Neutral Citation Number: [2011] EWHC 951 (QB)

Claim No: HQ10X00352

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/04/2011

**Before**:

**MR JUSTICE WYN WILLIAMS**

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**Between:**

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| **DAVID BRIAN CHANDLER** | **Claimant** |
| **- and -** | |
| **CAPE PLC** | **Defendant** |

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**Robert Weir QC & Simon Levene** (instructed by **Leigh Day & Co**) for the **Claimant**
**Charles Feeny** (instructed by **Clarke Wilmot Solicitors**) for the **Defendant**

Hearing dates: 28 March 2011 - 29 March 2011

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE WYN WILLIAMS

## Mr Justice Wyn Williams:

1. The Claimant was born on 8 May 1940. Between 22 April 1959 and 9 October 1959 and between 24 January 1961 and 9 February 1962 he was employed by a company known as Cape Building Products Ltd at premises occupied by that company at Iver Lane, Uxbridge Middlesex. In the remainder of this judgment I will refer to Cape Building Products Ltd as "Cape Products".

2. In the period 1959 to 1962 the Caper Products carried out two different processes at the site in Iver Lane. One of the processes was the manufacture of bricks; the other process was the manufacture of an incombustible asbestos board called Asbestolux.

3. The two processes were carried on in different parts of the site. It is admitted by the Defendant, however, that asbestos dust generated during the process of producing Asbestolux permeated the whole of the site.

4. The Claimant was employed to stack and load bricks. Primarily he worked out of doors. During the course of his work, however, he was exposed to asbestos dust which was produced during the manufacture of Asbestolux.

5. In 2007 the Claimant discovered that he had contracted asbestosis as a consequence of that exposure. His exposure, without doubt, had been caused by negligence and breach of statutory duty on the part of Cape Products.

6. Unfortunately for the Claimant, Cape Products has long since ceased to exist. Further, during the period of the Claimant's employment it had no policy of insurance which would indemnify it against claims for damages for asbestosis.

7. However, the Claimant submits that he has a cause of action against the Defendant. In summary, the Claimant submits that at all material times (i.e. during the period of his employment with the employer) the Defendant owed to him a duty of care and that the Defendant was in breach of that duty. In effect, the Claimant asserts that Cape Products and the Defendant were joint tortfeasors who are jointly and severally liable to pay him damages.

8. When the hearing before me began the quantum of damages was in issue. However, before the trial ended the quantum of damages was agreed, subject to liability, at £120,000 net of any reclaimable benefits. If the Defendant is liable to the Claimant it will submit to a provisional award of damages in that sum.

9. I should also record that the Defendant accepts that if it owed a duty of care to the Claimant it was in breach of that duty. Accordingly the sole issue which I am called upon to determine is whether or not the Defendant owed to the Claimant a duty of care.

The relevant facts in detail

10. I was provided with a mass of documentary evidence. As is often the case when numerous lever arch files are provided to the court, it was necessary to look at a fraction only of the documents therein contained. The documents were produced for a number of purposes; however, one of the main purposes was to demonstrate the

relationship between the Defendant and Cape Products at the time relevant to these proceedings. In order to understand that relationship it is necessary to set out briefly the history of both companies and how they became linked.

11. On 28 December 1893 The Cape Asbestos Company Ltd was incorporated in London. It is common ground that this was the predecessor company of the Defendant. Accordingly, hereafter, I will use the word Defendant to mean both the Defendant in these proceedings and its predecessor companies.

12. Within a few years of incorporation the Defendant was undertaking some form of asbestos goods manufacture in England. In the years leading to the First World War manufacture grew steadily. In 1913 the Defendant acquired land in Barking and constructed a factory upon it. The factory was used by the Defendant for the manufacture of asbestos products for decades thereafter.

13. In April 1945 the Defendant began negotiations for what is described as the purchase of a company known as the Uxbridge Flint Brick Company Ltd (hereinafter referred to as "Uxbridge"). That company had been incorporated in 1934 under the name of Hunziker (Great Britain) Ltd and it owned an area of land and two factory buildings in Iver Lane, Uxbridge. In one building, flint bricks were manufactured; the other building had been used for making cement pipes but, by 1945, it was empty. In September 1945 the Defendant bought at least a majority of the shares in Uxbridge.

14. The document entitled "The Cape Asbestos Story" describes how, upon the acquisition of those shares, Mr PE Coombs was appointed to manage the plant as "a branch of the Defendant". However, Uxbridge continued as a separate legal entity and Mr Coombs was appointed a director of that company. Despite the separate legal status of Uxbridge, however, the Defendant was capable of exercising control over its affairs as its majority shareholder.

15. Under Mr Coombs' stewardship Uxbridge became a successful enterprise. It continued to make bricks. However, the main purpose of the acquisition of the shares in Uxbridge had been to provide a facility for increased production of an asbestos product known as Pluto board. That product was in production at the Defendant's Barking factory and there was a need to expand production. Consequently, from 1945, Pluto board was produced by the Defendant in that part of the site at Uxbridge which had formally been used for making cement pipes.

16. In 1951 the Defendant began producing Asbestolux as well as Pluto board at Uxbridge. This product was very successful. It was used for insulation lining to all types of buildings and for various industrial purposes. In a short time, according to "the Cape Asbestos Story" the factory at Uxbridge had "become a valuable feature in the Defendant's economy".

17. Among the documents produced at the hearing before me were minutes of the meetings of the directors of Uxbridge. Minutes in 1953 show that there was then a proposal to erect a new building at the site at Uxbridge which was to be used in connection with the manufacture of Asbestolux. The minutes also show that it was proposed that the Defendant would rent that building from Uxbridge.

18. The minutes of a meeting of the Uxbridge directors which took place on 26 November 1954 show that the directors authorised expenditure of £7000 for extension to buildings, £5000 for a new workshop building and £10,000 for the purchase of various items of equipment. The minutes record that

> "The above expenditure on buildings and equipment is in connection with the expansion programme for Asbestolux on behalf of the Cape Asbestos Company Ltd."

19. At a director's meeting on 20 July 1955 the Uxbridge directors confirmed their agreement as to the rent which was to be charged to the Defendant for the new factory extension and part of the new workshop.

20. Mr Weir QC, on behalf of the Claimant, submits that the Uxbridge minutes (and those of the Defendant over this period) demonstrate that although Uxbridge and the Defendant were separate legal entities they worked closely together. It is hard to escape that conclusion. The Defendant produced both Pluto board and Asbestolux at part of the site; Uxbridge permitted the Defendant to carry on that activity. No doubt the Defendant paid rent to Uxbridge for its use of part of the site; no doubt, too, these arrangements were achieved because the Defendant was the majority shareholder in Uxbridge and each company had common directors.

21. At a meeting of directors of the Defendant held on 20 March 1956 the Defendant's managing director reported as follows:-

> "…in accordance with the company's policy, the products at present being manufactured at Uxbridge would be concentrated under a single administration there for all aspects of management, production and sales. The name of the Uxbridge Flint Brick Company Ltd would be changed to Cape Building Products Ltd…."

22. On 19 June 1956 the Defendant's directors resolved "to subscribe for 600,000 Ordinary Shares of 10/- each in Uxbridge." This brought the total of the Defendant's shares in Uxbridge to £1 million. It is common ground that from about this time and following the change of name Cape Products became and was a wholly owned subsidiary of the Defendant. Further, Cape Products took over the production of Asbestolux. Those employees who were employed to work in the production of Asbestolux became employees of Cape Products.

23. It is common ground that by this time a group of companies was in existence of which the Defendant was the parent company. Indeed, the documentary evidence suggests that the group had existed for some years previously. In 1956 Cape Products became one of the many subsidiary companies within the group. Further it was a subsidiary which was wholly owned by the Defendant.

24. The Claimant asserts that the group of companies had a core business i.e. the production of asbestos based products. Many of the subsidiary companies, including Cape Products, engaged in such production. Mr Weir QC submits that the evidence demonstrates that the Defendant controlled aspects of the core business even when the business was being undertaken by a subsidiary company. At the very least, submits

Mr Weir QC, many important decisions relating to the core business were either taken by or approved by the Defendant before they were put into effect by a subsidiary.

25. There is no real dispute about the fact that there was a core business undertaken by the Defendant and many of its subsidiaries. The most strongly contested issue of fact in this case, however, relates to the extent to which the Defendant controlled the activities of Cape Products in relation to the production of asbestos based products. I turn next, therefore, to those documents produced before me upon which the Claimant relies to make good the submission that the Defendant exercised control over Cape Products during the period 1956 to 1962 when that company was engaged in the manufacture of asbestos based products.

26. The minutes of board meetings of the Defendant and Cape Products show that as from June 1956 until the end of 1962 (which is the relevant period so far as the Claimant is concerned) both companies had common directors. As of June 1956 the managing director and deputy chairman of the Defendant was Mr Giles Newton. Two of the directors of the Defendant were Mr RH Dent and Mr R Riley. The minutes of the meeting of the Uxbridge directors held on 22 June 1956 show that Mr Newton and Mr Riley were also directors of Uxbridge and that Mr Newton was the chairman of Uxbridge. Mr Newton had held that position for some years previously.

27. On 8 August 1957 the directors of the Defendant appointed Mr Newton as the Defendant's chairman. Mr Dent and a Mr Hale were made its joint managing directors at the same time. By the commencement of the Claimant's employment in April 1959 the chairman of Cape Products was Mr Hale and two of its directors were Mr Dent and Mr Riley. Messrs Dent, Hale and Riley were also directors of the Defendant.

28. On 21 January 1959 the Defendant's secretary wrote to all its ordinary shareholders to inform them that it was proposed to raise capital for the "Group" to avoid the necessity of borrowing and to provide "it" (i.e. the group) with sufficient additional capital to carry out plans for further expansion and development. The means chosen for raising the capital was an increase in the authorised share capital of the Defendant.

29. This letter demonstrates quite clearly that by this time at the very latest there was a group of companies all associated with the Defendant. It demonstrates, too, that the needs of the group were to be facilitated by the Defendant.

30. The letter also provides some detail as to the group's activities. The group is described as having "manufacturing operations in the United Kingdom and elsewhere". Further, according to the letter:-

> "Among these operations, the manufacture of the insulating board Asbestolux at Uxbridge has made an outstanding contribution, while improvements and extensions to other factories in the group have brought additional benefits…."

31. At a meeting on 17 March 1959 the Defendant's directors considered an item described in the minutes as "Special Expenditure". One of the items under this head was "Expansion of Asbestolux Production". The minutes record:-

> "As a result of a careful examination of the market prospects and of production facilities, a scheme had been prepared to provide for the additional production of 9200 Asbestolux boards a week at a cost of £237,000. This would be effected by completing the scheme already begun at Barking, and by modifications and improvements to the plant at Uxbridge. The profit estimated to accrue from this expenditure, together with that already incurred at Barking (£105,000), was, at full production, £156,000 per annum.
>
> Of the total new expenditure of £237,000, £80,000 would be incurred by the Cape Asbestos Company at Barking and £157,000 by Cape Building Products Ltd at Uxbridge."

32. The minutes of the meeting of the directors of Cape Products which took place on 29 June 1959 record that

> "the Parent Company indicated that it would like 3 months' notice of any intention to cease production of exfoliated Vermiculite. IT WAS AGREED that further consideration of future policy should be made in the first instance by the Executive Committee and recommendations made to the Board of Directors in due course."

33. Minutes of a meeting of the Defendant's directors on 25 April 1961 record Mr Dent referring to discussions which had taken place at Uxbridge with regard to Asbestolux expansion and also record him as saying that he regarded the necessity for increased productive capacity to be a matter of urgency. He informed his co-directors that he would circulate a paper on the matter prior to the next meeting with the object of laying a scheme before the Board for approval.

34. On 16 May 1961 the Defendant's directors considered this issue further. The minutes record that:-

> "The Board considered the memorandum prepared by the managing director of Cape Building Products Ltd and circulated to the members of the Board recommending the expansion of Asbestolux manufacture at Uxbridge from 3 to 6 machines including one to be transferred from Barking.
>
> Mr RH Dent and Mr SDH Pollen were asked to examine certain financial and other considerations and subject to a satisfactory conclusion being reached, the Board agreed in principle to the allocation of approximately £700,000 to this project, final details of which will be laid before the Board as soon as possible."

The minutes of the meeting of the Defendant's directors on 31 October 1961 show that the project was approved on that date.

35. An important document in support of the Claimant's contention is the minutes of a meeting on 26 June 1961 of the directors of Cape Products. Item 7 of the minutes relates to a technical report submitted by the works director of Cape Products. The report included the information that arrangements were in hand for "Chrysotile M.6 fibre to be incorporated into the mix as from the current week in accordance with agreed group policy". The minutes also show that the topic of the expansion of Asbestolux production was discussed and the minutes record that:-

> "It was agreed that expansion should be up to 6 machines, with the present Barking machine representing the 6th unit, the move of this machine being deferred to be consistent with Parent Company policy."

It is also worth noting that at this same meeting the directors discussed a visit by representatives of the Nippon Asbestos Company of Japan. The minutes record that the managing director was asked by the acting chairman

> "to ensure that any final Agreement made in respect of the Nippon Asbestos Company be completed through the group company secretary, and that any initial arrangements in this case or any other proposed Licensing arrangement be made without prejudice to approval by the Board of the Parent Company."

36. Minutes of meetings of the directors of the Defendant and Cape Products show that on 9 August 1961 the bank accounts of Cape Products were transferred to "the Group Central Banking System" and that when, in July 1962, problems existed in relation to the production of Asbestolux at Uxbridge, the problem was reported to the Defendant's Board.

37. On 25 September 1962 the Defendant's Board considered a report from Dr Smither. .He was a medical doctor and by September 1962 he was an employee of the Defendant based at the factory in Barking. The minutes of what transpired at the meeting are as follows:-

> "Arising from discussion on the report by Dr Smither, it was agreed that this report had revealed important differences between methods of diagnosis of asbestosis in South Africa and the United Kingdom. It was also agreed that serious efforts to establish the facts regarding the relationship between asbestos and mesothelioma should continue to be supported. The need to give greater attention to the elimination of dust in mills and working areas was stressed, and Dr R Gaze was invited to summarise the steps being taken in South Africa and future proposals after his next visit."

38. Dr Smither first became associated with the Defendant on 1 November 1956. The Defendant's records show that he was appointed a medical officer on that date although those same records reveal that he did not become an employee of the Defendant until 1 June 1962. Be that as it may, the doctor appears to have assumed an important role for the Defendant within a comparatively short time of his

appointment. That conclusion is justified, in my judgment, on the basis of a short exchange of correspondence which took place in late 1961.

39. On 26 October 1961 Dr Smither wrote to Dr R Owen of HM Factory Inspectorate to the following effect:-

> "I very much enjoyed our day together at Uxbridge. Thinking over our discussion of the problem of the Asbestosis case at work, I remember that you mentioned carcinoma in the chromate industry. Can you let me know what the regulations are in this industry with reference to men continuing at work?
>
> ….While we're all agreed that the case of Asbestosis must leave a scheduled department, I am not quite sure of the regulations requiring them what Dr Bell calls "the atmosphere". Can you enlighten me on this one, so far as the regulations are concerned?"

Dr Owen replied on 6 November 1961. This reply provoked a further letter from Dr Smither dated 7 November 1961. It informed Dr Owen that Dr Smither and other doctors had met and had discussed the pathology and carcinogenesis of asbestos.

40. A number of points emerge from this correspondence. First, as a matter of probability, Dr Smither had gone to Uxbridge to meet Dr Owen to discuss a case of asbestosis which had occurred at Uxbridge. That seems to me to be the most natural interpretation of what Dr Smither wrote on 26 October 1961. If that is right it provides clear evidence that the Defendant was taking an active part in discussions relating to the health and safety of an employee of one of its subsidiaries. Second, the Dr Bell mentioned in the letter was identified (by reference to another document) as being the "factory doctor" at the Uxbridge factory in 1961. Third, Dr Smither was engaged in wide-ranging discussions as to the likely harmful effects of exposure to asbestos which, obviously, were of much wider purport than the particular conditions prevailing at any one factory.

41. It was shortly after this exchange of correspondence that Dr Smither became an employee of the Defendant. On 1 July 1963 he was appointed to a post with the title Group Medical Adviser. As from that date, on any view, Dr Smither was employed by the Defendant but in a capacity which made him responsible for the health and safety of the employees of all the companies in the group. In due course I will consider whether or not Dr Smither was the first holder of such a post or whether he succeeded a doctor called Wyers.

42. To date I have considered only documents which came into existence either before the Claimant's period of employment with Cape Products or those which were created more or less contemporaneously. However, some of the documents created by or on behalf of the Defendant some years later throw some light upon the relationship between the Defendant and Cape Products during the material time and the extent to which the Defendant was in control of important issues relating to the core business of the group.

43. In 1976/1977 the Defendant submitted written evidence to the Advisory Committee on Asbestos. As I understand it, this committee had been set up under the auspices of the Health and Safety Executive following the coming into force of the Health and Safety at Work Act 1974. The Defendant provided substantial detail to the committee – including detail about its historical practices. Under the heading "Medical Care" the information provided was as follows:-

> "For many years (certainly since 1946) Cape has employed its own Medical Adviser, and, in addition to the statutory obligation, under the Prescribed Diseases Regulations made under the National Insurance (Industrial Injuries) Act 1946, for the pre-employment and biennial medical examination of workers in the scheduled departments, has provided its own medical surveillance.
>
> Under the general guidance of the Group Medical Adviser each location has its own medical adviser and facilities for medical services. A copy of the section of the Group Policy Manual covering medical surveillance is included as Appendix C."

At Appendix B the Defendant provided a health record for all the factories operated by the companies within the Group. In relation to the factory at Uxbridge the Defendant was able to provide records for the period 1945 to 1975.

44. Appendix C to the evidence consisted of extracts from the Defendant's Policy Manual. It is clear that a group policy in relation to health and safety existed in 1976/77. While, of course, that is many years after the Claimant was last employed by Cape Products the Defendant has adduced no positive evidence to demonstrate that a group policy in relation to such matters did not exist from the time that a group of companies first came into existence.

45. On 23 January 1973 the Monopolies Commission produced a report to Parliament entitled "Asbestos and certain Asbestos Products". Appendix 4 of the Report was entitled "History and Development of the Cape Asbestos Company Limited". Much of the history set out in the report is in very similar terms to that contained within this judgment.

46. Paragraph 18 of the Appendix is important. It describes the relationship between the Defendant and its subsidiary companies; it is worth quoting it in full:-

> "The Cape Asbestos Company Ltd, a public company, is both a holding and a trading company. Cape has six main subsidiaries in this country concerned with products within the scope of the present inquiry, namely: Cape Asbestos Fibre Ltd, which is responsible for marketing throughout the world the Group's asbestos fibres and for importing all asbestos fibres required by Cape companies in the United Kingdom; Cape Insulation Ltd; Cape Universal Building Products Ltd; Small and Parkes Ltd; Trist, Draper Ltd; and Marinite Ltd. Certain of its operating subsidiaries in the United Kingdom have sold their business

> and assets to the parent company and now operate as its agents but, whether a subsidiary company trades as agent of the parent company or not, each is controlled by its own Board of directors. The chairman of each of the principal United Kingdom subsidiaries is an executive director of the parent company and reports to the managing director of the parent company. The managing director of each subsidiary company has a wide measure of autonomy in day-to-day matters, but is responsible to the chairman of the subsidiary concerned and consults him on all major policy decisions. Annual budgets for sales, profits and capital expenditure are prepared for each operating subsidiary for incorporation in a group budget submitted to the Board of the parent company. Each subsidiary also submits annually a 5-year forecast under the same heads. Used hitherto primarily to plan the provision of finance during the 5-year period, the parent company is now attempting to use the 5-year forecast as a basis of a wider measure of corporate planning and, Cape says, examines subsidiary's forecasts and profits on sales and capital employed against Group requirements in these respects."

47. The above extract describes, primarily, the relationship between the Defendant and its subsidiaries in the early 1970s. However, it is also provides some insight into the relationship before that time. For example, as of the 1970s and, probably, for some time previously some subsidiary companies acted as the agent for the Defendant; however, there is no evidence which suggests that such a situation existed in the early 1960s.

48. In the light of the contemporaneous and later documents discussed above there can be little doubt that the Defendant exercised control over some of the activities of Cape Products from the time that it came into existence and through the period during which the Claimant was one of its employees. With his usual realism, Mr Feeny does not seek to argue to the contrary. He submits, however, that although the Defendant was obviously entitled to exercise control over Cape Products and from time to time it did so, that does not mean that the Defendant controlled all its important activities. I accept that submission. A glance at the minutes of the meetings of the directors of Cape Products in the period 1956 to 1962 shows that many decisions about its activities, some of them important, were taken without reference to the Defendant.

49. It does not seem to me, however, that the Claimant's case stands or falls simply upon whether he can establish that the Defendant controlled all the activities of Cape Products. It is enough, in my judgment, if he can establish that the Defendant either controlled or took overall responsibility for the measures adopted by Cape Products to protect its employees against harm from asbestos exposure. I will explain why in the next section of my judgment.

50. Some of the documentary evidence discussed above bears upon this issue. I turn to deal with further sources of evidence which are also in point.

51. I heard oral evidence from Dr Kevin Browne. He is now aged 89. Dr Browne became the "factory doctor" at for the factory at Iver lane Uxbridge in 1974. At that

time he was not appointed as an employee; he was paid fees for his services. Normally he was engaged at the factory for one half day per week. At the time when Dr Browne was first appointed, Dr Smither was still the Group Medical Adviser. In 1978 Dr Browne succeeded Dr Smither as Group Medical Adviser.

52. Dr Browne has given evidence on behalf of Claimants in a number of cases brought against the Defendant. Many of those cases took place in the United States of America in the 1990s. The transcripts of his evidence in those proceedings were adduced in evidence before me.

53. In summary that evidence was to the following effect. First, as Group Medical Adviser, Dr Browne was responsible for the health and welfare of all the employees within the group of companies. Second, Dr Browne succeeded Dr Smither as Group Medical Adviser who had, in turn, succeeded Dr Wyers. According to Dr Browne, Dr Wyers had been the Group Medical Adviser from the 1940s. Upon taking up his own position Dr Browne had been given access to many of the files which his predecessors had accumulated. Third, in the 1950s Dr Smither had written a scientific paper which had quoted a paper written by Dr Wyers in the 1940s to the effect that at that time asbestos related disease was under control and likely to be in decline in the future.

54. In his closing submissions Mr Feeny invited me to reject that part of Dr Browne's evidence – given to American courts – to the effect that there had been successive Group Medical Advisers from the 1940s. That said, Dr Browne was not challenged expressly upon his evidence to the American courts when he was cross-examined before me by Mr Feeny.

55. I am not prepared to accept Mr Feeny's submission on this point. The Defendant has known that Dr Browne has been maintaining that position ever since Dr Browne's testimony in the American proceedings. Yet it has adduced no witness or documentary evidence to contradict Dr Browne's recollection. In particular it adduced no work records relating to Dr Wyers or offered an explanation as to why it could not. Further, in my judgment there is nothing inherently improbable about the existence of a Group Medical Adviser from the 1940s. The Defendant or other companies with which it was associated had a number of factories in the United Kingdom in the 1940s and 1950s. It had subsidiary companies from, at least, 1946 according to the documentary evidence. In those circumstances it is entirely plausible that there was a Group Medical Adviser.

56. It also seems clear that during the material time (1959 to 1962) there was a Group Chief Scientist or Chief Chemist. That conclusion is inescapable from the witness statement of Mr Alan Hodgson, served on behalf of the Defendant. Mr Hodgson started work for the Defendant in 1953. The relevant part of the statement is in the following terms:-

> "6. I started work for Cape at their Barking factory. I was involved in the improvement and innovation in asbestos products and additionally in the safety issues. There was considerable awareness within the Cape Group of the need for dust exhaust ventilation and filtration. Environmental control was always extremely important.

> 7. At that time Dr Gaze was the Chief Chemist and took an interest in dust suppression methods. While at Barking I carried out dust level investigations using a Royco automatic dust counting machine. I carried out additional research in the laboratory by setting up control replication of work place situations where dust may have been liberated."

57. Mr Hodgson's witness statement was made on 8 February 2002 in relation to proceedings brought against a successor company to Cape Products. It is hard to understand why an employee of the Defendant was one of the principal witnesses for a successor company of Cape Products in relation to an asbestos related claim at the Uxbridge factory unless, as the Claimant maintains, the Defendant was responsible for the health and safety of employees of subsidiaries as well as its own employees.

58. In that claim a statement was also made on behalf of the successor company by Mr Jock Sim. He, too, was an employee of the Defendant. Mr Sim had joined the Defendant on 1 January 1966 to work in the personnel department. In his witness statement he described how the Cape Group of companies expanded in the 1960s; he said that "the operation having grown to such an extent that the subsidiaries could no longer be centrally controlled and there was a degree of decentralisation." Mr Sim's witness statement continued:-

> "Health and safety was never centrally controlled however since each subsidiary company had its own safety committee made up of representatives from the works staff, the personnel department and management."

59. I have no reason to doubt that each of the factories whether operated directly by the Defendant or by one of its subsidiaries had a safety committee specific to the factory. In my judgment, however, that of itself is no basis for concluding that the Defendant had divested itself of all responsibility for the health and safety of employees of its subsidiaries. I do not regard Mr Sim's assertion as being any basis for concluding that the Defendant was not responsible for the health and safety of employees of subsidiaries. That view is reinforced by a later paragraph in Mr Sim's witness statement which reads:-

> "6. Cape Plc took considerable steps to ensure that working with asbestos was as safe as possible and produced detailed instructions before the Asbestos Regulations were introduced in 1969. These instructions were in place before I joined the company and I was not involved in drafting them."

60. In my judgment it is very unlikely that this paragraph is intended to relate solely and specifically to factories directly controlled by the Defendant. No purpose would be served by including such a paragraph in Mr Sim's witness statement if that is what it meant given that Mr Sim was responding to a claim for damages for an asbestos related disease which had come about because of working conditions at the factory at Uxbridge. Further, it should be recalled that Mr Sim began his employment on 1 January 1966; that means that "instructions were in place" for all factories at which asbestos was used in manufacture before that time.

61. On the basis of the whole of the evidence adduced before me I reach the following conclusions on balance of probability. First, throughout the period of the Claimant's employment with Cape Products the Defendant employed a doctor as a Group Medical Adviser. He was responsible for the health and welfare of all the employees within the group of companies of which the Defendant was a parent. I can think of no reason why his role was different from the role which Dr Browne assumed when he became Group Medical Adviser in 1978. Second, during the same period, the Defendant employed a Chief Chemist or Chief Scientist. That was Dr Gaze. Mr Hodgson's witness statement shows that Dr Gaze was involved in seeking out ways of suppressing dust from the time that Mr Hodgson commenced his employment with the Defendant and it is inconceivable that he was engaged in that activity solely in relation to the factories directly operated by the Defendant. Third, the correspondence between Dr Smither and Dr Owen in late 1961 establishes that Dr Smither was, in effect, involved in an investigation of a case of a person who had contracted an asbestos related disease at the factory at Uxbridge. Fourth, Cape Products "inherited" the working practices which the Defendant had adopted for the production of Asbestolux at the factory at Uxbridge. There is nothing in the minutes of the Board of Directors of Cape Products which suggests that any kind of change in working practices occurred in the years following 1956 and, in particular, during the time that the Claimant was employed by Cape Products. Fifth, many aspects of the production process (particularly that which involved substantial expenditure) was discussed and authorised by the Defendant's board. As and when it felt it appropriate the Defendant did control what Cape Products was doing.

62. The Defendant admits that the working practices relating to the manufacture of asbestos based products at the factory at Uxbridge in the period of the Claimant's employment gave rise to a foreseeable risk of injury to employees of Cape Products as a consequence of exposure to asbestos. The Defendant's concession upon foreseeability is hardly surprising given the nature of the Claimant's own evidence about his exposure and the circumstances in which it arose. It is to be recalled that the Claimant was employed to stack bricks. Most of his work took place in the open air. Yet, for virtually every hour of every working day, he was exposed to asbestos dust in the atmosphere. That came about because asbestos products were manufactured in a building which had no sides. Asbestos dust was permitted to escape from the building without any attempt to contain it save by extraction fans situated in close proximity to the production machinery which, it is admitted, were inadequate for their intended purpose.

63. It is against the factual background considered in detail above and the conclusions drawn in the immediately preceding paragraphs that it is necessary to consider whether or not the Claimant has established that the Defendant owed to him a duty of care.

Duty of care

64. In Caparo Industries Plc v Dickman [1992] 2 A.C. 605 Lord Bridge summarised the test which is to be applied in determining whether or not a person owes a duty of care to another. He said this:-

> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a

> duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other."

65. Subsequently, this formulation has come to be known as the "three-stage test" for determining whether or not a duty situation exists. Essentially, my task is to apply that test to the facts of this case.

66. Before doing so, however, it is necessary to dispel certain possible misunderstandings which might arise in cases of this type or upon a cursory reading of this judgment. First, the fact that the Claimant was owed a duty of care by Cape Products does not prevent such a duty arising between the Claimant and other parties. No doubt, the fact that a duty situation exists between the Claimant and his employer is a factor to be taken into account when deciding whether another party owes the Claimant such a duty. But, to repeat, the existence of the duty between the Claimant and his employer cannot preclude another person being fixed with a duty of care. Second, the fact that Cape Products was a subsidiary of the Defendant or part of a group of companies of which the Defendant was the parent cannot mean by itself that the Defendant owes a duty to the employees of Cape Products. So much is clear from Adams and others v Cape Industries plc & another [1991] 1 AER 929. Equally, the fact that Cape Products was a separate legal entity from the Defendant cannot preclude the duty arising. Third, this case has not been presented on the basis that Cape Products was a sham – nothing more than a veil for the activities of the Defendant. Accordingly, this is not a case in which it would be appropriate to "pierce the corporate veil."

67. It is commonly the case that injured workmen suffer their injuries as a consequence of the negligent acts or omissions of more than one legally identifiable party. That was the alleged situation in the case of Connolly v The Ritz Corporation Plc and another QBD 4/12/1998, a decision much relied upon by Mr Weir QC. In Connolly the Claimant was employed by a Namibian company called Rossing Uranium Ltd to work in an open-cast uranium mine in Namibia. Rossing Uranium Ltd was a Namibian subsidiary of The Ritz Corporation Plc. As a consequence of his work in Namibia the Claimant developed squamous-cell carcinoma of the larynx. He brought proceedings in this country for damages against The Ritz Corporation Plc and another English company which was a wholly owned subsidiary of Ritz in even though his exposure had occurred in Namibia and, no doubt, a duty of care was owed to him by his employer.

68. The Defendant's response was to seek to strike out the claim. It did so on a number of grounds but one of the grounds relied upon was that the pleaded case did not support the existence of the alleged duty of care on the part of the Defendants. During the course of his judgment Wright J summarised the Defendants' arguments as follows:-

> "Mr Spencer QC on behalf of the Defendant argues that this pleading whether in its amended or re-amended form, discloses no cause of action. In particular, he says, it lays no foundation for the alleged duty of care said to be owed to the plaintiff. He

> points out, as is undoubtedly the case, that it is not alleged that the plaintiff was employed by either of the First or Second Defendants….he points out, and it is not contended otherwise, that a duty of care to the plaintiff, as a Rossing employee, cannot come into existence simply because the employing company is a subsidiary (whether wholly owned or not) of a parent company which it is sought to fix with such a duty. Nor, as he points out, does the pleading seek to set out any of the relatively limited circumstances under which the doctrine of "piercing the corporate veil" can be invoked. There is no suggestion on the face of the pleading that Rossing was anything other than a separate and independent company, registered in Namibia, having its own separate Board of Directors – even if some of those directors may also have been the directors of the parent company. Accordingly, says Mr Spencer, unless it is being alleged that Rossing was a bogus or "sham" company with no separate will of its own, but is simply doing the bidding of one or other of its parent companies in England, the pleading sets up no factual basis for the duty alleged to have been owed by the English companies to the plaintiff. Mr Spencer asserts that no other person other than the plaintiff's actual employer can owe the duty owed by a master to his servant to the plaintiff."

69. Wright J's answer to these submissions was given in the section of his judgment which followed immediately:-

> "As a matter of strict language this may well be true; but that is not to say that in appropriate circumstances there may not be some other person or persons who owe a duty of care to an individual plaintiff which may be very close to the duty owed by a master to his servant. For example, the consultant who advises the employer upon the safety of his work processes may owe a duty to the individual employee who he can foresee may be affected by the contents of that advice – see, for example, *Clay v Crump & Sons Ltd* [1964] 1 QB 533. Even more clearly, if the situation is that an employer has entirely handed over responsibility for devising, installing and operating the various safety precautions required of an employer to an independent contractor, then that contractor may owe a duty to the individual employee which is virtually coterminous with that of the employer himself. That is not to say that the employer, by so handing over such responsibility, will necessarily escape his own liability to his employee.
>
> On a fair reading of his pleading, it seems to me that that is more or less what the amended Statement of Claim alleges – namely, that the first Defendant had taken into its own hands the responsibility for devising an appropriate policy for health and safety to be operated at the Rossing mine, and that either

> the first Defendant or one or other of its English subsidiaries implemented that policy and supervised the precautions necessary to ensure as so far as was reasonably possible, the health and safety of the Rossing employees through the RTZ supervisors. Such an allegation, if true, seems to me to impose a duty of care on those Defendants who undertook those responsibilities, whatever contribution Rossing itself may have made towards the safety procedures at the mine. The situation would be an unusual one; but if the pleading represents the actuality then, as it seems to me, the situation is likely to comprehend the elements of proximity, foreseeability and reasonableness required to give rise to a duty of care: *Caparo Industries v Dickman*[1992] 2 A.C. 605."

70. Mr Feeny acknowledges the possibility that the Defendant could assume a duty to the Claimant; he submits, however, that there can be no general duty upon the Defendant to prevent an independent third party from causing harm to the Claimant. Mr Feeny submits that special or exceptional circumstances needed to exist before a duty could be imposed upon the Defendant to prevent harm to him from asbestos exposure which was caused by the negligence and/or breach of statutory duty of Cape Products.

71. It is true that generally the law imposes no duty upon a party to prevent a third party from causing damage to another. That emerges clearly from Smith v Littlewoods Organisation Ltd [1987] A.C. 241. However, that same case makes it clear that there are exceptions to the general rule. In his speech Lord Goff identified the circumstances in which a duty might arise. They were a) where there was a special relationship between the Defendant and Claimant based on an assumption of responsibility by the Defendant; b) where there is a special relationship between the Defendant and the third party based on control by the Defendant; c) where the Defendant is responsible for a state of danger which may be exploited by a third party; and d) where the Defendant is responsible for property which may be used by a third party to cause damage. Mr Weir QC submits that if it is necessary to show that special or exceptional circumstances exist in the instant case that can be done. He submits that there was a special relationship between the Defendant and the Claimant based upon the Defendant's assumption of responsibility for safeguarding the Claimant against illness from exposure to asbestos; alternatively, the Defendant had the ultimate control of those measures which were taken to protect the Claimant from the risk of exposure to asbestos.

72. I end my discussion of the parties' submissions upon the law where I began. I must apply the three-stage test in Caparo. I must do so in the factual context that I have outlined in the preceding section of this judgment.

73. On the basis of the evidence adduced before me I am satisfied that the Defendant had actual knowledge of the Claimant's working conditions. As I have said the Defendant produced Asbestolux at the Uxbridge factory until 1956. There is no basis for concluding that production practices changed in any significant way before or during the Claimant's period of employment. In particular, as is clear, Asbestolux was produced in a building which had no sides. Dust was permitted to escape without any real regard for the consequences. This was no failure in day-to-management; this was a systemic failure of which the Defendant was fully aware.

74. The risk of an asbestos related disease from exposure to asbestos dust was obvious. Mr Feeny does not suggest otherwise. There can be no doubt that the Defendant should have foreseen the risk of injury to the Claimant. As I have said that is admitted.

75. The Defendant employed a scientific officer and a medical officer who were responsible, between them, for health and safety issues relating to all the employees within the group of companies of which the Defendant was parent. On the basis of the evidence as a whole it was the Defendant, not the individual subsidiary companies, which dictated policy in relation to health and safety issues insofar as the Defendant's core business impacted upon health and safety. The Defendant retained responsibility for ensuring that its own employees and those of its subsidiaries were not exposed to the risk of harm through exposure to asbestos. In reaching that conclusion I do not intend to imply that the subsidiaries, themselves, had no part to play – certainly in the implementation of relevant policy. However, the evidence persuades me that the Defendant retained overall responsibility. At any stage it could have intervened and Cape Products would have bowed to its intervention. On that basis, in my judgment, the Claimant has established a sufficient degree of proximity between the Defendant and himself. At paragraph 27 of the skeleton argument submitted on behalf of the Claimant the suggestion is made that in this case the degree of proximity between the Defendant and Claimant is central to the analysis of whether, on the facts, a duty of care was owed. I agree. The facts I have found proved in this case persuade me that proximity is established.

76. No argument was advanced to me by Mr Feeny that if foreseeability and proximity were established nonetheless it was not fair, just and reasonable for a duty to exist. Had such an argument been advanced I would have rejected it. By the late 1950s it was clear to the Defendant that exposure to asbestos brought with it very significant risk of very damaging and life threatening illness. I can think of no basis upon which it would be proper to conclude in those circumstances that it would not be just or reasonable to impose a duty of care upon an organisation like the Defendant.

77. In my judgment the three-stage test for the imposition of a duty of care is satisfied in this case. Accordingly, the Claimant succeeds in his claim.

## Conclusion

78. I propose to enter judgment for the Claimant for an award of provisional damages. For the avoidance of any doubt about its terms it would assist if the parties submitted a draft of the order for my approval prior to or at the handing down of the judgment. There need be no attendance at the handing down if an order consequent upon this judgment can be agreed by the parties.