was from the Erith factory. There must also be a real possibility that X's recollection is at fault when she recalls seeing dust floating across from the asbestos factory to the house. This would be at a distance of 650 metres from the factory. Quite apart from X's view being obscured by other buildings, it would require huge amounts of dust to be emanating from the factory for it to be visible from this distance. This would greatly affect people who lived much closer to the factory than X's mother-in-law. Yet there is no evidence that this occurred.

17. Applying the relevant words in the TDP, I conclude that there is no credible evidence of material asbestos exposure caused by the activities of T&N or a relevant company. Undoubtedly X contracted mesothelioma and this dreadful disease caused her death. The contents of Dr. Rudd's report indicate that asbestos dust inhalation was the likely cause of the disease. X's statement reveals a number of circumstances in which asbestos exposure may have occurred. Unfortunately the evidence does not allow me to conclude that material exposure to asbestos dust from T&N's Erith factory probably occurred.

**DAVID ALLAN, KC.**