Case No: B3/2011/1272

Neutral Citation Number: [2012] EWCA Civ 525
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(QUEENS BENCH DIVISION)
WYN WILLIAMS J
[2011] EWHC 951 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/04/2012

Before :

LADY JUSTICE ARDEN
LORD JUSTICE MOSES
and
LORD JUSTICE MCFARLANE

- -

Between :

DAVID BRIAN CHANDLER	**Respondent**
- and -	
CAPE PLC	**Appellant**

- -
- -

Mr Jeremy Stuart-Smith QC & Mr Charles Feeny (instructed by **Greenwoods Solicitors**) for the **Appellant**
Mr Robert Weir QC, Mr Simon Levene & Mr Sudhanshu Swaroop (instructed by **Leigh Day & Co.**) for the **Respondent**

Hearing dates : 8-9 February 2012

- -

Judgment

Lady Justice Arden:

1. This appeal is brought by Cape plc ("Cape"), the parent company of Mr Chandler's former employer. The principal issue is whether Cape owed a direct duty of care to the employees of its subsidiary to advise on, or ensure, a safe system of work for them. The respondent, Mr Chandler, has recently contracted asbestosis as a result of a short period of employment over fifty years ago with Cape Building Products Ltd ("Cape Products"). That company is no longer in existence. However, its parent company, Cape, formerly the well-known asbestos producer Cape Asbestos plc, is still in existence. On 14 April 2011, Wyn Williams J held that Cape was liable to Mr Chandler on the basis not of any form of vicarious liability or agency or enterprise liability, but on the basis of the common law concept of assumption of responsibility. Cape appeals against that decision.

2. We understand that this is one of the first cases in which an employee has established at trial liability to him on the part of his employer's parent company, and thus this appeal is of some importance not only to the parties but to other cases.

3. There is no issue about whether the system of work in this case was unsafe. Mr Chandler worked out of doors loading bricks produced by a brick manufacturing arm of Cape Products. Asbestos was produced on the same site in a factory with open sides, and dust from that factory migrated into the area where Mr Chandler worked. Cape in effect accepts that Cape Products failed in its duty to Mr Chandler. There was, held the judge, "a systemic failure of which [Cape] was well aware." (Judgment, paragraph 73).

4. Mr Chandler's employment with Cape Products ran from 24 April to 9 October 1959 and from 24 January 1961 to 9 February 1962 (together "the relevant period"). Cape Products was dissolved some years ago. Cape Products carried employer's liability insurance. However, this included an exception for pneumoconiosis. That exception was held by Rix J in *Cape plc v Iron Trades Employers Liability Association Ltd* [2004] Lloyd's Rep IR 75, to cover asbestosis. Accordingly, there was no point in seeking to have the dissolution of Cape Products set aside so as to be able to enforce rights against its employer's liability policy. There is, therefore, no relevant policy of employer's liability insurance to protect Mr Chandler.

5. The evidence at trial was sparse and consisted mainly of documentary evidence. There was only one witness who gave oral evidence, namely Dr Kevin Browne. He was 89 years old at the date of the trial. He had been the works doctor at Cape Products from 1974, and from 1978 group medical adviser in succession to a Dr Smither. In those circumstances, this court is substantially in the same position as the judge to the review the evidence. This court does not therefore in the main have to defer to the judge by reason of his having had the advantage, not available to this court, of hearing witnesses. This court is required to be satisfied for itself that the facts justified the imposition of liability.

The facts

6. The evidence about the relationship of Cape and Cape Products is mainly circumstantial. It can be separated into a number of threads although some of the evidence belongs to more than one thread. The threads may for convenience be labelled as follows:

    a) Origins of Cape Products' asbestos business

    b) Relationship between Cape and Cape Products

    c) Technical assistance given by Cape to Cape Products

    d) Contemporary evidence which was said to demonstrate that Cape was involved with the health and safety of employees of Cape Products

    e) Evidence as to Cape's involvement in the asbestos business of Cape Products

    f) Events subsequent to the relevant period.

(a) Origins of Cape Products' asbestos business:

7. Cape was involved in the production of asbestos from the nineteenth century and had several factories in the UK. Its principal factory was in Barking, near London. After the Second World War, Cape looked for other factory premises because there was insufficient room at its Barking factory for increased production of a major asbestos product, Pluto board. Cape Products, then known as Uxbridge Flint Brick Company Ltd, had two factories on a single site at Cowley Works, Uxbridge, some 30 miles away. One of these factories had been used for making cement pipes but that use had been terminated and so that factory was empty.

8. Cape acquired at least a majority of the share capital of Cape Products in 1945, and the outstanding shares in about 1953. Cape installed the necessary plant into the empty factory. A manager was appointed "to manage this plant as a branch of Cape" (see *The Cape Asbestos Story* produced by Cape Asbestos, 1953, page 71). Production of Asbestolux, a new form of non-combustible asbestos board, started. "In a short time, [Cape Products] was an invaluable feature in Cape's economy" (op. cit. page 72). However, it is noteworthy that at no relevant point in time did Cape cease to be an operating company itself or merely hold the shares in its subsidiaries as if it were an investment holding company.

(b) Relationship between Cape and Cape Products:

9. Cape started out as a tenant of Cape Products' site. Cape Products modified the empty factory for Cape's use in the production of Asbestolux (board minutes of 20 November 1954). Cape paid a rent and a share of the rates, and there is nothing to suggest that the rent was not fixed at the market rate.

10. The relationship could have remained one of landlord and tenant on arm's length terms but that did not happen. Slowly but surely, Cape Products became a part of an integrated group of companies headed by Cape:

i) On 20 March 1956, the board of Cape (not that of Cape Products) gave its approval to a separate administration at Uxbridge for dealing with all aspects of the management, production and sales of Asbestolux "in accordance with company policy". On one reading, this is inconsistent with Cape Products being able to be in charge of its own management systems.

ii) At all material times there was one or more directors of Cape on the board of Cape Products.

iii) Furthermore, most of the board meetings of Cape Products for which we have been shown minutes were held at Cape's Head Office in central London, rather than at the Cowley Works.

iv) On 17 July 1956, Cape decided to sell the assets of its asbestos business at Uxbridge to Cape Products and to change the name of Cape Products to its existing name: there could be no other reason for a sale followed by a change of name other than that Cape wished Cape Products to be seen as part of the larger Cape group.

v) Cape's board minutes for 25 April 1961 and 16 May 1961 confirm Cape Products' status as a member of the group. They refer to discussions taking place at Uxbridge for the expansion of Asbestolux production. The board minutes of Cape for 31 October 1961 additionally gave approval for increased Asbestolux production.

11. The judge noted that Cape Products continued to be a separate company, and thus inferentially that the intention disclosed in *The Cape Asbestos Story* that it should be a branch of Cape, was never achieved. I agree. Cape could have treated Cape Products as a division or branch without removing its separate legal personality, but it did not so. Cape Products remained the owner of its own assets and handled its own sales and dealings with third parties.

12. On 26 June 1961, the board of Cape Products agreed to enter a licence with a Japanese company, Nippon Asbestos Company ("Nippon"), for the manufacture and sale of Asbestolux, "without prejudice to approval by the board of the parent company". (Asbestolux appears to have been a generic product, not one protected by intellectual property rights). The board resolution suggests that, where the grant of a licence affected the interests of the group, Cape Products was making corporate decisions with regard to those interests, as well as those of itself as a separate legal entity. It was acting as a company which had been integrated into a larger group of companies.

13. In turn, the Cape board took an interest in issues relating to the management by subsidiaries of their own business. On 31 July 1962, for instance, Cape's board discussed action proposed to solve a production difficulty at the Uxbridge factory.

(c) Technical assistance:

(i) Know-how:

14. It would have been very surprising if Cape did not make technical know-how available to Cape Products in view of its long experience in the asbestos industry. There is evidence that it was indeed shared. For instance, the board minutes of Cape Products for 26 June 1961 refer to the mixing of chrysotile fibre into the products of Cape Products "in accordance with agreed group policy". The same minutes refer to a proposal for Cape Products to take over a machine from the Barking factory although it appears this proposal did not come to fruition.

(ii) *Product development:*

15. Dr Gaze, a qualified chemist, had been employed by Cape at its Barking factory from the 1940s. He and his team had been responsible for developing brake linings made from moulded white asbestos. The judge found that he was appointed group chief chemist (Judgment, paragraph 61). According to Dr Browne, Dr Gaze's responsibility extended to health and safety issues raised by research and development. Dr Gaze became a director of Cape in September 1961. According to the evidence of Mr Alan Algarth Hodgson, a chemist who worked at the Barking factory, Dr Gaze was interested in dust suppression methods. He died of mesothelioma in 1982.

16. By 1959 reference is made in the minutes of Cape Products Limited to a "Group Central Laboratory" helping to resolve problems due to the rejection of certain goods produced at Uxbridge.

(iii) Health and safety issues:

17. The concession made by Cape (paragraph 34 below) means that we can assume that by the start of the relevant period there was some recognition of the health dangers of asbestos production.

18. Health and safety issues were dealt with at company and parent company level. In common with other group companies, Cape Products employed its own works doctor and had its own works safety committee on which workers were represented. As an occupier of the premises, Cape Products was subject to the obligations imposed by the Asbestos Regulations 1931 and the Factories Act 1937 ("the 1937 Act").

19. For the better protection of its employees across the group, Cape appointed a group medical adviser in the 1950s, Dr Wyers. He was located at Barking and was engaged in research on health and safety issues for those involved in the production of asbestos. He died suddenly on 12 December 1956. According to the judge, he was succeeded in 1957 by Dr W. H. Smither, but that date is challenged on this appeal.

20. Dr Smither began working for Cape as works doctor at Barking before he took up employment with Cape on 1 June 1962. While working for Cape, Dr Smither carried out research into the link between asbestos and lung disease. He became an international authority in this field. Dr Smither was also a member of an industry-led expert body, the Asbestos Research Council, set up in the 1950s to lead research into

the health and safety issues arising from asbestos. Dr Smither attended a meeting on behalf of Cape at Cape's premises on 11 September 1957 and became its chairman in due course.

21. Cape gave evidence to the Health and Safety Executive for the purposes of an inquiry into asbestos in the 1976-7 that it had had a group medical adviser since at least 1946 and that, in addition to complying with statutory requirements for health and safety enacted in 1946:

> "Cape…has provided its own medical surveillance."

22. As to the nature of this surveillance, it is clear that from 1945 Cape had kept statistics for asbestosis, lung cancer and mesothelioma among employees or former employees at Uxbridge. The evidence also showed that as at the date of its evidence it had a group manual which provided for regular medical checkups for employees having regular contact with asbestos and asbestos products, and other employees at the discretion of the manager. Reference is made in the evidence to steps taken to monitor dust after the enactment of the Asbestos Regulations in 1969, but no information is provided about the steps taken before that date.

(d) Contemporary evidence said to demonstrate that Cape was involved with the health and safety of group employees:

23. There is an important exchange of letters between Dr Smither and Dr R Owen of HM Factory Inspectorate at the Ministry of Labour. In the first letter, dated 26 October 1961, Dr Smither wrote to Dr R Owen of HM Factory Inspectorate at the Ministry of Labour to the following effect:

> "THE CAPE ASBESTOS COMPANY LTD
>
> Central Laboratory …Barking…Essex
>
> Dear Dr Owen,
>
> 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?
>
> You will recall that you mentioned that grade 2 silicosis cases are allowed to continue. Can you quote me the regulations in these cases?
>
> 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 to leave what Dr Bell calls 'the atmosphere'. Can you enlighten me on this one, so far as the regulations are concerned?"

24. The second letter is the reply of Dr Owen dated on 6 November 1961 addressed to Dr Smither at Cape:

> "Dear Dr Smither

> Thank you for your letter of the 26 October…
>
> As you know there is no regulation in the Asbestos Industry Regulations 1931, which requires cases of asbestosis to be suspended from their further employment in scheduled departments. Although this is of course medically desirable.
>
> I have sent you under separate cover a copy of the report by Dr. McLaughlin on the X-ray files we examined together. Further copies have been sent to Dr. McLaughlin and to Dr. Bell."

25. This reply prompted a further letter from Dr Smither dated 7 November 1961. This was written from his medical practice but the words "Cape (West Ham)" (ie Barking) have been added by someone in manuscript. The letter stated:

> "Dear Dr. Owen,
>
> Thank you for your letter of yesterday. I am most grateful for your references which I shall look up and study with care.
>
> Dr. McLaughlin came to lunch at the Cape today, with Dr. Enticknap of East Ham Memorial Hospital and Dr. Holt of Reading University. We had a most interesting discussion on the pathology and carcinogenesis of asbestos. There is certainly a lot to be done on the subject if we are to find the answers to some awkward questions.
>
> … "

26. Although none of these letters bear any statement as to the capacity in which Dr Smither was acting, they demonstrate that he visited Cape Products' factory to discuss a particular case of asbestosis (it is not clear whether the employee was employed in the asbestos production or brick making side of Cape Products' business). He took the lead in discussions with the inspector of factories, and the discussions were related to finding out what the regulatory requirements were in this and in another, possibly analogous industry. The works doctor was not a party to the correspondence although reference is made to him.

27. As to the references in the correspondence to a "scheduled department", this appears to be one to which access was restricted unless the employee was wearing protective clothing. As Dr Browne had explained in his evidence in the 1994 proceedings, a person removed from dust exposure had a better prognosis. Dr Smither's letter and the inspector's reply both show that there was some understanding even in 1961 of a connection or potential connection between dust exposure and the development of asbestosis.

(e) Cape's involvement in the asbestos business of Cape Products:

28. There are a number of the board minutes preceding or in the relevant period in which Cape takes decisions about the expansion of Cape Products business. Throughout the relevant period, there were directors of both companies in common which would have increased the flow of information between them.

(f) Events subsequent to the relevant period

29. The judge relied on Cape's board minutes of a meeting on 27 November 1964 which confirm that by that date at least Dr Smither, described as group medical adviser, was seeking to do research on the lung function of employees including those at Cape Products. At a board meeting on 1 November 1966 the board discussed a problem that had arisen in Northern Ireland over sales there. It is clear that Dr Smither was involved in discussion over the safe installation of asbestos products by the consumer, the Northern Ireland Hospital Authority. There was also a report on health and safety produced by Dr Smither in 1962 following a visit to South Africa. However, none of this evidence in fact takes matters much further. The evidence subsequent to the relevant period does not show that Dr Smither must necessarily have had a role in relation to safety, or that Cape must necessarily have been involved in Cape Products' affairs, in the relevant period. Nonetheless, events occurring after the relevant period in my judgment are relevant to confirm or explain the cogency of events before or during the relevant period.

The judge's judgment:

30. The conclusion to which the judge came on the facts was that Cape controlled at least some aspects of the business of Cape Products (Judgment, paragraph 46). Mr Chandler's case did not, however, stand on that alone, but on the responsibility exercised by Cape for protecting employees from harm from the asbestos atmosphere. Accordingly the judge then brought together what he saw as the most important findings. They related to (1) the role of Dr Smither, (2) the role of Dr Gaze, (3) the exchange of correspondence between Dr Smither and the factory inspector, (4) the fact that Cape Products had acquired its asbestos business from Cape and (5) that, when it suited it Cape intervened in the management of Cape Products' business. The relevant conclusions are in paragraph 61 of the judge's judgment:

> "[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."

31. The judge went on to consider whether Cape had assumed responsibility for Cape Products' employees. He found that there had been an assumption of responsibility for the reasons set out in paragraphs 72 to 77 of this judgment:

> "[72] I end my discussion of the parties' submissions upon the law where I began. I must apply the three-stage test in C*aparo*. 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 para 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."

32. The three-stage test in *Caparo*, to which the judge refers, is the test established in *Caparo Industries plc v Dickman* [1990] 2 AC 605 for determining whether a situation gives rise to a duty of care. The three ingredients are that the damage should be foreseeable, "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 upon the one party for the benefit of the other."(per Lord Bridge at page 618).

The issues

33. The essential issues at trial were:

    i) Whether Cape was proved to have assumed responsibility for the safety of the employees of its subsidiary, Cape Products, so as to give rise to a relevant duty of care owed by Cape to Mr Chandler to prevent the exposure of which he complained; and

    ii) Whether Cape was proved to be in breach of the relevant duty.

34. The grounds of appeal are (1) that the judge applied the wrong test for the imposition of liability on a parent company; (2) that the judge failed to identify the scope of the duty of care which he found; (3) that the judge wrongly made specific findings of fact and on occasions wrongly reversed the onus of proof and (4) that the judge misunderstood a concession made in the pleadings.

35. The form of the concession was as follows:

> "[Cape] will admit that asbestos exposure in substantial concentration sufficient to create a risk of asbestosis was known to be foreseeably hazardous at the material time and that a person causing or permitting such exposure would be liable in respect to any relevant common law and statutory duties if the same were owed. "

36. Counsel did not address the same points in the same depth. Accordingly the cases on this appeal of each party are most easily understood by setting out all of their arguments together on the law and the facts. In that way, their cases can be seen, as they need to be seen, in the round.

Submissions on the law

37. Mr Jeremy Stuart-Smith QC, for Cape, submits that there is little disagreement between the parties as to the applicable principles of the law. He submits that the fact that Cape is the parent company of Mr Chandler's employer does not of itself give rise to duties to protect the respondent from injury at work. It was also common ground at the trial that there was nothing to justify the piercing of the corporate veil in this case (see Judgment, paragraph 66). Cape was entitled in law to organise its operations so that they were carried out by the members of its group. It is also common ground that the fact that Cape is the parent does not preclude the existence of the duty.

38. Mr Stuart-Smith accepts that there can be an assumption of responsibility by an independent contractor in favour of the employees of his employer. He submits that where the question is one of the assumption of responsibility it is unnecessary to follow the three-part test in *Caparo* because no new duty of care is created in this case.

39. Mr Robert Weir QC, for Mr Chandler, submits that the right course is for the court to determine whether a duty of care is owed by Cape to Cape Products' employees by using the well-known three-fold test laid down in *Caparo* that the injury should be foreseeable, that there should be a relationship of proximity between the parties and that it should be fair, just and reasonable to impose liability. The first element of this test is satisfied. As to the other two elements, Mr Weir draws no distinction between them.

40. Although it appears that there is no reported case of a direct duty of care on the part of a parent company, Mr Weir cites the passage from the speech of Lord Bingham in *Lubbe v Cape Plc* [2000] 1 WLR 1545. That case concerned the question whether proceedings, which had been brought by former employees of a former South African subsidiary of Cape in England and Wales, should be stayed on the grounds that the proper forum was South Africa. The House did not therefore have to consider the basis of which such an action might succeed. However, at page 1555 Lord Bingham expressly contemplated that it might involve as in this case a detailed examination of the relationship between the parties based on the surviving documentary material. Mr Weir also relies on judgment of Gage LJ in *Gray v Fire Alarm Fabrication Services*

Ltd [2007] ICR 247, where an independent sub-contractor was held to owe a duty of care to an employee of his employer.

41. Mr Weir also relies on the decision of Wright J in *Connelly v RTZ Corporation,* (1999) CLC 533 in which Wright J had refused to strike out a case brought by the employee of a subsidiary against the subsidiary's parent company. However, Mr Stuart-Smith submits that this was only an application to strike out a pleading and therefore all Wright J had to find was that the point was arguable. In any event, it was a case where there was an entire handover of control to the parent company (which is not usual as between parent and subsidiary), whereas in this case Cape Products always remained liable for breach of the duty of care to employees.

42. On Mr Weir's submission, the imposition of a duty of care does not "collapse the principle of limited liability". The court can therefore hold that there has been an assumption of responsibility without piercing the corporate veil.

Submissions on the facts

43. The focus of Mr Stuart-Smith's submissions on the facts is on what he calls four areas of error by the judge: (1) the judge's failure to identify features of the relationship between parent and subsidiary which were unusual or outwith the characteristics of that relationship, which are on his submissions preconditions to a finding of an assumption of responsibility; (2) the judge's failure, as he submits it to be, to determine the extent of the duty owed by Cape to Mr Chandler and whether breach of that duty could have caused the excessive asbestos exposure to which he was subjected; (3) erroneous findings of fact by the judge and (4) the reversal of the onus of proof by the judge.

44. Amplifying point (1) above, Mr Stuart-Smith submits that the judge erred in that he did not hold that Mr Chandler was required to prove features in the evidence which went beyond or as he put it were "outwith" the usual characteristics of the relationship between parent and subsidiary. Thus the imposition of liability on Cape was wrong. Normal incidents of the parent/subsidiary relationship would include: obtaining the approval to capital expenditure; having common directors; transferring bank accounts to the same bank, producing the same product and the fact that the parent controlled certain aspects of the subsidiary's activities.

45. Mr Stuart-Smith submits that the fact that Cape is the parent company involves certain levels of control. This control does not need to involve the health and safety issues and does not imply that there is day to day involvement in this subsidiary. In the present case, Cape exercised financial control over expenditure in just the same sort of way that one would normally expect to see a subsidiary looking to a parent for approval. There were also common directors but every director has an independent responsibility for running the company and so the mere fact that there were common directors does not, on Mr Stuart-Smith's submission, imply a watering down of the subsidiary's obligations to its employees.

46. The issue in the present case is whether Cape, as parent company, accepted responsibility for the health and safety of employees. Thus the court has to be satisfied that there was relevant control of the subsidiary's business. It would not necessarily have to be a comprehensive policy of protecting employees from all risks.

It is necessary to look at the scope of the policy to see the extent of any intervention. Mr Stuart-Smith accepts that if the parent company were to take over the entirety of the subsidiary's operations, then a duty of care would be owed.

47. Cape Products operated independently of Cape. Cape Products had its own directors who owed separate fiduciary duties to it. The independence of Cape Products is, on Mr Stuart-Smith's submission, confirmed by the fact that, prior to the sale of assets by Cape Products, Cape used to receive monthly reports from Cape Products, but after the sale, the reports on direct factories no longer included Cape Products. The effect of the change was that the asbestos operations at Uxbridge became the responsibility of Cape Products, and on Mr Stuart-Smith's submission, no one else.

48. As to the involvement of Dr Smither, Mr Stuart-Smith submits that there are three aspects to be considered:-

(1) Was Dr Smither a group medical adviser during the employment of Mr Chandler? The employment record of Cape Products for Dr Smither showed that he only became group medical adviser in 1963. On Mr Stuart-Smith's submission, the judge was not entitled to make a finding that he had become group medical adviser before that on the material before him. That consisted of evidence that Dr Browne gave evidence in 1994 in proceedings in the US indicating that Dr Smither succeeded Dr Wyers as soon as his post became vacant. However, that evidence was not wholly clear. Moreover, he expressed uncertainty about the date of that appointment in evidence at the trial of these proceedings. Cape seeks to challenge this date. Mr Stuart-Smith focuses on the fact that Dr Smither did not become an employee of Cape until 1963, and the fact that, when cross-examined in these proceedings, Dr Browne could not recall the actual date and said that it was at least as early as 1964. The judge accepted the date that Dr Browne gave in 1994.

(2) What was Dr Smither's brief? Mr Stuart-Smith submits that his function with Cape was to disseminate information about medical matters. His responsibility did not extend to safety. He did not have any function of ensuring that particular steps were taken. If he went further, it was only because he was pursuing his own research interests.

(3) What was Dr Smither doing when he wrote to the factory inspector? Mr Stuart-Smith submits that Dr Smither was really involved in this correspondence because he was on his way to becoming an international authority on asbestos. Although Dr Smither went well beyond what was necessary to protect employees, the question was still whether Cape had assumed responsibility for preventing Cape Products from exposing Mr Chandler to the risk of contracting asbestosis. The fact that Dr Smither was not employed by Cape would not prevent this happening. However, Mr Stuart-Smith submits that the exchange of correspondence did not contain any hint that Dr Smither controlled the procedures at Cape Products. He wrote from the central laboratory that other factories may also have had laboratories. In 1967 there was evidence that Cape had established a new group laboratory at Uxbridge. It was on Mr Stuart-Smith's submission only a scientific laboratory and not a medical

> laboratory. Dr Smither's interest was in diagnosis. He was not an occupational health doctor. The correspondence does not necessarily show that Cape was controlling Cape Products for the protection of its employees. Dr Smither may have been there because he had a personal professional interest. The reason for his going to Uxbridge does not appear.

49. Dr Smither prepared a report following a visit to South Africa that was considered by the board of Cape in September 1962. The Cape board stressed the elimination of dust. It is possible, submits Mr Stuart-Smith, that after 1962 Cape began to take a greater controlling interest over its subsidiaries but the board minutes did not refer to health and safety issues. The judge should not, in any event, have used the material for the period 1962-70.

50. On Mr Stuart-Smith's submission, the judge should have concluded that responsibility for health and safety at Uxbridge remained with the management at Uxbridge. There was a works doctor and nurse there. There was a works safety committee. Cape Products carried on its own research and development of its products. Cape was involved if at all only in surveillance of disease, not operational procedures. There was no finding that any policy was suggested by Cape, still less that it was inadequate.

51. Mr Stuart-Smith submits that the judge should not have relied on events subsequent to the relevant period. With respect to the evidence to the Advisory Committee on Asbestos submitted by Cape in l976 and 1977, Mr Stuart-Smith submits that this should largely be discounted as it was written long after the relevant period and referred loosely to the past. The judge accepted that this evidence is many years after the relevant period. However, in this context, the judge observed that Cape:

> "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 company came into existence." (Judgment, paragraph 44)

52. In that passage, submits Mr Stuart-Smith, the judge wrongly reversed the burden of proof.

53. Mr Stuart-Smith submits that in any event the judge fails to identify the scope of the duty of care owed by Cape for the health and safety of employees. There was no evidence that Cape took control of Cape Products' operational procedures for the health and safety of its employees. On Mr Stuart-Smith's submission, the fact that there was a group policy about the product mix for Asbestolux merely reflected a concern on the part of Cape about the quality and content of group products and said nothing about employees' health and safety. Likewise, the fact that Cape Products sought to acquire a machine from the Barking factory merely went to group planning and said nothing about health and safety of employees. The same was true of the licensing of know-how to Nippon. It was thoroughly understandable that Cape should be involved in that decision. Likewise, the transfer of bank accounts to a group bank account did not indicate that Cape undertook responsibility for the health and safety of Cape Products' employees.

54. It was not possible to call a number of witnesses but this is not a case where an adverse inference should be drawn because of that. Such documentation as exists demonstrates the absence of control or advice at any significant level. There is simply no evidence of Cape intervening in the affairs of Cape Products so as to show that it was taking control of Cape Products' duty to its employees. The judge says that there was systemic failure. It was however the duty of the management on site to provide proper ventilation under the l937 Act. There is no evidence that those duties were delegated to anyone.

55. Mr Weir submits that this is a case about weaving strands of evidence together in order to ascertain what the position was as between parent and subsidiary with regard to the former's responsibility for the health and safety of employees. For example (and leaving aside for the moment the fact that this evidence post-dated the relevant period), there was evidence that there had been a poor reaction to selling certain asbestos products and Dr Gaze and Dr Smither were involved in the solution. This evidence was consistent with the case that the judge had found throughout the relevant period of employment. They were interested in these things and their research was a continuation of the same theme. The judge's conclusion that Dr Smither had succeeded Dr Wyers was all of a piece. This was not a case where the subsidiary was just under the control of the parent. The judge gleaned information from the transcripts. There is very little information that has come from Cape itself. Indeed, all the people concerned in the management of Cape Products are now deceased.

56. Mr Weir submits that the letters to and from Dr Smither have to be seen in the context of all the other evidence. This was a case of a gross level of exposure to asbestos. As the judge said at the end of paragraph 62 of his judgment, asbestos dust was permitted to escape from the building where asbestos was manufactured without any attempt to contain it, save by extraction fans situated in close proximity to the production machinery which, on Cape's admission, were inadequate for their intended purpose.

57. In this case, submits Mr Weir, Cape Products as a subsidiary of Cape acquired assets from Cape. Therefore Cape had knowledge of the system of work in force at the Uxbridge factory. There are no documents evidencing communications because there were no such communications and there should have been. The medical adviser reported to the board. On Mr Weir's submission, the medical adviser plainly did not meet the responsibility of Cape. This, on Cape's admission, was a case of blatant exposure. Thus the judge records at the end of paragraph 73 of his judgment that "this was no failure in day to day management, this was a systemic failure of which the defendant was fully aware."

58. Mr Weir rejects the suggestion that the judge reversed the burden of proof. There was no evidence produced by Cape Products. If the position was that working methods were changing, there was no evidence of it. There was however a group policy of surveillance. Cape were collecting data and they must have done something with it. If the court finds that there was a medical adviser and a chief chemist, that is sufficient because the cause of Mr Chandler's disease was not a matter of medical advice. Thus it is not a matter of what advice Dr Smither gave.

59. Mr Weir relies on the minutes of the meeting of the Asbestos Research Council held at the London offices of Cape on 11 September 1957. These were attended by

representatives of a number of companies in this field, including Cape. Dr Smither is shown as a medical officer and as a representative of Cape. This document was not before the judge. It shows that Cape chose to invite Dr Smither to the meeting and it shows that Cape were fully engaged on the question of health and safety issues concerning asbestosis. Moreover, as Mr Weir submits, the judge's findings regarding Dr Smither are not disputed.

60. The judge also relied on the evidence of Mr Hodgson. His witness statement, in conjunction with the other evidence, naturally led the judge to find that Dr Gaze was group chief scientist and that he worked in the group laboratory. So it was not difficult to see what the judge has drawn from the document. As stated at paragraph 10 of the witness statement, the laboratory had to be moved. It was a centre of activities on asbestos production issues. Accordingly, the judge was able to draw inferences from the fact that Dr Gaze was chief chemist scientist. Mr Browne said later that he was chief safety officer. There was a medical officer working in conjunction with Dr Gaze. He became a director also.

61. Mr Weir also relies on the evidence of Mr Sim, another employee of Cape, who gave evidence on behalf of Cape about working conditions at Uxbridge in an action brought by the widow of an employee. This was an additional strand of evidence and could not be determinative on its own. However, Mr Sim's evidence states that Cape took considerable steps to ensure that the method of working with asbestos was as safe as possible. Mr Sim also stated that Cape produced detailed instructions before the Asbestos Regulations were introduced in l969. Thus Cape was taking active steps to protect employees of Cape Products and those steps were under the influence of Cape.

Discussion and conclusions

62. The basis on which the judge found there was a duty of care on the part of Cape is on the basis of an assumption of responsibility. This falls within the second and third parts of the three-part *Caparo* test for determining whether there is a duty of care, namely proximity and the further requirement that it be fair, just and reasonable to impose liability. These two requirements are directed to the essentially same question. As Lord Oliver pointed out in *Caparo*:

> "'Proximity' is, no doubt a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances in which, pragmatically, the courts conclude that a duty of care exists." (page 633)

63. The development of the law of negligence has to be incremental and the judge was in my judgment correct to hold that the analogous line of cases in negligence to the instant case is the line of authority on the duty of a person to intervene to prevent damage to another. As Lord Goff pointed out in *Smith v Littlewoods Ltd* [1987] AC 241 at 270, there is in general no duty to prevent third parties causing damage to another. But Lord Goff recognised that there were exceptions to this principle, for example where there was "a relationship between the parties which gives rise to an imposition or assumption of responsibility" on the part of the defendant (page 272D).

64. Lord Goff speaks of the imposition or assumption of responsibility. Whether a party has assumed responsibility is a question of law. The court does not have to find that the relevant party has voluntarily assumed responsibility (see also on this point *Customs and Excise Commissioners v Barclays Bank* [2007] 1 AC 181, cited by Mr Weir). The word "assumption" is therefore something of a misnomer. The phrase "attachment" of responsibility might be more accurate.

65. Responsibility was imposed in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, where the Home Office was held liable for damage done by escaping Borstal boys over whom the Home Office had had control. Its control over them gave rise to a special relationship in law between the plaintiffs and the Home Office. An assumption of a duty of care has also been found to exist as between an independent contractor and employees of the employer: see, for example, Gray *v Fire Alarm Fabrication Services Ltd* [2007] ICR 247; *Clay v AJ Crump Ltd* [1964] 1 QB 533.

66. Likewise, it has been held on two occasions that it is arguable that a parent company may owe a duty of care to employees of subsidiaries: see *Connelly v Rio Tino Zinc Corporation* and *Ngcobo v Thor Chemicals Holdings Ltd v others*, January 1996, per Maurice Kay J, unreported. There is nothing in either judgment or the general law to support the submission advanced by Mr Stuart-Smith that the duty of care can only exist in these cases if the parent company has absolute control of the subsidiary. Moreover, if a parent company has responsibility towards the employees of a subsidiary there may not be an exact correlation between the responsibilities of the two companies. The parent company is not likely to accept responsibility towards its subsidiary's employees in all respects but only for example in relation to what might be called high level advice or strategy.

67. Mr Stuart-Smith contends for a threshold test, namely that, in determining whether there has been an assumption of responsibility, the court is restricted to matters which might be described as not being normal incidents of the relationship between a parent and subsidiary company. Mr Stuart-Smith did not produce any case establishing this proposition and I would reject it. Moreover, the way in which groups of companies operate is very varied. Sometimes, for example, a subsidiary is run purely as a division of the parent company, even though the separate legal personality of the subsidiary is retained and respected. Accordingly it is simply not possible to say in all cases what is or is not a normal incident of that relationship.

68. On this basis, I do not need to consider Mr Weir's fallback submission that, in assuming a specific health and safety role in relation to Cape Products, Cape would not be acting outside the normal parent and subsidiary relationship.

69. I would emphatically reject any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company.

70. The question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees.

71. Before I make my own assessment as to whether there was an assumption of responsibility in this case, I need to address a number of discrete arguments put by Mr Stuart-Smith:

i) *The exchange of correspondence between Dr Smither and the factory inspector in October and November 1961*: Mr Stuart-Smith describes this correspondence as "slim pickings" on which to impose a direct duty of care on Cape to Cape Products' employees. There are a number of points which arise out of this correspondence:

a) Were these letters written by Dr Smither as group medical adviser? There is no job description in evidence for the group medical adviser but it seems reasonable to infer that Dr Browne's evidence in the US proceedings that, even in the period prior to Mr Browne's appointment, his function was to supervise medical care at each factory (I would add, when called on to do so for some reason), and for that purpose to visit each factory. There is a dispute about the exact date of Dr Smither's appointment as group medical adviser. In my judgment, the (handwritten) employment record is not a sufficient basis to overturn the judge's finding because, if the employment record were right, it would mean that, inexplicably, Cape had no group medical adviser in the period 1957 to 1963. There was no evidence about when the relevant entry in the employment record was made. Mr Stuart-Smith submits that the judge should not have found that Dr Smither attended the meeting with the factory inspector at Uxbridge in a management role as opposed to pursuing a personal research interest, especially since Dr Holt, the Uxbridge works doctor, was present. I do not accept that argument. If he had not attended as a representative of Cape he would have hardly written to the inspector on Cape notepaper on 26 October 1961.

ii) *Erroneous finding as to the date on which Dr Gaze was appointed group chief chemist for Cape:* Contrary to Mr Stuart-Smith's submission, there was evidence for the judge's finding on this point. Mr Hodgson, a chemist employed by Cape at its Barking factory from 1953 to 1971 signed a witness statement in 2002 in proceedings brought by the widow of a former employee against a company which was a successor to Cape Products (as well as being a member of the Cape group). Mr Hodgson stated that Dr Gaze was Chief Chemist at the Barking laboratory while he was there.

iii) *Reversal of the onus of proof*: Mr Stuart-Smith complained that the judge had reversed the onus of proof in paragraph 44 of his judgment (the material passage is set out in paragraph 50 above). I disagree. What the judge is referring to is merely the evidential burden of proof. Sufficient evidence had been produced to make it clear to him that the existence of a group policy on health and safety should be inferred from the known facts unless Cape could show that it did not exist.

iv) *Reliance on subsequent events:* Mr Stuart-Smith criticises the judge for taking into account evidence as to events subsequent to the relevant period. In my judgment, the position is as follows:

a) In deciding whether to attach responsibility, the court has to look at the events at the time of the alleged assumption of responsibility. Subsequent events are in general irrelevant. In this case, there was a significant subsequent event in that the subsidiary became unable to meet its liabilities to Mr Chandler because it was dissolved. But that event is not relevant to the attachment of responsibility and must therefore be left out of account. The fact that the subsidiary subsequently went out of business is a totally irrelevant consideration. However, sometimes the evidence about subsequent events helps to confirm or clarify what was happening at the relevant time.

b) I do not accept the submission that the judge should not have placed reliance on the evidence of Mr Hodgson about dust suppression monitoring at the Uxbridge factory from 1953 (judgment paragraphs 57 and 58).

c) The criticism of the judge's reliance on the evidence of Mr Jock Sim, who only joined Cape in 1966, is also misplaced for two reasons. First, the judge had to cite Mr Sim's evidence that health and safety was not centralised and that each factory had its own work committee because Cape relied on it. The judge made the point that this evidence did not as a matter of law prevent the assumption by Cape of legal responsibility. Secondly, there was other evidence to support the conclusion in law that Cape had assumed liability, quite independent from that of Mr Sim. Therefore the evidence of Mr Sim could be used to confirm that conclusion, as it purported to do. On this appeal, Mr Weir relies on it for that purpose. In a passage quoted by the judge, Mr Sim stated in his evidence that Cape took considerable steps to ensure that working with asbestos was as safe as possible and produced instructions about measures which were in place before Mr Sim joined Cape. Mr Sim was giving evidence in other proceedings concerning a claim by an employee of a subsidiary. So the inference can properly be made, as the judge so held, that procedures issued by Cape would have been in place in factories owned by subsidiaries during the relevant period. However, reliance on such an inference is not essential to the overall conclusion in this case.

d) In September 1962, after the conclusion of the relevant period, there was also a report that Dr Smither made to the board of Cape following a visit to South Africa. Mr Stuart-Smith submits that the judge was wrong to have regard to this as it was both subsequent to the relevant period and did not concern Uxbridge. But the board discussed dust suppression techniques. While Dr Smither was not apparently at this board meeting, these minutes disclose that it was appreciated that there was a relationship between dust suppression techniques and the diagnosis of asbestosis. In those circumstances the latter subject was unlikely to have simply been a personal research of his.

Overall assessment of the evidence

72. Mr Stuart-Smith submits that it is significant that there is no evidence that Cape had any responsibility for devising or implementing operational policies and that there is no complaint about any specific advice that Dr Smither gave and no evidence that Cape dictated Cape Products' policy on health and safety. I do not find this to be surprising, as what is complained of is not the taking of any particular step but an *omission* to take steps or to give advice.

73. In the present case, Cape was clearly in the practice of issuing instructions about the products of the company, for instance, about product mixes. We know that Cape Products could not incur capital expenditure without parent company approval. Cape's board minutes show that Cape approved the separate administration of Cape Products' operations "in accordance with company policy" of Cape. There is nothing wrong in that but it suggests that the company policy of Cape on subsidiaries was that there were certain matters in respect of which they were subject to parent company direction. No doubt the illness of the employee of Cape Products which brought Dr Smither to Uxbridge had had to be reported to Cape under directions given by Cape.

74. I accept Mr Stuart-Smith's submission that Cape was not responsible for the actual implementation of health and safety measures at Cape Products. However, as Mr Weir points out, the problem in the present case was not due to non-compliance with recognised extraction procedures. It was due to dust in the atmosphere in the part of the Cowley Works in which Mr Chandler worked and which was not used for asbestos production. There is no evidence that what went wrong here was that Cape Products failed to maintain some dust extraction machines in the asbestos factory and in any event it is difficult to see how such machines could have avoided the escape of dust given the open sides of the factory. As the judge observed, the problem was systemic.

75. The configuration of the asbestos factory dated back to the time when Cape introduced its Pluto board manufacturing business into the Cowley Works. By installing its business there, it must have implicitly undertaken a duty of care to ensure that its business was carried on without risk to the employees in the other business of Cape Products carried on at the Cowley Works. In due course, it required Cape to purchase this business. Nonetheless, despite the sale, it maintained a certain level of control over the asbestos business carried on at Uxbridge. Products were for instance to be manufactured in accordance with its product specification. Product development, with a group chief chemist, was carried out in the Central Laboratory at Barking. Cape moreover had superior knowledge about the asbestos business. It was in a substantial way of business and its resources far exceeded those of Cape Products. Dr Smither was doing research into the link between asbestos dust and asbestosis and related diseases. He was also (if this label makes any difference) the group medical adviser of Cape.

76. Added to those factors was the role played by Dr Smither. Whether or not he was formally appointed group medical adviser in the relevant period, it is clear that he was engaged on research, based on empirical research done at Cape and its asbestos-producing subsidiaries, about the relationship between asbestos production and asbestosis. This is indeed confirmed by an extract from a letter written by Dr Smither in November 1962 quoted by Silber J, sitting in the Manchester District Registry, in

Rice v Secretary of State for Business Enterprise and Regulatory Reform [2008] EWHC 3216 (QB) at [73]. This passage makes it clear that only slight exposure to asbestos dust was needed. Dr Smither must have known about the risks during some part or all of the relevant period. This is also clear from the reference in the letter to the factory inspector of 7 November 1961. I do not see on what basis his work could have been inspired by a personal research interest given that there is no evidence that he was carrying out this work privately and not for Cape's benefit. There is, for instance, no evidence that he was working for a research institution. The exchange of letters in October and November 1961 is clear evidence of Cape involving itself in issues relevant to health and safety policy at Cape Products, for example whether an employee diagnosed as having asbestosis could continue to be employed in that business.

77. Cape concedes that the system of work at Cape Products was defective. The judge inevitably found as a fact -and there is no appeal from this – that Cape was fully aware of the "systemic failure" which resulted from the escape of dust from a factory with no sides. Cape therefore knew that the Uxbridge asbestos business was carried on in a way which risked the health and safety of others at Uxbridge, most particularly the employees engaged in the brick making business.

78. Given Cape's state of knowledge about the Cowley Works, and its superior knowledge about the nature and management of asbestos risks, I have no doubt that in this case it is appropriate to find that Cape assumed a duty of care either to advise Cape Products on what steps it had to take in the light of knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken. The scope of the duty can be defined in either way. Whichever way it is formulated, the injury to Mr Chandler was the result. As the judge held, working on past performance and viewing the matter realistically, Cape could, and did on other matters, give Cape Products instructions as to how it was to operate with which, so far as we know, it duly complied.

79. In these circumstances, there was, in my judgment, a direct duty of care owed by Cape to the employees of Cape Products. There was an omission to advise on precautionary measures even though it was it was doing research and that research had not established (nor could it establish) that the asbestosis and related diseases were not caused by asbestos dust. Moreover, while I have reached my conclusion in my own words and following my own route, it turns out that, in all essential respects, my reasoning follows the analysis of the judge in paragraphs 61 and 72 to 75 of his judgment.

80. In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the

companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.

81. Finally, I must deal with Mr Stuart-Smith's submission that the judge had gone beyond Cape's concession in the pleadings (above, paragraph 34). He submits that the second part of the concession comes into play only if Cape is held to be under the relevant duty. The court has first to say what the duty was before there can be any "causing or permitting" of any breach. Mr Weir submits that, once Cape has been found to have overall responsibility, it must follow that they caused or permitted the breach of duty to Mr Chandler. Even if their role had been only advisory, they would still be under a joint and several liability. It follows from my reasoning that Mr Weir's submission is correct. In my judgment, what Cape accepted was that Cape Products had breached its duty to its employee and that if it, Cape, had assumed a duty to Cape Products' employees to advise on, or to ensure, that they had a safe system of work, that system of work was in fact rendered an unsafe one in a way which triggered its liability by reason of the migration of asbestos dust.

Proposed order

82. For these reasons I would dismiss the appeal.

Lord Justice Moses:

83. I agree.

Lord Justice McFarlane:

84. I also agree.